

CAN SOCIOECONOMIC RIGHTS AMELIORATE THE ACCOUNTABILITY
DEFICIT OF THE NIGERIAN STATE?

A dissertation presented

by

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to

Cornell University Law School,

in partial fulfillment of the requirements

for the degree of

Doctor of the Science of Law

in the subject of Law

Cornell University

Ithaca, NY

August 2013

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CAN SOCIOECONOMIC RIGHTS AMELIORATE THE ACCOUNTABILITY DEFICIT OF THE NIGERIAN STATE?

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Cornell University, 2013

Can justiciable socioeconomic rights assist in the formulation of government policies and programs that are accountable to Nigerian citizens? This dissertation has tried to answer the question by establishing that mechanisms of accountability such as the rule of law and separation of powers have been enacted into the Nigerian Constitution. But the government's socioeconomic policies have not been accountable, as reflected in my content analysis of Nigeria's health-care and education sectors. I show that the sole exception was the Social and Economic Rights Action Centre (SERAC) decision of the African Commission on Human and Peoples' Rights. But Nigeria has subsequently argued that socioeconomic rights are nonjusticiable, and they are merely Fundamental Objectives and Directive Principles of State Policy under its Constitution. I analyzed cases from the U.S. States of Kentucky, New Jersey, and New York, whose constitutions provide for free public education for children, and prove that courts have the capacity to adjudicate upon socioeconomic policies of governments in the area of education and make such policies accountable to constitutional mandates. I evaluated the jurisprudence from India, where socioeconomic rights are nonjusticiable directive principles of state policy, but her Supreme Court has expanded the right to life to encompass directive principles of health care and education. But it is very instructive that India, in 2002, opted for a constitutional amendment to transform the nonjusticiable provision on primary education of the

Directive Principles of State Policy into a justiciable fundamental human rights provision under its Constitution. The South African Constitutional Court, in interpreting its Constitution, wherein socioeconomic rights are justiciable has formulated a reasonableness test doctrine in evaluating the seriousness/effectiveness of the various programs that the South African government had designed to implement socioeconomic rights. I then conclude that existing mechanisms of accountability in Nigeria can be complemented by constitutionally enforceable socioeconomic rights. The same principles formulated by the Nigerian judiciary in striking down unconstitutional legislation or in securing civil and political rights are applicable to judicial adjudication over socioeconomic rights. A constitutional amendment to make socioeconomic rights justiciable will ameliorate Nigeria's public governance accountability deficit.

BIOGRAPHICAL SKETCH

Adedokun (abundance of crowns) was conceived in the United Kingdom, hence Olatokunbo (wealth from across the ocean), and born in Lagos, Nigeria, to Kolawole and Adebisi Ogunfolu, both royal natives of Porogun Quarters in cosmopolitan Ijebu-Ode Kingdom in South West Nigeria, about 100 kilometers to the Atlantic Ocean. In Nigeria, Adedokun acquired his primary education at Polytechnic Staff School Ibadan, secondary education at Federal Government College Odogbolu, and legal education at Obafemi Awolowo University, Ile-Ife (formerly University of Ife). In 2008-2009, Adedokun was awarded both the Cornell University Law School Graduate Fellowship and Cornell University Institute for African Development Fellowship, to fund a Master of Laws (LL.M.) Program at Cornell University Law School. Adedokun was away in Nigeria from 2009 to 2010, to conduct fieldwork and teach human rights law and international humanitarian law at Obafemi Awolowo University. He resumed at Cornell in 2010, for his Doctor of the Science of Law Program (J.S.D.) under the guidance of his Committee chair, Professor Chantal Thomas, and other committee members, Professors Muna Ndulo and Robert Hockett, to conduct research into how justiciable socioeconomic rights can ameliorate the accountability deficit of public governance in Nigeria. In the last phase of his J.S.D. program, Adedokun and his wife Olabisi were both blessed with the most wonderful gift of all, their first child.

Dedicated to my father, Kolawole Abiodun Ogunfolu (1927-1997), and my brother Kemi Ogunfolu (July 28, 1963-July 5, 1983)

ACKNOWLEDGMENTS

I thank my parents, Kolawole Abiodun Ogunfolu and Adebisi Adunni Ogunfolu (née Agbabiaka), for their love and huge investments in my progress. My wife and my siblings are greatly appreciated. My utmost gratitude extends to my committee chair, Professor Chantal Thomas and other committee members, Professors Muna Ndulo and Robert Hockett. I appreciate the intellectual support and warmth of Professors Mitchel Lasser and John J. Barceló III. The warmth and kindness of Dean Charles Cramton, Professor Larry Bush, Dawne Peacock, Virginia Star, Patricia Hall, Karen D. Wilson, Anne Lukingbeal, and Gail Howser sustained me. The Cornell University Library was incredibly efficient in sourcing physical and digital materials for my research. I made great friends at Cornell University Law Library; these friends made my research work a lot easier than they can imagine. Some of them are, Patricia Court, who was one of my referees for my doctorate degree application; Thomas Mills, Brian Eden, Jane S. Drumheller, Laura Robert, Nancy J. Moore, and Carol Clune. The Cadmus family in Ithaca has been wonderful to me. Juan Lube of the computer lab was very helpful with my computer issues, particularly when my Toshiba laptop crashed. Jackie Sayegh and Evangeline Ray of the Institute for African Development, Cornell University, made Ithaca pleasant for me. My appreciation extends to my teachers at Polytechnic Staff School Ibadan, Federal Government College Odogbolu, and Obafemi Awolowo University Ile-Ife, all in Nigeria. I appreciate my four referees for my LL.M. application to Cornell Law School in 2008, Professors Margaret Okorodudu-Fubara; K.A. Ako-Nai, former dean of the law faculty and former deputy vice-chancellor, respectively, at Obafemi Awolowo University, as well as Michelo Hansungule and Martin Nsibirwa, both of the Centre for Human Rights at the University of Pretoria, South Africa. I appreciate my Nigerian academic mentors, Niyi Fasanmi, Dr. Oladipo Fashina, Dr. Sola Kasim,

Professors Margaret Okorodudu-Fubara, K.A. Ako-Nai, Roger Makanjuola, Adebayo Lamikanra, L. Oladipo Salami, and Yunusa K. Salami. My former students at Obafemi Awolowo University enriched and challenged my mind with their various intellectual engagements. A few of them are Dayo Fagbemi, Adebowale Eboda, Yinka Fadeyibi, Elimma Ezeani, Dafe Akpeneye, Funmilayo Akinosi, Temi Kusamotu, Adetoun Teslimat Adebajo, Precious Erimiatoe, Funso Fatunla, Ronke Nedd, Bukola Ayanbule, Olufunke Olaogun, Oludamilola Adejumo, Ola Faro, Maria Usang Assim, Tomi Adewoye, Bimbo Odeleye, and Jennifer Ganiyu. I am very grateful for the support and interviews granted to me by a retired justice of Nigeria's Court of Appeal, Honorable Albert Gbadebo Oduyemi, in February 2012, in Ijebu-Ode, Nigeria. Senior partner of Libra Law Office, Lagos, Mrs. Hairat Aderinsola Balogun (OON), her partners, Osahon Idemudia, Afolabi Balogun and former counsel in chambers, Honorable Wasiu Animahun, presently a Lagos State High Court Judge, warmly introduced me into legal practice. Deaconess Osinibi and Pa J.T. Okuneye and their children supported my wife and mum during my Ithaca sojourn. I appreciate the editorial services of Emily Johnson. Laura Glenn did most of the editorial work at a kind discount. The kind financial support of Cornell University Law School Graduate Fellowship, 2010-2012, and Berger International Legal Studies Program Fellowship, 2012-2013, made my dream of acquiring the Doctor of the Science of Law (J.S.D.) degree from Cornell University Law School a reality. I am very grateful to Cornell University for enriching my intellectual life, and the warmth of the Ithaca community will always be treasured. My ultimate thanks are reserved for the almighty God for his immeasurable blessings.

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INTRODUCTION

Subject of the Dissertation

Socioeconomic rights are not justiciable under the Constitution of the Federal Republic of Nigeria decreed by the military in 1999. They are classified as nonjusticiable Fundamental Objectives and Directive Principles of State Policy, just as they were categorized by its template, the military decreed 1979 Constitution.¹ I argue in this dissertation, that justiciable socioeconomic rights derived from a constitutional amendment, can contribute to existing accountability mechanisms in striving to make the Nigerian state more accountable.² Justiciable socioeconomic rights will subject government policies to objective judicial scrutiny and complement existing mechanisms of accountability to make the Nigerian state more accountable for its socioeconomic policies.³ All available complementary mechanisms of accountability, including constitutionally enforceable socioeconomic rights must be deployed to continuously tackle Nigeria's accountability deficit in public governance.

¹ "It must be emphasized that the duty thus cast on the state is only to pursue a policy that is geared towards securing the amenities specified; it does not confer on any individual a corresponding entitlement to demand such amenities as a right. Regrettably, however, the Constitution provides no machinery for ensuring such compliance, and expressly excludes the use of the courts for the purpose, even to the limited extent of a mere declaration by a court that the government is or is not complying with the principle. This exclusion is predicated on the danger of a confrontation between the court and the political organs and on the alleged incompetence of lawyers to decide such matters. The danger of confrontation hardly justifies the complete exclusion of judicial intervention, and judges are no less competent than politicians to assess the performance of government. However the National Assembly is given power to provide for a machinery to promote and enforce the directive principles of the Constitution." Nwabueze, B.O. *Ideas and Facts in Constitution Making: The Morohundiya Lectures* Faculty of Law University of Ibadan, (Ibadan: Spectrum Books Limited, 1993), p.157.

² Section 9 (2) of the 1999 Constitution of the Federal Republic of Nigeria provides for such amendment which "shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States." A greater percentage of votes are required for amending the fundamental human rights provisions in Chapter four and for the creation of new states as well as boundary adjustments.

³ Socio-economic rights will address Achebe's question: "How do we begin to solve these problems in Nigeria, where the structures are present but there is no accountability?" Achebe, Chinua, *There was a Country: A Personal History of Biafra*, (New York, Penguin Press, 2012), p. 252.

Nigeria's current finance minister has been at the vanguard of the accountability movement in Nigeria and her efforts would be greatly complemented by justiciable socioeconomic rights. The Nigerian judiciary, Nigerian Bar Association, Nigerian Union of Journalists, progressive politicians, members of organized civil society, and ordinary citizens have utilized existing mechanisms of accountability to check the accountability deficits of the Nigerian state during military rule and under previous civilian regimes, as well as the current evolving experiment with democracy introduced by the military decreed 1999 Constitution of the Federal Republic of Nigeria. These efforts could be complemented by constitutionally justiciable socioeconomic rights, which would subject government socioeconomic policies to greater scrutiny and ameliorate the accountability deficit of public governance in Nigeria. Reforming the Nigerian state has always been a dangerous venture, as evidenced by the kidnapping of the mother of Nigeria's finance minister on December 9, 2012, in Nigeria.⁴

The Nigerian economy earned over \$300 billion from oil revenues between 1982 and 2007, but paradoxically, poverty is still the lot of most Nigerians. From 1991 to 2001, 70 percent of Nigerians lived on less than a dollar a day.⁵ "The widespread poverty is perhaps the clearest demonstration of the failure of governance in Nigeria."⁶ The position today remains the same if not worse. Nigeria ranked 142 in the 2010 Human Development Report, with life expectancy at

⁴ Efeizemor, Victor, 'Okonjo-Iweala's 83- year Old Mother Kidnapped' This Day , Lagos, December 10, 2012, <http://www.thisdaylive.com/articles/okonjo-iweala-s-83-year-old-mother-kidnapped/133118/> (accessed on December 10, 2012). Okonjo-Iweala stated that the kidnappers wanted her to resign as finance minister due to oil subsidy reforms to check multibillion dollar fraud but they released her mum after five days in captivity, BBC News, December 17, 2012, 'Nigeria's Okonjo-Iweala: Kidnappers 'demanded resignation' <http://www.bbc.co.uk/news/world-africa-20762630> (accessed on December 17, 2012)

⁵ Human Development Report 2003, (New York: United Nations Development Program, 2003), p. 200

⁶ Obiagwu, Chinonye and Odinkalu, Chidi Anselm, 'Nigeria: Combating Legacies of Colonialism and Militarism', in An-Na'im Abdullahi Ahmed, (ed.), Human Rights Under African Constitutions: Realizing the Promise for Ourselves, (Philadelphia: University of Pennsylvania Press, 2003), pp. 211-250 at p.241.

48.4 and gross national income (GNI) per capita of \$2156 (PPP2008\$).⁷ Maternal mortality still ranks among the worst in the world, with 1,100 women losing their lives per 100,000 live births.⁸ Nigeria also has one of the worst infant mortality rates in the world.⁹ This problem could be remedied if the Nigerian government would take seriously such socioeconomic issues as public health and education following the lead of countries in similar situations in different parts of the world.¹⁰ Countries that are more effectively governed generally utilize public resources

⁷ Human Development Report 2010, (New York: United Nations Development Program, 2010), p.145.

⁸ Ibid. at p. 158; Ezegwu E.C; Onah H.E; Ezegwu F.O. and Okafor I.I. ‘Maternal Mortality in a Transitional Hospital in Enugu, South East Nigeria,’ *African Journal of Reproductive Health*, Vol. 13, No. 4 (December, 2009), pp. 66-72. Harrison, Kelsey, ‘Maternal Mortality in Nigeria: The Real Issues,’ *African Journal of Reproductive Health*, Vol. 1, No.1, (March, 1997), pp. 7-13. Scott-Emuakpor, Ajovi, ‘The evolution of health care systems in Nigeria: Which way forward in the twenty-first century,’ *Nigerian Medical Journal*, Vol.51, Issue 2, 2010, pp. 53-65, full text available at: <http://www.nigeriamedj.com/article.asp?issn=0300-1652;year=2010;volume=51;issue=2;spage=53;epage=65;aulast=Scott-Emuakpor> (accessed on April 3, 2012). Audu, B.M; Takai, U.I. and Bukar, M. ‘Trends in maternal mortality at University of Maiduguri teaching hospital, Maiduguri, Nigeria-A five year review,’ *Nigerian Medical Journal*, Vol.51, No. 4, (October-December 2010), pp. 147-151, full text available at: http://www.nigeriamedj.com/temp/NigerMedJ514147-2844549_075405.pdf (accessed on April 3, 2012). A higher figure of 1,120 maternal mortality per 100,000 live births was revealed at the fourth annual Nurses Scientific Conference in Lagos, Nigeria (whose theme was: ‘Maternal and Child Care: Challenges to Nursing Practice’) by Mrs. Jokotade Agunbiade, Lagos State Director of Nursing Services, who claimed that: “Nigeria’s maternal, child health statistics is the world’s worst.” Olukayode Thomas and Joke Kujenya, ‘Can Jonathan save mothers from dying at childbirth?’ *The Nation*, Lagos, April 3, 2012, <http://www.thenationonline.net/2011/index.php/news/41881-can-jonathan-save-mothers-from-dying-at-childbirth.html> (accessed on April 3, 2012).

⁹ Save the Children, *Nutrition in the First 1,000 Days: State of the World’s Mothers 2012*, p. 57 <http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/.PDF> (accessed on May 8, 2012), see also, UNICEF, *State of the World’s Children 2012: Children in an Urban World*, http://www.unicef.org/sowc/files/SOWC_2012-Main_Report_EN_21Dec2011.pdf (accessed on May 8, 2012).

¹⁰ After listing South Korea, Hong Kong, Singapore, Kuwait and United Arab Emirates as developing countries which became prosperous between 1960 and 1985 while simultaneously eliminating poverty and drastically reducing infant mortality, Amartya Sen states that: “Another issue concerns the identity of the remaining five countries in the list of the top 10 in reducing infant and child mortality. They are all much poorer countries, which have nevertheless achieved tremendous lowering of under-five mortality (reductions of 70 to 80 per cent during 1960-85), have reached very low absolute mortality rates, mainly through public programmes of medical care, epidemiological control and elementary education. The list includes socialist economies such as China and Cuba. Others on the list are Costa Rica, Chile and Jamaica, and all of them have used, for significant parts of the period, much public intervention in securing health care, medical facilities and basic education across the population.” Sen, Amartya, *Public Action to Remedy Hunger*, The Fourth Annual Tanco Memorial Lecture, August 2, 1990, Queen Elizabeth II Conference Centre, London, at pp. 13-14.

consistently over several decades to improve life expectancy.¹¹ Nigeria ranked 156 in the 2011 Human Development Report with life expectancy at 51.9 years,¹² and a gross national income (GNI) per capita of \$2069 (PPP2005\$).¹³ It ranked 153 in the 2013 HDR, with life expectancy at 52.3 years.¹⁴

Nigeria with a territorial size of 923,768 square kilometers (almost twice the size of the state of California) and a population comprising over 250 major ethnic nationalities and around 160 million people. It is the eighth most populous country in the world.¹⁵ Nigeria is a major producer of crude oil and gas, but there is no stable electricity power supply. Hospitals that can afford electricity generating plants depend on them during surgical procedures. Manufacturing plants also depend on electricity producing generators to function. A power outage caused the June 3, 2006, Sosoliso airliner crash at the Port Harcourt airport in Nigeria, which killed over one hundred passengers who were mainly schoolchildren. Only one very badly burned passenger survived the crash. Ordinarily, the runway lights would have been lit to guide the landing of a plane in a severe rainstorm, but in this case they were not lit. . The standby generator at the airport was not switched on because it was daytime and its fuel was rationed for use at night.¹⁶

The 1979 Constitution of the Federal Republic of Nigeria and its carbon copy, the 1999

¹¹ Ibid. at p. 16.

¹² Human Development Report 2011, (New York: United Nations Development Program, 2011), p.126, full text available at: http://hdr.undp.org/en/media/HDR_2011_EN_Complete.pdf (accessed on April 28, 2012).

¹³ Ibid. at p. 129.

¹⁴ Human Development Report 2013, The Rise of the South: Human Progress in a Diverse World, (New York: United Nations Development Program, March 14, 2013), p.146, full text available at: <http://www.undp.org/content/dam/undp/library/corporate/HDR/2013GlobalHDR/English/HDR2013%20Report%20English.pdf> (accessed on April 23, 2013).

¹⁵ National Planning Commission, Annual Performance of the Nigerian Economy 2010, full text available at: <http://www.npc.gov.ng/vault/ECONOMY.pdf> (accessed on 26 October 2011).

¹⁶ Dada, Steve; Ezeobi, Chiemele and Ogbodo, Dele, 'Six Year After Sosoliso Plane Crash Blamed on Power Failure,' ThisDay Newspaper, Lagos and Abuja, June 14, 2012, <http://www.thisdaylive.com/articles/six-years-after-sosoliso-plane-crash-blamed-on-power-failure/117950/> (last visited June 14, 2012)

Constitution of the Federal Republic of Nigeria, both contain a bill of rights recognizing civil and political rights while entrenching the supremacy of the Constitution. In some ways they are similar to the Constitution of the United States.¹⁷ In both countries socioeconomic rights are not constitutionally protected by their supreme federal constitutions, but unlike Nigeria's thirty-six states, the fifty states of the United States have their own constitutions, some of which are older than the 1787 U.S. Constitution. Constitutions of forty-nine of the U.S. states guarantee primary and secondary education to some extent. The exception is the Mississippi state constitution.¹⁸ In forty-five of the states, litigation over the funding of education is ongoing.¹⁹ Litigation has also occurred over the funding of health insurance challenges, mounted by several American states to

¹⁷ Horowitz, Donald L. 'Many Uses of Federalism,' *Drake Law Review*, Vol. 55 (2006-2007), pp. 953-970.

¹⁸ Henkins, Louis, et al *Human Rights*, (Thompson Reuters/Foundation Press, 2009), at p. 1477; see also Rebell, Michael, 'The Rights to Comprehensive Educational Opportunity,' *The Harvard Civil Rights-Civil Liberties Law Review*, Vol. 47, No. 1. (March, 2012), pp. 47-117;

¹⁹ ACCESS, Teachers College, Columbia University, <http://www.schoolfunding.info/litigation/litigation.php3> (accessed on May 7, 2012); a distribution of the outcome of the cases with plaintiffs winning 27 and the states as defendants winning 20 with 6 no court decision as at March 2010 can be accessed at: http://www.schoolfunding.info/litigation/New_Charts/03_2010eq_ad_schoolfundingliability.pdf (accessed on May 7, 2012); the Supreme Court of North Carolina 2004 decision in *Hoke County Board of Education v. State* 599 S.E. 2d 365 led to an increase in the North Carolina budget for public schools from \$6.88 billion in 2005 to \$7.5 billion in 2006. Silberman, Todd and Kane Dan, 'School's budget ship comes in,' *The News & Observer*, July 06, 2006, http://ncprogress.org/PDF/070606%20newsobserver%20_%20Schools%20budget%20ship%20comes%20in.pdf (accessed on May 9, 2012); Ryan, James E. 'Standards, Testing, and School Finance Litigation,' *Texas Law Review* Vol. 86, (2007-2008), pp. 1223-1263; Rebell, Michael A. and Wolff, Jessica R. *Litigation and Education Reform: The History and the Promise of the Education Adequacy Movement*, (Teachers College, Columbia University: The Campaign for Educational Equity, March, 2006), pp. 1-24, full text available at: http://www.schoolfunding.info/resource_center/adequacy-history.pdf (accessed on May 9, 2012); Greif, Alexandra 'Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate,' *Yale Law and Policy Review* Vol. 22, (2004), pp. 615-658; Saunders, Thomas 'Settling without Settling: School Finance Litigation and Governance Reform in Maryland,' *Yale Law and Policy Review* Vol. 22, (2004), pp. 571-614; Almeida, Tico A. 'Refocusing School Finance Litigation on At-Risk Children: *Leandro v. State of North Carolina*,' *Yale Law and Policy Review* Vol. 22, (2004), pp. 525-570; Wetzler, Lauren A. 'Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut,' *Yale Law and Policy Review* Vol. 22, (2004), pp. 481-524; Rebell, Michael A. and Metzler, Jeffrey 'Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont,' *Journal of Law and Education*, Vol. 31, (2002), pp. 167-190.

the Patient Protection and Affordable Care Act (PPACA), signed into law on March 23, 2010, by America's President Barack Obama.²⁰

Nigeria's Constitution differs from the American Constitution and contains a Chapter II, titled Fundamental Objectives and Directive Principles of State Policy, which contains a plethora of nonjusticiable socioeconomic rights.²¹ I attempt to show how the constitutional process in the United States at the state level has navigated to some extent around the strictures/constraints of an American Constitution that does not provide for socioeconomic rights. Nevertheless poverty and unemployment as well as difficult survival challenges for low income earners remain widespread in American society. The strategy in the United States has been to employ ordinary legislation both at the states level and at the federal government level to provide welfare rights.

I have juxtaposed the theoretical debates over socioeconomic rights which are justiciable in South Africa and nonjusticiable in India with the Nigerian legal regime, which provides for socioeconomic rights as nonjusticiable fundamental objectives and directive principles of state policy under Chapter II of the 1999 Constitution of the Federal Republic of Nigeria, as highlighted above. South African courts unlike Nigerian courts are empowered to enforce socioeconomic rights through constitutional mandates. South Africa's highest court, the Constitutional Court, has formulated the standard of reasonableness concept, to evaluate the accountability of government policies in the fulfillment of constitutionally mandated

²⁰ Joondeph, Bradley W. 'Federalism and Health Care Reform: Understanding the States' Challenges to the Patient Protection and Affordable Care Act,' *Publius: Journal of Federalism* Vol. 41. No. 3 (2011), pp.447-470; Gamkhar, Shama and Pickerill, Mitchell J. 'The State of American Federalism 2010-2011: The Economy, Health Care Reform and Midterm Elections Shape the Intergovernmental Agenda,' *Publius: Journal of Federalism* Vol. 41. No. 3 (2011), pp. 361-394, at pp. 367-368, 374-376, 381-382.

²¹ Read, James S. 'The New Constitution of Nigeria, 1979: "Washington Model"?' *Journal of African Law*, Vol.23, No. 2 (Autumn, 1979), pp.131-174; The Hon. Justice Kayode Eso, 'The Problems of Interpretation and of Application of the Provisions of the Constitution,' in *All Nigeria Judges Conference Papers*, Ilorin, Kwara State, 8th -16th March 1982, (London: Sweet & Maxwell, 1983), pp. 127-173.

socioeconomic rights.²² “But at the same time the standard of reasonableness enables courts to hold the state accountable in a manner consistent with the doctrine of the separation of powers.”²³ Nigerian governments have accorded respect to constitutionally enforceable provisions but not to legislative provisions on education. This has been demonstrated by Nigeria’s flagrant disobedience of court orders directing compliance with the provisions of the 2004 Universal Basic Education Act. In the *Socio-Economic Rights and Accountability Project SERAP v. Nigeria and Universal Basic Education Commission*²⁴ decision of November 2010, the Economic Commission of West African States (ECOWAS) Court of Justice found Nigeria in violation of Article 17 of the African Child’s Right, Act (a Protocol to the African Charter on Human and Peoples’ Rights-Banjul Charter), section 15 of the Nigerian 2003 Child’s Right Act and section 2 of the 2004 Compulsory Free and Universal Basic Education Act. The court then ordered the Nigerian government to make adequate arrangements for compulsory and free education for every Nigerian child.²⁵ The court dismissed Nigeria’s objection that education is merely a prerogative of government policy under the nonjusticiable Chapter II provisions of the Constitution of the Federal Republic of Nigeria on Fundamental Objectives and Directive Principles of State Policy.²⁶ Nigeria has not embarked on any remedial actions to comply with the judgment and the ECOWAS jurisprudence on Nigeria is analyzed in greater detail in section 4 of chapter 4 in this dissertation.

²² Quinot, Geo and Liebenberg, Sandra, ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa’ Stellenbosch Law Review, Vol. 22, No. 3, (2011), pp. 639-664.

²³ Ngcobo, Sandile, South Africa’s Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers’ Stellenbosch Law Review, Vol. 22, No. 1, (2011), pp. 37-49 at p. 46.

²⁴ ECW/CCJ/APP/12/7.

²⁵ ECOWAS Court orders Nigeria to provide free education for every child, Vanguard, Lagos, November 30, 2010, <http://www.vanguardngr.com/2010/11/ecowas-court-orders-nigeria-to-provide-free-education-for-every-child/> (accessed on April, 25, 2011).

²⁶ Nwauche, E.S. ‘Enforcing ECOWAS Law in National Courts,’ (Journal of African Law, Vol. 55, No. 2, 2011), pp. 181-202, at p. 197.

Can socioeconomic rights be employed in the realization of a Nigerian State with improved accountability? This dissertation argues that socioeconomic rights can contribute to the formulation of state policies and programs that are accountable to the people. Such policies and programs can ultimately lead to the formulation by technocrats and political leaders of socioeconomic policies that are accountable to Nigerians. Accountable government policies hold a greater promise of diversifying the oil dominated economy and the development of relevant programs to boost the manufacturing and agro-allied sectors, which have the potential of generating greater income and prosperity for the average Nigerian as well as more tax revenues than oil for socioeconomic goods.

Education at the primary, secondary and tertiary levels in Nigeria remain severely underfunded and experienced qualified teachers are scarce commodities at all levels. Yet an educated and healthy populace with enabled capabilities is a necessary catalyst for the economic and industrial development of any country, desirous of improving the quality of life of its citizenry.²⁷ Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations*, published in 1776, advocated compulsory public primary education with a syllabus that covered literacy skills, geometry, and mechanics.²⁸ Thomas Paine's "Rights of Man" published in the United States around the same time also strongly advocated for compulsory publicly funded

²⁷ Sen, Amartya, 'Capability and Well-Being' in Sen, Amartya and Nussbaum, Martha (eds.) *The Quality of Life: A study prepared for the World Institute for Development Economics Research (WIDER) of the United Nations University*, (Oxford: Clarendon Press, 1993), pp. 30-53, at p. 44; Nussbaum, Martha, *Women and Human Development: The Capabilities Approach*, (Cambridge: Cambridge University Press, 2000), p. 90; Nussbaum, Martha, 'Capabilities and Human Rights,' *University of Fordham Law Review*, Vol. 66 (1997), pp. 273-300; Nussbaum, Martha C. 'Women's Education: A Global Challenge,' *Signs*, Vol. 29, No. 2 (Winter 2004), pp. 325-355; Nussbaum, Martha 'Education and Democratic Citizenship: Capabilities and Quality Education,' *Journal of Human Development*, Vol.7, No. 3 (November 2006), pp. 385-395; Nussbaum, Martha, 'Capabilities, Entitlements, Rights: Supplementation and Critique,' *Journal of Human Development and Capabilities*, Vol. 12, No. 1 (2011), pp. 23-37, at p. 33

²⁸ Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Lerner Max, (ed.) (New York: The Modern Library, 1937), pp. 737-738.

primary education.²⁹ As Tanzania's Head of State, Julius Nyerere of made education and health care his priorities.³⁰ The development of human capabilities as a step towards freedom from poverty is a necessary anodyne for the Nigerian State in need of improved accountability in public governance.³¹

Research Question

This dissertation will attempt to answer the question: Can justiciable socioeconomic rights assist in the formulation of government policies and programs that are accountable to Nigerian citizens?

Scope of the Dissertation

This dissertation is concerned with the accountability deficit in Nigerian public governance and is limited primarily to health and education aspects of nonjusticiable socio economic rights mentioned under Chapter II Fundamental Objectives and Directive Principles of State Policy of

²⁹ Nussbaum, Martha, *Creating Capabilities: The Human Development Approach*, (Cambridge, Massachusetts: Harvard University Press, 2011), p.139.

³⁰ "What Freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity." Nyerere, Julius K. 'Stability and Change in Africa,' (an Address to the University of Toronto, 1969), reproduced in *Africa Contemporary Record* 2 (1969-70), C30-31; quoted in Howard, Rhoda 'The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa,' *Human Rights Quarterly*, Vol. 5, No. 4 (Nov., 1983), pp. 467-490, at p. 467

³¹ "The insecure sharecropper, the exploited landless labourer, the totally subdued housewife, the overworked domestic servant, and the hard core of the unemployed even in the richer countries, may all come to terms with their respective predicaments by the sheer necessity of uneventful survival. Grievance and discontent may be submerged in cheerful endurance and the acceptance of the 'natural order', and the victim may learn to take pleasure in small mercies. The relative deprivations are thus muffled and muted in the interpersonal scale of utility comparisons. ...the perspective of freedom provides a more real view of different persons' interests." Sen, Amartya, 'Rights as Goals,' Text of the Austin Lecture given on April 6, 1984, , at the University College London, April 6-8, 1984, in Guest, Stephen and Milne (eds.), *Equality and Discrimination: Essays in Freedom and Justice*, Eleventh Annual Conference of the United Kingdom Association for Legal and Social Philosophy, (Stuttgart: Franz Steiner Verlag Wiesbaden GMBH, 1985), p. 24.

the 1999 Constitution of the Federal Republic of Nigeria. It examines the approach in the United States toward the employment of ordinary legislation and states' constitutions to secure socioeconomic rights in a constitutional culture strongly against constitutionally guaranteed socioeconomic rights. However, this approach has not worked well in Nigeria. For example, the 2004 Universal Basic Education Act has a poor record of implementation, due to the absence of an accountability mechanism to enforce socioeconomic rights in Nigeria. Constitutionally guaranteed civil and political rights have been well protected by the Nigerian judiciary and its decisions are obeyed by the Nigerian government.³² It is important to note that socioeconomic goods can be also attained through ordinary legislation in jurisdictions where socioeconomic rights are not constitutionally enforceable. This has been the experience with social security education and healthcare in Europe and to some extent in the United States.³³ Nevertheless the United States spends billions of dollars on socioeconomic goods for its citizens, which exceed even European spending.³⁴ A claim can therefore be made for the attainment of socioeconomic goods through other means, besides constitutional enforcement.³⁵

This dissertation examines prominent socioeconomic rights cases decided by the

³² *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228 S.C.; *Shugaba Darman v. Federal Minister of Internal Affairs* (1981) 2NCLR 459; *Bishop Olubunmi Okojie v. Attorney-General of Lagos State* (1981) 1 NCLR 218; *Attorney-General Imo State v. Ukaegbu* (1981) 2 NCLR 568; *Governor of Lagos State & Others v. Chief Odumegwu Ojukwu & Another* (1986) 1 NWLR (Part 18) 621.

³³ Waldron, Jeremy, *Liberal Rights: Collected Papers 1981-1991*, (Cambridge: Cambridge University Press, 1991), p. 32; Henkin, Louis et al *Human Rights*, (New York: Foundation Press, 1999), p. 86; "U.S. domestic order...sustains institutions that alleviate want..." Shulman, Mark R. 'The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity,' *Fordham Law Journal*, Vol. 77, (2008-2009), pp. 555-581, at p. 580.

³⁴ "In 1992 total spending on social welfare, excluding education and veterans' benefits, by government at all levels was \$936 billion, whereas the justice system (police, courts, and prisons) cost \$94 billion and the military cost \$298 billion." U.S. Department of Commerce, *Statistical Abstract of the United States*, 1997 (Washington: Government Printing Office, 1997), Tables 576, 338, 515, reproduced in Kelley, David, *A Life of One's Own: Individual Rights and the Welfare State* (Washington D.C.: CATO Institute, 1998), p. 27.

³⁵ Hohfeld, Wesley, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,' 23 *Yale L.J.* (1913), pp. 16-59, at pp. 28-32.

Constitutional Court of South Africa and the directive principles in the Indian Constitution to gauge their impact on accountability in public governance. The right to education provisions in the constitutions of the U.S. states of Kentucky, New Jersey, and New York are also analyzed through the jurisprudence of their courts to ascertain the impact of constitutional mandates on public governance accountability. The dissertation focuses on pronouncements of the Supreme Court of Nigeria on the correlation between corruption and deprivation of socioeconomic rights.³⁶ Forces in the Nigerian legal system that have utilized existing mechanisms of accountability would be greatly enhanced by constitutionally guaranteed socioeconomic rights and knock out the bottom of persistent arguments by government lawyers that the 1999 Nigerian Constitution recognizes socioeconomic rights as nonjusticiable fundamental principles and objectives of state policy. The general comments of the Committee of the International Covenant on Economic, Social and Cultural Rights are also evaluated. Nigeria acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on July 29, 1993.³⁷

Research Methodology

The methodology employs a comparative constitutional law approach.³⁸ Comparative legal analysis is premised on the fact that no two legal systems are the same.³⁹ Nigeria's 1999

³⁶ Attorney-General of Ondo State v Attorney-General of the Federation and others [2002] 9 N.W.L.R. (Pt.772) 222 at 283-474.

³⁷ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed on 12 April, 2011).

³⁸ Zweigert, Konrad and Kötz, Hein, Introduction to Comparative Law, (Oxford: Clarendon Press, 1998) (3rd ed. Translated from German by Tony Weir); Banakar, Reza and Travers, Max (eds.) Theory and Method in Socio-Legal Research, (Oxford and Portland Oregon: Hart Publishing, 2005); Langford, Malcolm (ed.) Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, (Cambridge: Cambridge University Press, 2008); Jacob, Herbert et al. (eds.) Courts, Law, and Politics in Comparative Perspective, (New Haven and London: Yale University Press, 1996); Merton, Robert, K. Social Theory and Social Structure, (New York: The Free Press, 1968).

³⁹ Glendon, Mary Ann; Gordon, Michael W. and Osakwe, Christopher, Comparative Legal Traditions, (St. Paul, Minnesota: West Publishing Company, 1982), p. 10. This explains the lack of results of the law and development project exported to Africa by leading American scholars in the 1960s. "Immediately after

Constitution is almost a carbon copy of the 1979 Constitution of the Federal Republic of Nigeria and it reflects decades of autocratic military rule in Nigeria.⁴⁰ Law reports and other legal materials I have procured from Nigeria and key materials available at Cornell library became the primary materials for this dissertation. Secondary materials include classical texts and contemporary seminal texts, as well as textbooks and journal articles on socioeconomic rights, international law, political economy, philosophy, and political science. Materials were limited to those that related to the research question. The secondary materials above and key publications were readily provided by Cornell University library and its external links. The librarians were very proactive and an invaluable help with my research needs. Judicial decisions from Nigeria, India, the United States, and South Africa were relied upon. The complexity of comparative constitutional law is factored within the comparative analysis of differing climates with varying sociopolitical cultural norms.⁴¹ The online data bases of the Cornell University Library, the

independence, American lecturers were trotting around African University campuses selling their 'Law and Development' courses in which they preached that development could be enhanced, facilitated, encouraged etc. through law." Shivji, Issa G. *The Concept of Human Rights in Africa*, (London: CODESRIA Book Series, 1989), p.65, note, 22; "The need to see our own and foreign legal institutions in context means that comparative law by its very nature is an interdisciplinary field, one that depends heavily on practical knowledge and empirical investigation. Legal norms cannot be fully understood without some knowledge of their sources: their political, social, and economic purposes; the milieu in which they operate; the role of the legal profession; the operation of the court system." Glendon, May Ann; Gordon, Michael Wallace and Carozza Paolo G. *Comparative Legal Traditions in a Nutshell*, Second Edition, (St. Paul, Minnesota: West Group, 1999), p.11.

⁴⁰ "Thus it can be seen that the basic choices as to the form of the new Constitution were in fact made by the outgoing military government." Read, James S. 'The New Constitution of Nigeria, 1979:

"Washington Model"? *Journal of African Law*, Vol.23, No. 2 (Autumn, 1979), pp.131-174, at p. 135.

⁴¹ Tushnet, Mark, 'The Possibilities of Comparative Constitutional Law,' *Yale Law Journal* (April, 1999), pp. 1225-1309, at pp.1227-1228, 1307; Choudry, Sujit, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,' 86 *Ind. L.J.* (1998-1999) pp. 819-892, at p. 825. Sandra Liebenberg after appraising Tushnet and Choudry above, succinctly put it this way in the South African context: "References to comparative constitutional law in the interpretation of a national constitution are thus susceptible to two main criticisms: arbitrariness, in the sense that judges frequently only draw from jurisdictions whose language and legal traditions are familiar to them; and superficiality, in that they suffer from the inevitable lack of in-depth knowledge of the relevant historical, social and legal contexts. On the other hand, openness to learning from other constitutional cultures and traditions constitutes a major resource for transformative critique and development of our own constitutional

African Union, and the Economic Commission of West African States; as well as agencies of the United Nations, especially the High Commissioner for Human Rights Office, and the United Nations Development Program were also utilized. A content analysis of the socioeconomic jurisprudence in Nigeria, India, the United States and South Africa was embarked upon. At the international stage, I evaluated the general comments of the Committee of the International Covenant on Economic, Social and Cultural Rights and a decision of the African Commission on Human and Peoples' Rights on socioeconomic violations in Nigeria as well jurisprudence of the Economic Community of West African Court of Justice relating to Nigeria's socioeconomic obligations under the 2004 Universal Basic Education Act and the African Charter on Human and Peoples' Rights.

Arrangement of the Dissertation

In chapter one I argue that mechanisms of accountability have been adopted in Nigeria, and I establish that mechanisms of accountability such as the rule of law and separation of powers have been enacted into the Nigerian Constitution. I evaluate the concept of accountability in public governance and proceed to examine the existing mechanism of accountability in Nigeria, starting with the rule of law. I examine the accountability mechanism of separation of powers and give a snapshot of both the international and domestic bills of rights as mechanisms of accountability and I then examine human rights commissions. I treat transparency in governance as a mechanism of accountability, and follow it with an analysis of freedom of the press as a veritable tool in the accountability toolbox. I move on to interrogate fiscal mechanisms of accountability in the expenditure of public funds in Nigeria and end with an analysis of the

culture.” Liebenberg, Sandra, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, (Claremont, South Africa: JUTA, 2010), p. 118. Even in international criminal law domestic norms add nuance to supposedly global paradigms, see: Greenawalt, Alexander K.A. ‘The Pluralism of International Criminal Law,’ 86 Ind. L.J. (2011) pp. 1063-1130.

African Union's peer review accountability mechanism of the New Partnership for Africa's Development.

In chapter 2, I argue that government socioeconomic policies have not been accountable, and I establish this claim convincingly. I map out the role of the military in the creation of an unaccountable Nigerian State reflected in military coups and the plunging into an abyss of a devastating civil war that resulted in over a million deaths. I establish respectively the dire state of Nigeria's health-care and education sectors through a content analysis of comprehensive data. I then analyze and conclusively prove the deleterious effects of corruption on socioeconomic rights in Nigeria. My case studies of the accountability profiles of some Nigerian state governors and my comprehensive analyses of financial data show conclusively that billions of dollars in oil revenues still get stolen annually in Nigeria. I end the chapter with an analysis of two American cases, *SEC v. Halliburton and KBR* and *United States of America v. Siemens Aktiengesellschaft*, prosecuted by the Securities and Exchange Commission in the United States. The cases establish the negative impact of multinationals on accountability of public governance in Nigeria occasioned by their bribing of political leadership in Nigeria in order to win multibillion dollars contracts. Finally based on established evidence, I conclude that there is a huge accountability deficit in public governance in Nigeria.

In chapter three I examine the status of socioeconomic rights as Fundamental Objectives and Directive Principles of State Policy. Here I also establish the involvement of military juntas in Nigeria in aborting the peoples' will to have socioeconomic rights entrenched as justiciable constitutional fundamental rights in the Nigerian Constitutions decreed by the military juntas. I proceed to highlight the Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria, on Fundamental Objectives and Directive Principles of State Policy. I then evaluate

Nigerian socioeconomic jurisprudence and proceed to analyze the concept of *locus standi* in Nigerian jurisprudence. I examine the socioeconomic jurisprudence of the Supreme Court of Nigeria as well as the constitutional framework that is inclusive and represents a broad spectrum of the desires of Nigerians. I conclude that there is very strong evidence of broad support for justiciable socioeconomic rights by Nigerians to contribute to making socioeconomic policies of government accountable. A constitutionally guaranteed and relaxed right of access to courts in Nigeria is also required to empower aggrieved citizens as litigants to improve the accountability matrix of public governance.

In chapter four I focus on the international context of socioeconomic rights. I argue that constitutionally enforceable socioeconomic rights will assist Nigeria in fulfilling its obligations under international human rights law and improve accountability of its socioeconomic policies. I briefly trace the theoretical debates about whether or not socioeconomic rights are fundamental rights, like civil and political rights. I go on to analyze the General Comments jurisprudence of the Committee set up by the International Covenant on Economic, Social and Cultural Rights, after which I examine the socioeconomic jurisprudence of the African Commission on Human and Peoples' Rights and use the famous SERAC decision against Nigeria on socioeconomic rights as a case study. I end by analyzing the socioeconomic jurisprudence of the Court of Justice of the Economic Community of West African States (ECOWAS) on Nigeria. I conclude in this that the SERAC decision and ECOWAS Court of Justice jurisprudence on Nigeria shows conclusively that socioeconomic rights can complement existing mechanisms of accountability and ameliorate the accountability deficit of Nigerian public governance by subjecting socioeconomic policies of government to judicial scrutiny.

In chapter five I embark on a comparative analysis of the implementation of socioeconomic rights in different countries. Through the scholarship of American professors like Mark Tushnet, Lawrence Sager, and Frank Michelman I learn how the United States has ameliorated the limitations of a constitutional tradition strongly opposed to constitutionalized socioeconomic rights through the use of ordinary legislation by both the federal government and the states to provide socioeconomic goods, such as basic education. I juxtapose the United States experience with that of Nigeria, where socioeconomic rights are not justiciable, but are listed as fundamental objectives and directive principles of state policy under Chapter II of the 1999 Constitution of the Federal Republic of Nigeria. I then proceed to analyze jurisprudence on education in the American states of Kentucky, New Jersey, and New York; whose constitutions provide for free public education for children. I show conclusively that the education jurisprudence in the three states improved accountability in public policies on education.

In the latter portion of the chapter I analyze public interest litigation based socioeconomic jurisprudence in India; and conduct a brief analysis of the transformative constitutions of Argentina and Colombia, both of which contain enforceable socioeconomic rights. I also establish in the next section, that a number of African countries have incorporated justiciable socioeconomic rights in their constitutions within the past two decades, to improve accountability of public governance. I conclude that Nigeria has positive lessons to learn from the education jurisprudence of Kentucky, New Jersey, and New York in improving accountability and in the crafting and implementation of public school educational policies. Nigeria can benefit equally from the experiences of Argentina, Columbia, and India in improving accountability of public governance through the subjection of government policies to a minimum threshold of scrutiny by the judicial branch. India has also amended its Constitution to make

education an enforceable socioeconomic right for children up to the age of fourteen, while at the same time the Indian Supreme Court has expanded the constitutionally guaranteed right to life to encompass a right to health care. I conclude that all mechanisms of accountability including constitutionally enforceable socioeconomic rights must be on deck to ameliorate Nigeria's accountability deficit in public governance.

Chapter 6 critically evaluates the most prominent socioeconomic rights decisions of the Constitutional Court of South Africa in interpreting constitutionally mandated socioeconomic rights, and I demonstrate that those crucial decisions improved the accountability of the government's socioeconomic policies. The formula employed by South Africa's Constitutional Court in the decisions was a reasonableness test. I end the chapter with an analysis of the Court's rejection of the minimum core formula of the Committee on Economic, Social and Cultural Rights.

In chapter seven which concludes this dissertation, I argue that socioeconomic rights can ameliorate the accountability deficit in Nigerian governance. Constitutionally justiciable socioeconomic rights can ameliorate the accountability deficit of the Nigerian state through the subjection of government's socioeconomic policies to judicial scrutiny. I evaluate constitutional legitimacy and the capability of courts to adjudicate over socioeconomic rights. I show that existing mechanisms of accountability in Nigeria can be complemented and enhanced by constitutionally enforceable socioeconomic rights that will subject government's socioeconomic policies to judicial scrutiny. I then proceed to outline the findings of this dissertation and make recommendations.

CHAPTER ONE

MECHANISMS OF ACCOUNTABILITY ADOPTED IN NIGERIA

1.0. Introduction

I argue in this chapter that mechanisms of accountability have been adopted in Nigeria. I establish that mechanisms of accountability, such as the rule of law and separation of powers have been enacted into the Nigerian Constitution. In Section 1.1 I render an analysis of the concept of accountability in public governance, and then analyze examples of the mechanisms of accountability with the rule of law in section 1.2. In section 1.3 I proceed to examine the accountability mechanism of separation of powers and in section 1.4 provide a snapshot of both the international and domestic bills of rights as mechanisms of accountability. Human rights commissions are examined in section 1.5, transparency in governance as a mechanism of accountability in section 1.6, and freedom of the press as a veritable tool in the accountability toolbox in section 1.7. Section 1.8 interrogates fiscal mechanisms of accountability in the expenditure of public funds in Nigeria. I end the examples of mechanisms of accountability in section 1.9, with the African Union's peer review accountability mechanism of the New Partnership for Africa's Development.

1.1. Accountability in Public Governance

The attainment of accountability in public governance has preoccupied human societies over the ages.⁴² Greek Athenian democratic thought is one of the earliest documented sources of accountable governance. In the fifth century it debated the concepts of *aneuthynos* (unaccountable) and *hypeuthynos* (accountable) in securing democratic governance. Herodutus,

⁴²⁴² Mashaw, Jerry L. 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance,' in Dowdle, Michael W. *Public Accountability: Designs, Dilemmas and Experiences*, (Cambridge: Cambridge University Press, 2006), pp. 115-156.

the historian, and playwrights Sophocles and Aeschylus, as well as Democritus, the philosopher devoted significant portions of their scholarship in the fifth century to accountable governance.⁴³

“It was only in democracies that machinery was evolving to hold officials to account, and in fact there is every reason to believe that by the middle of the fifth century *hypeuthynos* “accountable” had become a democratic catchword.”⁴⁴ Sir John Trenchard and Thomas Gordon of the Whig party in England published the Cato letters in the London Journal from 1720 to 1723 letters including copious examples of Athenian accountability. By publishing the letters they were in essence demanding Athenian accountability from Robert Walpole, the leading Whig cabinet member and his colleagues.⁴⁵ “The purpose of these examples was principally to demonstrate the dangers of runaway ministers and the need to hold public men accountable.”⁴⁶

Accountability in Athenian democratic thought and practice can be distilled into the concepts of answerability, responsiveness, and sanctions. Answerability simply meant that public power was held in trust on behalf of the public and a public official must demonstrate in a transparent manner that every exercise of public power was to promote public good. Responsiveness meant that public policies were to be distilled from public debates and executed in an inclusive manner. Sanctions were punishments imposed on public officials for infractions or abuse of public power. It was only when these concepts of accountability were fulfilled that an Athenian public official was allowed to take an honorable retirement from office; otherwise

⁴³ Roberts, Jennifer Tolbert, *Athens on Trial: The Antidemocratic Tradition in Western Thought*, (Princeton: Princeton University, 1994), pp. 35-39.

⁴⁴ *Ibid.* at p. 36.

⁴⁵ *Ibid.* at pp. 150-152.

⁴⁶ *Ibid.* at p. 151.

sanctions ranging from exile to execution could be imposed after a trial pronouncing that he had committed a breach of accountability.⁴⁷

Within thirty days of laying down his office, each official had to present his records for audit or be liable to prosecution. Even officials to whose hands no public funds had been entrusted had to have a statement to that effect approved. During the first portion of the review, the outgoing official's records of the public funds he had received and expended were carefully checked against relevant documents in the state archives...by a board of λογῶται, Athens' public accountants. If the λογῶται found cause for suspicion in the accounts of any officeholder they would pass the information on to the συνήγορο, who would arrange the delinquent official's prosecution before a regular court. An official convicted of embezzlement or taking of bribes would have to pay ten times the amount involved. If the charge was simply one of maladministration, the penalty was only twice the amount mismanaged. If no irregularities appeared, it would be proposed to the court that the official's accounts be cleared, but the ultimate verdict lay with the court itself, and any citizen had the right to appear before the court and challenge its recommendation. Even if the financial portion of the audit passed uneventfully, however, a second period of scrutiny followed. For three days a board of ten state examiners chosen by lot, the εὔθυνοι, sat to hear charges of misconduct of a nonfinancial nature. These could be brought by any citizen who felt that the magistrate had been guilty of malfeasance. He might accuse the magistrate of having wronged him personally or having acted detrimentally to the welfare of any other person or of the state. Offences committed by an official against a private citizen might result in a regular δίκη; if a public wrong was suspected and a *prima facie* case seemed to exist, the charge was referred to the θεσμοθέται, who in turn brought it before a court. Only when these examinations and any prosecutions from them had been completed was an outgoing official permitted to lay down his office with honor. Only when his εὔθυνοι were complete, we read, was it legal for a man to set out on a journey, transfer his property to anyone else, be adopted into a different family, or even make a votive offering to a god. In other words, the state had a lien on the property and civic freedom of all officials until their accounts were settled.⁴⁸

In contemporary times, the concept of public accountability, has borrowed heavily from the Athenian concept of accountability in public governance. It has evolved over several centuries into the modern concept of separation of powers.⁴⁹ “Nevertheless the ideas of the ancients about the nature of law, and about the means of controlling power in civil societies, provided much of the basic material to which writers in later ages were to turn for ammunition in the great battles

⁴⁷ Roberts, Jennifer Tolbert, *Accountability in Athenian Government*, (Madison: The University of Wisconsin Press, 1982).

⁴⁸ *Ibid.* at pp. 17-18.

⁴⁹ Vile, M.J.C. *Constitutionalism and the Separation of Powers*, (Oxford: Oxford University Press, 1967), p. 21.

over the control of the machinery of the State.”⁵⁰ An example is English politics in the eighteenth century, highlighted above.

In Africa, constitutional arrangements have generally concentrated power in the executive branch of government⁵¹ and created imperial presidents.⁵² The pattern commenced in Ghana in 1960, and spread to other former British colonies in Africa.⁵³ This consolidation of power in the presidency has been to the detriment of the legislative and judicial branches of government.⁵⁴ A key component of research into the architecture of African constitutions must endeavor to make the executive branch accountable, typified by a very powerful president according to constitutional mandates in each country. “To begin with, little importance is attached to constitutional sanctions against the abuse of power and there is often a lack of

⁵⁰ Ibid. at p. 21.

⁵¹ The first leader of post independent Tanzania, Julius Nyerere captured the trend in a brief article: “We have to acknowledge that, although the people of Tanganyika can understand the idea of law being made by groups, they see leadership and enforcement of the law as the responsibility of a “person” with authority answerable for his actions to the group, but not hampered by it in effecting them. Under our proposals, therefore, where it is necessary to lead, the President has the powers to lead. Our first President, who will take office on December 9, will be directly elected by the people on a basis of adult suffrage. In future, however, the executive and legislature will be interlocked by ensuring that the President, like a prime minister, is leader of the majority in the National Assembly...Our constitution differs from the American system in that it avoids any blurring of the lines of responsibility, and enables the executive to function without being checked at every turn. For we recognize that the system of “checks and balances” is an admirable way of applying the brakes to social change. Our need is not for brakes-our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and resistances which are inherent in all societies.” Nyerere, Julius, ‘How Much Power for a Leader?’ Africa Report, 7:7 (1962), p. 5.

⁵² Okoth-Ogendo, H.W.O. ‘Constitutions without Constitutionalism: Reflections on an African Paradox,’ in Shivji, Issa G. (ed.), *State and Constitutionalism: An African Debate on Democracy*, (Harare: Southern Africa Political Economy Series (SAPES) Trust, 1991), pp.3-25, at pp. 13-15. There is also a parallel in the United States of America evidenced by Watergate scandal and the Vietnam war embarked upon by an American president unilaterally, Morton, Mintz and Cohen, Jerry S. *Power Inc.: Public and Private Rulers and How to Make Them Accountable*, (New York: The Viking Press, 1976); constraining presidential power in America is an ongoing concern, Goldsmith, Jack, *Power and Constraint: The Accountable Presidency after 9/11*, (New York: W.W. Norton & Company, 2012).

⁵³ Nwabueze, B.O. *Presidentialism in Commonwealth Africa* (New York: St. Martin’s Press, 1974) pp.104-135.

⁵⁴ Hatchard, John; Ndulo, Muna and Slinn, Peter, *Comparative Constitutionalism and Good Governance in the Commonwealth* (Cambridge: Cambridge University Press, 2004), p. 60.

democratic ethic amongst politicians in the country.”⁵⁵ This entails empowering the legislative and judicial branches as independent effective checks and balances on the executive; but ultimately the emergence of the three branches as equal partners in governance will enhance accountability of public governance to the governed in African countries.

The role of the Structural Adjustment Programs of the 1980s and 1990s that stripped African countries of their sovereignty must not be underplayed because those policies crafted by the International Monetary Fund and the World Bank accentuated dictatorship and suppressed accountable democracies.⁵⁶ Constitutions are supposed to control governments, in democratic arrangements.⁵⁷ Constitutions become meaningless when they are unable to limit executive power.⁵⁸ “The theory of the separation of powers and checks and balances emphasizes the element of control.”⁵⁹

African scholars and public servants “have worked for and argued for accountability, transparency and probity in government and public affairs often in extremely difficult and dangerous circumstances.”⁶⁰ Conventions to promote democratic ethos also need to be developed

⁵⁵ Ibid. at p. 96.

⁵⁶ “Demand for good governance, protection of human rights and political liberalisation are directly undercut by external debt and the imposition of structural adjustment programmes that batter the poorest members of society and impair their ability to organise.” Adelman, Sammy, ‘Constitutionalism, Pluralism and Democracy in Africa,’ *Legal Pluralism & Unofficial Law*, Vol. 42, (1998), pp. 73-88, at p. 86.

⁵⁷ Wheare, K.C. *Modern Constitutions*, (London: Oxford University Press, 1966), pp. 7-9.

⁵⁸ “The term ‘constitutional government’ is apt to give the impression of a government according to the terms of a constitution. That there is a formal written constitution according to whose provisions a government is conducted is not necessarily conclusive evidence that the government is a constitutional one. Again the determining factor is: Does the constitution impose limitations upon the powers of the government? There are indeed many countries in the world today with written constitutions but without constitutionalism.” Nwabueze, B.O. *Constitutionalism in the Emergent States* (Rutherford: Farleigh Dickinson University Press, 1973), p. 2.

⁵⁹ Vile, M.J.C. *Constitutionalism and the Separation of Powers* (second ed.) (Indianapolis: Liberty Fund, 1998) p. 409.

⁶⁰ McAuslan, Patrick, ‘Good Governance and Aid in Africa,’ *Journal of African Law*, Vol. 40, No. 2 (1996), pp. 168-182, at p. 169.

in African countries to respect constitutional mandates and provisions.⁶¹ Sociocultural forces have an important role to play in socializing public officerholders to view public office as a trust to be used for the enhancement of the welfare of the governed.⁶² The answerability aspect of public accountability in the British tradition of ministerial responsibility epitomizes such democratic ethos.⁶³ Moral failures of cabinet ministers are equally sanctioned in Britain.⁶⁴ Maintaining conventions on the proper use of public power for public good is a necessary democratic ethic in Africa's constitutionalism to secure accountability.⁶⁵

In Africa, "the crucial question is how we can move away from merely theorizing about constitutionalism to practical institutionalism of its basic tenets."⁶⁶ Accountable governance enhances the legitimacy of governance and aids its durability.⁶⁷ This it achieves under a

⁶¹ "Often called 'conventions,' the unwritten looms large over the written, at times supplanting what is 'written.' Histories of slender texts (such as the American) and voluminous texts (such as the Indian) provide vivid examples of the unwritten at play and at war with the written texts. In Roland Barthes's telling image, constitutions entail not just the practices of writing but of reading to the point (as Barthes maintains) that the birth of the reader necessarily entails the death of the author." Baxi, Upendra, 'Constitutionalism as a Site of State Formative Practices,' *Cardozo Law Review*, Vol. 21, (1999-2000), pp. 1183-1210, at p. 1187

⁶² Mazrui, Ali, 'Constitutional Change and Cultural Engineering: Africa's Search for New Directions,' in Oloko-Onyango (ed.) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges*, (Kampala: Fountain Publishers, 2001), pp. 18-36; Ghai, Yash, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims,' *Cardozo Law Review*, Vol. 21, (1999-2000), pp. 1095-1140, at p. 1099; an analysis of the European and American socio-legal experiences is explored in Thornhill, Chris, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, (Cambridge: Cambridge University Press, 2011).

⁶³ Marshall, Geoffrey, *Constitutional Conventions: The Rules and Forms of Political Accountability*, (Oxford: Clarendon Press, 1984), pp. 54-79.

⁶⁴ *Ibid.* at pp. 94-110.

⁶⁵ Marshall, Geoffrey and Moodie, Graeme C. *Some Problems of the Constitution* (4th ed.) (London: Hutchinson, 1967), pp. 25-40.

⁶⁶ Oloko-Onyango, J, 'Constitutionalism in Africa: Yesterday, Today and Tomorrow,' in Oloko-Onyango (ed.) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges*, (Kampala: Fountain Publishers, 2001), pp. 1-15, at p. 3.

⁶⁷ "Legitimate governance implies a system of political administration which derives its legitimacy from the people. It is necessarily "democratic". Thus, it is a political system in which the decision makers in the legislative and executive fields are under effective popular control and demonstrate by their actions that they are responsible to the people from whose mandate they derive their position; a system which guarantees the basic rights and freedoms of the individual enforced by an independent judiciary and a system in which the rule of law is observed." Ezejiiofor, Gausi, 'The Role of NGOs in the Securement of

constitutional democracy, by being transparent, responsive and inclusive in socioeconomic policy formulation and execution.⁶⁸ All branches of a government must be answerable, and responsive to constitutional mandates promoting the welfare of the governed, failing which they would incur constitutional sanctions.⁶⁹ These are the fundamental principles of a government accountable to the governed under constitutional democracy.⁷⁰ “Moreover, a strong civil society will hold the government accountable and curb government functionaries’ excesses and abuse of power.”⁷¹ All of the above factors; must inform an inclusive and broad based constitution making process, that aims at accountability in public governance predicated upon a civil society allowed to nurture the ethos of constitutionalism.⁷²

Legitimate Governance in Africa: The Lessons of the Nigerian Experience,’ in Quashigah, Edward Kofi and Okafor, Chinedu Obiora (eds.) *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999), pp. 331-341, at p. 331.

⁶⁸ “Constitutional democracy encompasses...holding political leaders and government officials to the ruled for actions through clearly formulated and transparent processes...requiring public agencies to be responsive to the needs of the public and to promote social and economic development for the benefit of all citizens in an equitable manner and not just for a particular ethnic group...providing information that permits accountability to be achieved, laws to be carefully applied, markets to function, and people to be creative and innovative.” Ndulo, Muna, ‘The Democratic State in Africa: The Challenges for Institution Building,’ *National Black Law Journal*, Vol. 16 (1998-2000), pp. 70-101, at p. 79.

⁶⁹Chirwa, Danwood M. and Nijzink, Lia, ‘Accountable government in Africa: Introduction,’ in Chirwa, Danwood M. and Nijzink, Lia (eds.) *Accountable Government in Africa: Perspectives from Public law and Political Studies*, (Tokyo: United Nations University Press, 2012), pp. 1-12, at p.5.

⁷⁰ “The new concept of constitutionalism should rest on accountable/responsive state and collective rights/freedoms.” Shivji, Issa G. ‘State and Constitutionalism: A New Democratic Perspective in Shivji, Issa G. (ed.), *State and Constitutionalism: An African Debate on Democracy*, (Harare: Southern Africa Political Economy Series (SAPES) Trust, 1991), pp. 27-54, at pp. 39-40

⁷¹ Oko, Okechukwu, ‘Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa,’ *Vanderbilt Journal of Transnational Law*, Vol. 33, (2000), pp. 573-644, at p. 610.

⁷² “Constitution-making structures must be open to the views and opinions of all stakeholders who must be given a meaningful opportunity to make their views known. If a constitution is to represent the aspirations and dreams of all the people, deliberate steps have to be undertaken to ensure that those who might be disempowered become part and parcel of the process (Mbeki, 1995, p. 10). The process must be transparent; it must be undertaken in full view of the country and the international community. The constitutional text must be in a simple language that is accessible to all. It should therefore be translated into all the major languages spoken in a given jurisdiction. A constitution that is perceived as having been imposed on a large segment of the population, or as having been adopted through the manipulation of the process by some stakeholders, is unlikely to gain sufficient popularity or legitimacy to endure the test of time. The process of constitution-making cannot, and should not, be determined solely by the government of the day, but by all the stakeholders.” Ndulo, M. ‘Constitution-Making in Africa: Assessing Both the

Accountability in public governance has also been a key objective of the Organization of African Unity and its successor body, the African Union as well as the Economic Commission of West African States and Nigeria is a member of these bodies. The term “good governance” has been the preferred terminology employed by these bodies in their various instruments analyzed below, to convey the concept of public governance accountability. From the preceding analysis it can be safely asserted that

Public accountability is the requirement that those who hold public trust should account for the use of that trust to citizens or their representatives. Public accountability signifies the superiority of the public will over private interests and tries to ensure that the former is supreme in every activity and conduct of a public official. Without effective accountability, bureaucratic power runs amock. In popular parlance, power corrupts and absolute, i.e. unchecked and unaccountable use of power, tends to corrupt absolutely.⁷³

The Organization of African Unity (OAU) in its inaugural ministerial conference on human rights held in April 1999, in Grand Bay, Mauritius, adopted and affirmed the “interdependence of the principles of good governance, the rule of law, democracy and development.”⁷⁴ The Constitutive Act of the African Union (AU) adopted in Lome, Togo on July 11, 2000, came into force on May 26, 2001, when the OAU became the AU.⁷⁵ The African Union also aims to “promote democratic principles and institutions, popular participation and good governance.”⁷⁶ The African Union Convention on Preventing and Combating Corruption was adopted on July 11, 2003, in Maputo, Mozambique and came into force on August 5, 2006. It demands “Respect for democratic principles and institutions, popular participation, the rule of

Process and the Content,’ Public Administration and Development, Vol. 21, (2001), pp. 101-117, at p. 113.

⁷³ Olowu, Dele, ‘Organizational and Institutional Mechanisms for Ensuring Accountability in Africa: A Review,’ Commonwealth Law Bulletin, Vol. 20 (January, 1994), pp. 329-339, at p. 329.

⁷⁴ Paragraph 3, full text of the declaration is reproduced in Heyns, Christof and Killander, Magnus, Compendium of Key Human Rights Documents of the African Union, (Third Edition), (Pretoria: University of Pretoria Law Press, 2007), pp.120-124

⁷⁵ Full text available at: http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm (accessed on April 16, 2013).

⁷⁶ Article 3(g).

law and good governance.”⁷⁷ The principles also enjoin state parties to be transparent and accountable in public governance.⁷⁸

The African Charter on Democracy, Elections and Governance was adopted on January 30, 2007 in Addis Ababa, Ethiopia, and it came into force on February 15, 2012.⁷⁹ It aims to “promote good governance by ensuring transparent and accountable administration.”⁸⁰ In addition, the Charter stipulates that

State parties shall strive to institutionalise

- Accountable, efficient and effective public administration;
- Strengthening the functioning and effectiveness of parliaments;
- An independent judiciary;
- Relevant reforms of public institutions including the security sector;
- Harmonious relationships in society including civil-military relations;
- Consolidating sustainable multiparty political systems;
- Organising regular, free and fair elections; and
- Entrenching and respecting the principle of the rule of law.⁸¹

The Economic Commission of West African States (ECOWAS) Protocol on Democracy and Good Governance adopted on December 21, 2001, addresses the concept of good governance in conjunction with human rights and the rule of law in section VII.⁸² It stipulates that

⁷⁷ Article 3(1), full text available at: http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBAT_ING_CORRUPTION.pdf (accessed on April 16, 2013).

⁷⁸ Article 3(3)

⁷⁹ As at April 16, 2013, only seventeen African Countries have ratified the treaty and interestingly Botswana has not signed nor ratified the treaty. Full text of ratification is available at: http://www.au.int/en/sites/default/files/Charter%20on%20Democracy%20and%20Governance_0.pdf (accessed on April 16, 2013).

⁸⁰ Article 12(1), full text is available at: http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed on April 16, 2013).

⁸¹ Article 32.

⁸² Articles 32-39, full text available at: <http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf> (accessed on April 16, 2013)

- Member States and the Executive Secretariat shall endeavour to adopt at national and regional levels, practical modalities for the enforcement of the rule of law, human rights justice and good governance.
- Member States shall ensure accountability, professionalism, transparency and expertise in the public and private sectors.⁸³

1.2. Rule of Law

The rule of law features prominently in the 1999 Constitution of The Federal Republic of Nigeria and boldly proclaims that: “The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.”⁸⁴ It further stipulates that “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.”⁸⁵ In modern times, the rule of law entails that both the governed and government officials be bound by determinate and publicized law which is not retroactive, with inbuilt accountability checks on executive power and legislative power.⁸⁶ This modern view also predetermines the legal relationship between individuals and also between the individual and the state.⁸⁷ Institutions manned by government

⁸³ Article 34.

⁸⁴ Section 1(2), Constitution of the Federal Republic of Nigeria 1999, Federal Government Press, Mobil Road, Apapa, Lagos.

⁸⁵ Ibid. section 1(3).

⁸⁶ Tamanaha, Brian Z. ‘A Concise Guide to the Rule of Law,’ in Palombella, Gianluigi and Walker, Neil, (eds.) *Relocating the Rule of Law*, (Oxford: Hart Publishing, 2009), pp. 3-15; “At the heart of the rule of law lie three core principles. First, the polity must be governed by general rules that are laid down in advance. Secondly, these rules (and no other rules) must be applied and enforced. Thirdly disputes about the rules must be resolved effectively and fairly. In a common law system, a fourth principle might be added: that government itself is bound by the same rules as citizens and that disputes involving governments are resolved in the same way as those involving private parties.” Saunders, Cheryl and Le Roy Katherine, ‘Perspectives on the Rule of Law,’ in Saunders, Cheryl and Le Roy Katherine (eds.) *The Rule of Law*, (Sydney: The Federation Press, 2003), pp. 1-20, at p. 5.

⁸⁷ Yusuf, Hakeem O. *Transitional Justice, Judicial Accountability and the Rule of Law*, (New York: Routledge, 2010), p.13.

officials and laws are pathways or tools for achieving the ends of the rule of law.⁸⁸ Oxford law professor Andrew Venn Dicey was most famously associated with the term at the end of the nineteenth century.⁸⁹ However the concept of the rule of law has a pedigree of several centuries and predates Dicey.⁹⁰ In the 1780 Constitution of the state of Massachusetts, the rule of law is reflected as “a government of laws and not of men.”⁹¹ It has been argued that two of the attributes of the rule of law propounded by Dicey, equality of all before the law, and access to independent judicial adjudication of disputes, guarantees accountability in the exercise of the coercive power of government.⁹²

A.V. Dicey interpreted the rule of law to comprise “three components”⁹³:

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, and by the law alone; but he can be punished for nothing else. It means again equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the “rule of law” in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the “administrative law” (*droit administratif*) or the “administrative tribunals” (*tribunaux administratifs*) of France. The notion which lies at the bottom of the “administrative law” known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere

⁸⁸ “The rule of law is about establishing a government that is bound by and governs through, pre-existing laws, which treat citizens as equal before the law, which respect human rights, ensure law and order, and provide for efficient settlement of disputes and regularized decisions. While institutions and laws can assist in these outcomes, they are means, not the ends. They should never be confused for ends in themselves, and they are often not the most important levers of change.” Kleinfeld, Rachel, *Advancing the Rule of Law Abroad: Next Generation Reform*, (Washington, D.C.: Carnegie Endowment for International Peace, 2012), p. 213.

⁸⁹ Neumann, Michael, *The Rule of Law: Politicizing ethics*, (Aldershot: Ashgate, 2002), pp. 1-20.

⁹⁰ Reid, John Phillip, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, (DeKalb: Northern Illinois University Press, 2004).

⁹¹ Art. 30, reproduced in Cass, Ronald A. *The Rule of Law in America*, (Baltimore: The John Hopkins University Press, 2001), p. 2

⁹² Yusuf, H.O. *Rule of Law and Politics of Anti-Corruption Campaigns in a Post-Authoritarian State: The Case of Nigeria*, Vol. 22 (2011), *King’s Law Journal*, pp. 57-83.

⁹³ Mclean, Iain, *What is Wrong with the British Constitution*, (Oxford: Oxford University Press, 2010), p.25.

of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and is indeed fundamentally inconsistent with our traditions and customs. The “rule of law” lastly may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.⁹⁴

The Parliament of England subsequently acted through the administrative machinery that evolved from the nineteenth-century industrial era into the bureaucratic machinery of the welfare state of the twentieth century, which exercised delegated wide discretionary authority with increased administrative powers. This reality, according to William Robson, debunked Dicey’s claim that the rule of law in England lacked “wide discretionary authority on the part of the government”⁹⁵

The second point made by Dicey on the absence in England of “administrative tribunals” (*tribunaux administratifs*) of France was a misunderstanding/misrepresentation of the French system as Robson clearly demonstrated above. England definitely operated administrative tribunals, that treated government officials differently from ordinary citizens; and the Crown up

⁹⁴ Dicey, A.V. Introduction to the Law of the Constitution, (eight edition.) (London: Macmillan & Co., 1926), pp.198-199.

⁹⁵ “For nearly three-quarters of a century Parliament has made a practice of conferring, with increasing frequency, judicial powers on Ministers in charge of departments. The legislation relating to public health, education, local government, transport, health insurance, unemployment insurance, pensions and other social services is teeming with provisions in which disputes between administrative authorities and householders, parents, employers, insured persons, approved societies, doctors, druggists and other sections of the community are determined not by the courts of law, but by government departments or by administrative tribunals appointed by Ministers of the Crown. This tendency is not the result of a well thought-out constitutional principle. Its growth was haphazard, sporadic and unsystematic. Yet it was not, on the other hand, due to a fit of absentmindedness. Parliament did not merely overlook the courts of law. But the possibility of setting up new organs of adjudication which would do the work more rapidly, more cheaply, more efficiently than the ordinary courts; which would possess greater technical knowledge and fewer prejudices against government; which would give greater heed to the social interests involved and show less solicitude for private property rights; which would decide debates with a conscious effort at furthering the social policy embodied in the legislation: this prospect offered solid advantages... In doing so, Parliament was only repeating a process which has happened again and again in the history not only of England but of many civilised countries.” Robson, William, Justice and Administrative Law: A Study of the British Constitution, (London: Stevens & Sons Limited, 1947), pp.346-347.

until 1947, was not liable in tort until the passage of the Crown Proceedings Act of 1947. Government officials still enjoy certain privileges in court.⁹⁶ Administrative tribunals in France employed public administration experts to determine the liability of government officials and not to shield them from regular courts as claimed by Dicey.⁹⁷

The third component of the rule of law, according to Dicey, was shaped by his background as member of the Whig Party. He disliked the idea of an enumerated bill of rights in a constitution. “Whigs of the nineteenth century assumed that the Constitution was built up on free or unrestricted competition.” The Whig Party was funded and promoted by the manufacturing class of the nineteenth century.⁹⁸

There is no clear-cut definition of the rule of law, and various definitions have evolved over the centuries in different places and climes.⁹⁹ But its central features in democratic constitutional arrangements require that governmental powers must not be arbitrary, or

⁹⁶ Ibid. p. 344.

⁹⁷ Jowell, Jeffrey, ‘The Rule of Law Today’, in Jowell, Jeffrey and Oliver, Dawn, *The Changing Constitution*, (fifth Ed.) (Oxford: Oxford University Press, 2004), 5-25, at p.7.

⁹⁸ “The manufacturers who formed the backbone of the Whig Party wanted nothing which interfered with profits, even if profits involved child labour wholesale factory accidents, the pollution of rivers, of the air, and of the water supply, jerry-built houses, low wages, and other incidents of nineteenth century industrialism. In the field of central government they secured the removal of restrictions, and they were not anxious for restrictions under the control of local authorities. No Whig politician made a reputation as a social reformer...indeed until 1875 the development of public health law may be related almost exactly to cholera epidemics. These epidemics did, therefore produce new administrative powers, but very slowly...” Jennings, Ivor, *The Law and the Constitution*, (London: University of London Press, 1959), pp. 309-310.

⁹⁹ Radin, Margaret Jane, ‘Reconsidering the Rule of Law,’ Vol. 69, No. 4 (July, 1989), *Boston University Law Review*, pp. 781-819; A collection of essays prove the point in Wolff, Robert Paul (ed.) *The Rule of Law*, (New York: Simon and Schuster, 1971); Kleinfeld, Rachael, ‘Competing Definitions of the Rule of Law,’ in Carothers, Thomas (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge*, (Washington, D.C.: Carnegie Endowment for International Peace, 2006), pp. 31-73; Luban, David, ‘The Rule of Law and Human Dignity: Re-examining Fuller’s Canons,’ Vol. 2, No. 1, (March, 2010), *Hague Journal on the Rule of Law*, pp. 29-47.; Bedner, Adriaan, ‘An Elementary Approach to the Rule of Law,’ Vol. 2, No. 1, (March, 2010), *Hague Journal on the Rule of Law* 48-74; Ellis, Mark, ‘Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice,’ Vol. 72 (Winter, 2010-2011) *University of Pittsburgh Law Review*, pp. 191-215; Gosalbo-Bono, Ricardo, ‘The Significance of the Rule of Law and its Implications for the European Union and the United States,’ Vol. 72 (Winter, 2010-2011) *University of Pittsburgh Law Review*, pp. 229-360.

concentrated in one body, and that such powers must be accountable to the electorate.¹⁰⁰ It has also become an overarching concept of constitutional democracy for the separation of governmental powers and respect for human rights as well as judicial independence.¹⁰¹ Separation of powers under the rule of law ensures “that stability and predictability of the rules which is the core of constitutionalism.”¹⁰² The Economic Commission of West African States (ECOWAS) established in 1975, in its 2001 Democracy and Good Governance Protocol to the ECOWAS Treaty states that “Member States recognise that the rule of law involves not only the promulgation of good laws that are in conformity with the provisions on human rights, but also a good judicial system, a good system of administration, and good management of the State apparatus.”¹⁰³

The International Congress of Jurists at its 1959 Delhi meeting interpreted the rule of law as the responsibility of the judiciary and lawyers to protect the civil and political rights of individuals, and stated that it entails the upholding of human rights in administrative and criminal procedures. Further, human rights were not to be derogated using the excuse of

¹⁰⁰ “The aim of the rule of law is to limit, thereby checking the arbitrary, oppressive, and despotic tendencies of power, and to ensure the equal treatment and protection of all citizens irrespective of race, class, status, religion, place of origin, or political persuasion. It implies a legal framework that is fair, that is enforced impartially (particularly in regard to human rights, public security and safety), and that legitimizes state actions. Authority is legitimate if there is an established legal and institutional framework, and if decisions are to be taken in accordance with the accepted institutional criteria, processes, and procedures.” Ndulo, Muna, ‘Introduction Good Governance: The Rule of Law & Poverty Alleviation,’ in Ndulo, Muna (ed.) *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation*, (Oxford: James Currey, 2006), pp. 1-10, at p. 2.

¹⁰¹ *Id.*

¹⁰² Nwabueze, B.O. *Ideas and Facts in Constitution Making: The Morohundiya Lectures Faculty of Law University of Ibadan*, (Ibadan: Spectrum Books Limited, 1993), p.190.

¹⁰³ Article 33 (1), Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Executive Secretariat Dakar, December, 2001, <http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf> (accessed on January 20, 2013).

government security.¹⁰⁴ In addition, the rule of law must facilitate the socioeconomic climate for individuals to fulfill their aspirations in dignity.¹⁰⁵ The 1961 Lagos Conference on the Rule of Law distilled the rule of law to require a constitution freely adopted by citizens, which guarantees democratic representation and fundamental human rights.¹⁰⁶ An independent judiciary is sine qua non for the existence of the rule of law and a free press promotes the rule of law to check authoritarian rule.¹⁰⁷ An independent police institution is also crucial in the rule of law matrix.¹⁰⁸

Political will of the ruling elite to promulgate just laws that regulate their conduct and respect for laws by the ruled have been recognized as vital to entrenching a rule of law culture.¹⁰⁹ This much was stated by the Nigerian Supreme Court in 1986, when in flagrant disregard of a court order that restrained the Lagos State government from evicting Odumegwu Ojukwu from his father's house, Lagos State evicted him forcefully. The house had earlier been declared an abandoned property during the Nigerian Civil War of 1967-1970, when Odumegwu Ojukwu led the abortive eastern Nigerian secession attempt. The Supreme Court held that governments and

¹⁰⁴ Elias, T. Olawale, *Government and Politics in Africa*, (Bombay: Asia Publishing House, (second ed.), 1963, p. 164.

¹⁰⁵ Ohonbamu, 'The Rule of Law in Nigeria' in Elias, T.O. (ed.) *Law and Social Change in Nigeria*, (Lagos: Lagos University Press, 1972), pp. 197-227, at p. 198.

¹⁰⁶ Ibid. at p. 201.

¹⁰⁷ Ibid. at p. 227.

¹⁰⁸ Discussion with Professor Muna Ndulo.

¹⁰⁹ "It is clear therefore that the ideal of the rule of law becomes an empty fiction if the political will to make just law, obey and enforce the same judiciously is lacking on the part of the political authorities. In the final analysis we must accept that law can only rule when the rulers and the ruled alike acknowledge and accept the rule of law." Agbede, I. A. 'The Rule of Law: Fact or Fiction?' in Yakubu, Ademola John (ed.), *Administration of Justice in Nigeria: Essays in honour of Hon, Justice Mohammed Lawal Uwais*, (Lagos: Malthouse Press Limited, 2000), pp. 137-151, at p. 149.

constituted authorities are bound and restrained by the laws of the land, and that failing this, anarchy would become the norm.¹¹⁰

Rule of law has also been problematic as a factor in the economic development literature on causality.¹¹¹ The question is, does rule of law promote economic development, or is it economic development that leads to rule of law?¹¹² British Department for International Development (DFID) and United States Agency for International Development (USAID) development assistance bodies have expended millions of dollars on rule of law initiatives in Nigeria.¹¹³ The European Union is also involved in rule of law initiatives.¹¹⁴ The New Partnership for Africa's Development (NEPAD) also recognizes the rule of law as one of vital ingredients of development.¹¹⁵

¹¹⁰ *Governor of Lagos State & Others v. Chief Odumegwu Ojukwu & Another* (1986) 1 NWLR (Part 18) 621.

¹¹¹ Currott, N.A. 'Foreign aid, the rule of law, and economic development in Africa,' Vol. 2 (December, 2010), *University of Botswana Law Journal*, pp. 3-18

¹¹² Trebilcock, Michael J. and Daniels Ronald J. *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, (Cheltenham, UK: Edward Elgar, 2008), pp. 1-57; Upham, Frank, 'Mythmaking in the Rule-of-Law Orthodoxy,' in Carothers, Thomas (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge*, (Washington, D.C.: Carnegie Endowment for International Peace, 2006), pp. 75-104, particularly at pp. 82, 76-83

¹¹³ United States Agency for international Development, *Africa Regional Rule of Law Status Review*, April 30, 2009, http://pdf.usaid.gov/pdf_docs/PNADO804.pdf (accessed on January, 4, 2012); "The international donor community has spent decades working with developing countries to guide, promote, and even demand reforms across a wide range of standards. One of the most prominent objectives has been to instill and establish stable rule of law where it is feeble or fractured, for a variety of noble reasons. Success in these endeavors has all too often been limited or temporary; positive gains, such as improved constitutions, are often offset by implementation and enforcement failures." Channell, Wade, 'Grammar Lessons Learned: Dependent Clauses, False Cognates, and other Problems in Rule of Law Programming,' Vol. 72 (Winter, 2010-2011) *University of Pittsburgh Law Review*, pp. 171-189, at p. 171.

¹¹⁴ Paasivirta, Esa, 'Can External Programs Influence Internal Development of the Rule of Law? Some Observations from the European Union Perspective,' Vol. 72 (Winter, 2010-2011) *University of Pittsburgh Law Review*, pp. 217-227.

¹¹⁵ "NEPAD Framework Document and the Declaration identify, among others, democracy and good political governance as preconditions and foundations of sustainable development and the eradication of poverty. The overall objective is to consolidate a constitutional order in which democracy, respect for human rights, the rule of law, separation of powers and effective, responsive public service are realised to ensure sustainable development and a peaceful and stable society." NEPAD/HSGIC-03-2003/APRM/OSCI, 9 March 2003, quoted in APRM Country Review Report No. 8 African Peer Review

The issue then is, if law can be employed to assist economic development, can law also assist in the improvement of accountability in public governance? I analyze the role of law in the improvement of accountability in public governance in chapters 4 and 5 dealing with socioeconomic jurisprudence at the international and domestic courts, respectively. Chapter 6 on socioeconomic jurisprudence of the South African Constitutional Court shows that the reasonableness test formula applied by the Court to the health-care, housing, and social security policies of the government resulted in improved accountability of socioeconomic policies of the South African government.

In the 1960s, the United States employed first-rate legal scholars from prominent law schools to work on a law and development project, wherein legal assistance would serve as a catalyst for socioeconomic development in the developing world. Disillusionment with the instrumentalist approach to law as a tool for social change set in among these scholars in the 1970s.¹¹⁶ In the 1990s, the World Bank assimilated the rule of law as a tool to enable governments to become accountable and run more efficient development policies.¹¹⁷ The World Bank Annual Reports in 2003 and 2004 revealed that its rule of law projects in 100 countries had

Mechanism Country Review Report Federal Republic of Nigeria, p. 64,
<http://aprm.tanzania.org/docs/APRM%20Nigeria%20report.pdf> (accessed on January 5, 2013).

¹¹⁶ Trubek, David M. and Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wis. L. Rev.* (1974), pp. 1062-1102.

¹¹⁷ "Consistent with its endorsement of the new market-friendly conception of development, the Bank does not advocate the establishment of welfare states. In a market-friendly state, law is not an all purpose tool at the service of an interventionist state, whether of the welfare, mild authoritarian or despotic variety. Instead, law, provides rules to facilitate market transactions mainly by defining property rights, guaranteeing the enforcement of contracts and maintaining law and order. Law is no longer a protagonist of social and economic change. Its role, though indispensable, is largely passive. Under this conception, there is no room for lawyers reared in legal instrumentalism as they might either support those with a vested interest in supporting policies which distort market relations or, worse still, use law to expand the role of the state in the management of the economy." Faundez, Julio, 'Legal technical assistance', in Faundez, Julio, (ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries*, (London: Macmillan Press Ltd in association with the British Council, 1997), pp. 1-24, at p.13.

gulped \$3.8 billion since 1993.¹¹⁸ The foundation for the expenditure was laid in 1989, when it declared that:

It is not just the unpredictability of policies that discourages investment, but also the uncertainty about their interpretation and application by officials. This problem is exacerbated by the frequent lack of a reliable legal framework to enforce contracts. The rule of law needs to be established. In many instances this implies rehabilitation of the judicial system, independence for the judiciary, scrupulous respect for the law and human rights at every level of government, transparent accounting of public monies and independent public auditors responsible to a representative legislature, not to an executive. Independent institutions are necessary to ensure public accountability.¹¹⁹

The rule of law when properly observed is claimed to enable a virtuous circle of inclusive political governance.¹²⁰ “Despite its origins in neoclassical thought, rule of law discourse has expanded over time to include a variety of alternative theoretical viewpoints.”¹²¹ Nigeria’s judiciary has strenuously upheld the rule of law, and it is one of the stabilizing features of existing mechanisms of accountability in Nigeria that aids accountability in governance.

1.3. Separation of Powers

The 1999 Constitution of the Federal Republic of Nigeria divides governmental powers into legislative, executive, and judicial powers under Chapters V, VI, and VII. The powers of each branch of government are listed out in great detail. Separation of powers connotes a clear division of powers between the executive, the legislative, and judicial arms of government, with

¹¹⁸ Santos, Alvaro, ‘The World Bank’s Uses of the “Rule of Law” Promise in Economic Development, in Trubek, David M and Santos, Avaros (eds.), *The New Law and Economic Development: A Critical Appraisal*, (Cambridge: Cambridge University Press, 2006), pp. 253-300, at p.253, footnote 1.

¹¹⁹ The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, (Washington, D.C.: The World Bank, 1989), p.192.

¹²⁰ “What’s more, the principle of the rule of law opens the door for greater participation in the political process and greater inclusivity, as it powerfully introduces the idea that people should be equal not only before the law but also in the political system. This was one of the principles that made it difficult for the British political system to resist the forceful calls for greater democracy throughout the nineteenth century, opening the way to the gradual extension of the franchise to all adults.” Acemoglu, Daron and Robinson, James A; *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, (New York: Crown Publishers, 2012), p. 333.

¹²¹ Thomas, Chantal, “Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism”, *Cornell Law Review*, Vol. 96, No. 4, (May, 2011), p. 1002.

each arm independent of the other arms, but serving as checks and balances on one another.¹²²

The three branches do not exist in watertight compartments, and in the execution of their various functions they impact one another and influence policy outcomes that affect society.¹²³

Montesquieu was one of the earliest exponents of the formula, which he gleaned from a misreading of the English constitutional model. He was influenced by John Locke's 1690 "*Second Treatise on Government*," wherein Locke advocated monarchical dispensation of justice. Montesquieu, in his 1748 *The Spirit of the Laws*, stated that

Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go....To prevent this abuse, it is necessary from the nature of things that one power should be a check on another....When the legislative and executive powers are united in the same person or body...there can be no liberty....Again, there is no liberty if the judicial power is not separated from the legislative and the executive. There would be an end to everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.¹²⁴

1.4. International and Domestic Bills of Rights

Another layer of accountability has been the international concern with human rights to make countries conform with a minimum threshold of human rights protection in the policies they formulate to administer their territories. The 1948 Universal Declaration on Human Rights (UDHR) epitomizes such concern. The International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force on January 3, 1976, after the thirty-fifth country ratified the

¹²² Widner, Jennifer, 'Building Judicial Independence in Common Law Africa', in Schedler, Andreas; Diamond, Larry and Plattner, Marc F. (Eds.), *The Self-Restraining State: Power and Accountability in New Democracies*, (Boulder: Lynne Rienner Publishers, 1999), pp. 177-193.

¹²³ de Figueiredo, Jr. Rui J.P. ; Jacobi, Tonja and Wiengast, Barry R. 'The New Separation-of Powers Approach to American Politics', in Wiengast, Barry R. and Wittman, Donald A. (eds.), *The Oxford Handbook of Political Economy*, (Oxford: Oxford University Press, 2006), pp. 200-222.

¹²⁴ L'Esprit des Lois, Chapter XI reproduced in Aihue, D.O. and Oluyede, P.A., *Cases and Materials on Constitutional Law in Nigeria*, (Ibadan: University Press Limited, 1987), p.20 ;see also Drewry, Gavin, 'The Executive: Towards Accountable Government and Effective Governance?', in Jowell, Jeffrey and Oliver, Dawn, *The Changing Constitution*, (fifth Ed.) (Oxford: Oxford University Press, 2004), 280-303, at p.285

treaty.¹²⁵ The ICESCR and the UDHR in combination with the International Covenant on Civil and Political Rights (ICCPR) are termed the “International Bill of Rights.”¹²⁶

In Nigeria fundamental human rights were entrenched in the 1960, 1963, 1979, and 1999 Constitutions. Chapter IV provisions on fundamental human rights of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right to life.¹²⁷ It also guarantees the right to dignity of the human person and prohibits torture and inhuman or degrading treatment.¹²⁸ The right to personal liberty is guaranteed.¹²⁹ The right to fair hearing is also guaranteed by the Constitution.¹³⁰ Other civil and political rights are also guaranteed by the Constitution.¹³¹

1.5. Human Rights Commission

During the 1960s and up until the 1970s, the ombudsperson took root as an accountability mechanism all over Africa.¹³² “The 1990s saw the development of a new and potentially more significant institution, the Human Rights Commission (HRC).”¹³³ In Nigeria the brutal dictator, General Sanni Abacha, established the Nigerian Human Rights Commission to deflect international criticisms of the appalling human rights record of his junta. The enabling 1995 Act was amended in 2011, after a six-year delay to make the Commission more independent. But the previous two executive secretaries were removed from office in June 2006 and March 2009,

¹²⁵ Craven, Mathew C.R. *The International Covenant on Economic, Social, and Cultural Rights*, (Oxford: Clarendon Press, 1995), p.1.

¹²⁶ *Ibid.* p.7.

¹²⁷ Section 33

¹²⁸ Section 34

¹²⁹ Section 35

¹³⁰ Section 36

¹³¹ Sections 37-44

¹³² Hatchard, John, ‘Legal Techniques & Agencies of Accountability: Human Rights Commissions in Commonwealth Africa,’ in Ndulo, Muna (ed.) *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation*, (Oxford: James Currey, 2006), pp.108-125.

¹³³ *Ibid.* at p. 108.

respectively, before the end of their tenures, for being critical of government human rights violations.¹³⁴

Chidi Anselm Odinkalu, the current chairperson of the Nigerian Human Rights Commission, was invited by the Nigerian police to explain his comments made on March 5, 2012, that the police in Nigeria “execute well over 2,500 detainees summarily every year.”¹³⁵ Fact Sheet No. 19, issued in April 1993 at Geneva by the United Nations, analyzed national institutions for the promotion and protection of human rights, and it recognized that the Economic and Social Council of the United Nations first mooted the idea of such institutions in 1946. Fact Sheet No. 19 listed a number of functions of such national institutions, including the ombudsperson and human rights commission:

Another important function of a human rights commission is systematically to review the government’s human rights policy in order to detect shortcomings in human rights observance and to suggest ways of improving it. Human rights commissions may also monitor the State’s compliance with its own and with international human rights laws and if necessary, recommend changes. The ability of a commission to initiate enquiries on its own behalf is an important measure of its overall strength and probable effectiveness. This is particularly true in regard to situations which involve persons or groups who do not have the financial or social resources to lodge individual complaints.¹³⁶

¹³⁴ Amnesty International, ‘Nigerian president signs landmark human rights bill,’ March 29, 2011, <http://www.amnesty.org/en/news-and-updates/nigerian-president-signs-landmark-human-rights-bill-2011-03-29> (accessed on April 23, 2012)

¹³⁵ FOX NEWS, ‘Nigeria police want to interrogate rights leader,’ April 16, 2012, <http://www.foxnews.com/world/2012/04/16/nigeria-police-want-to-interrogate-rights-leader/> (accessed on April 23, 2012)

¹³⁶ Fact Sheet 9, <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf> (accessed on April 23, 2012).

The Committee on Economic, Social and Cultural Rights (CESCR) was created in May 1986.¹³⁷ The Committee has essentially played the norm-clarification role, explaining possible consequences of the CESR-proposed socioeconomic rights. Alston, a former chairman of the Committee has elaborated upon the norm clarification of the Committee.¹³⁸ The Committee's General Comment 10, issued on December 1, 1998, clarified the role of national human rights institutions in the realization of human rights, including socioeconomic rights. Such a role entails the promotion and protection of human rights through educating the judiciary, private sector, public sector, and labor movements on socioeconomic rights, as well as evaluating whether domestic legislation and administrative policies are in tandem with the provisions of the CESCR.¹³⁹ "Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions."¹⁴⁰ This is a vital point that has not been well addressed in the human rights literature, and national human rights institutions, including the Nigerian one, have focused on violations of civil and political rights, and neglected socioeconomic rights violations, except in housing eviction matters.

¹³⁷ Alston, Philip, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights,' *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 332-381.

¹³⁸ Alston, Philip, 'The Committee on Economic, Social and Cultural Rights', in Alston, Philip (ed.) *The United Nations and Human Rights: A Critical Appraisal*, (Oxford: Clarendon Press, 1992), pp., 473-508 at pp.490-496.

¹³⁹ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/148/41/PDF/G9814841.pdf?OpenElement> (accessed on April 23, 2012)

¹⁴⁰ *Ibid.* paragraph 3.

1.6. Transparency in Governance

Ngozi Okonjo-Iweala, Nigeria's current finance minister, who occupied the same position from 2003 to 2006, introduced transparency into government accounts by publishing monthly disbursements to local, state, and federal ministries in newspapers, so that relevant constituencies would know the revenue profile under the control of their elected legislators, local government chairmen, and state governors.¹⁴¹ In addition, she made sure Nigeria became the first country to sign on to the Extractive Industries Transparency Initiative (EITI).¹⁴² Transparency in governance also goes a long way in making institutions accountable to the governed. The Economic Commission of West African States, of which Nigeria is a member, incorporated the concept in its 2001 Protocol on Democracy and Good Government, which states that "Member States undertake to fight corruption and manage their national resources in a transparent manner, ensuring that they are equitably distributed."¹⁴³ The latest tool in the transparency field has been the use of the Internet, to make the myriad of governance policy decisions accessible to members of the public with access to the Internet. This has been more pronounced in the north, but it is also catching up in the south. Services have been offered via the World Wide Web, or the net, cutting the red tape of bureaucracies worldwide.¹⁴⁴ The Freedom of Information Act in various jurisdictions has also been employed, by civil society especially the press, to enhance transparency in public governance accountability.

¹⁴¹ Human Rights Watch, Chop Fine, <http://www.hrw.org/en/node/11042/section/9> (accessed on December 20, 2010), p.94.

¹⁴² Id.

¹⁴³ Article 38 (1), Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Executive Secretariat Dakar, December, 2001, <http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf> (accessed on January 20, 2013).

¹⁴⁴ Dutil, Patrice; Howard, Cosmo; Langford, John and Roy, Jeffrey, *The Service State: Rhetoric, Reality and Promise*, (Ottawa: University of Ottawa Press, 2010).

1.7. Freedom of the Press

Freedom of the press is a vital component of the accountability matrix. The 1999 Constitution of the Federal Republic of Nigeria guarantees the right to freedom of expression and the press under section 39 of Chapter IV provisions on justiciable fundamental human rights.¹⁴⁵ A free press amplifies the ability of civil society to make informed demands upon governance mechanisms in society.¹⁴⁶ A virile press also amplifies struggles of civil groups in society aimed at influencing input and outcome processes of government policies that have a bearing on poverty alleviation.¹⁴⁷ It took eight years of civil society advocacy for the Freedom of Information Act in Nigeria to become law on May 28, 2011.¹⁴⁸ This should enhance the role of

¹⁴⁵ Constitution of the Federal Republic of Nigeria, Federal Government Press, Mobil Road, Apapa, Lagos.

¹⁴⁶ “Nearly 70 countries have introduced Freedom of Information (FOI) laws, 55 in the last 10 years alone (Banisar 2006). Some laws aim to strengthen democracy, while for others FOI is primarily a device to combat corruption. The UK Freedom of Information Act 2000 (FOIA) was part of the new ‘constitutional settlement’ ushered in by New Labour, who promised that it would initiate an era of great transparency and accountability. ‘Open government is good government’, said the Lord Chancellor, Lord Irvine of Lairg, during a speech about the draft law (Irvine 1998). However, the political and administrative realities of FOI since the implementation have tested government’s support of the law and, if international experience is any guide, will lead to constraints against information access in the future. FOI laws take from governments the power to decide which information should be in the public domain and place it in the hands of the requester and the judicial system. The difference between the information people want and that government is willing to give has caused tension and led to restrictions to access laws in other countries. The governments of Canada, Australia and Ireland, for example, have constrained information access to varying extents by amending their laws and making cuts to their administration.” Glover, Mark and Holsen, Sarah, ‘Downward Slope? FOI and Access to Government information’, in Hazell, Robert, (ed.), ‘Constitutional Futures Revisited: Britain’s Constitution to 2020, (New York: Palgrave Macmillan, 2008), pp. 178-196, at p.178.

¹⁴⁷ “Media enhance the accountability of government and other powerful actors through uncovering and publicizing the chain of logic, decisions, and events that lead to specific outcomes, especially outcomes that run counter to the public interest. The identification of those responsible and the processes involved inherently increases accountability, and the anticipation of such identification can contribute to more responsible decision making and a positive outcome for the public interest.” Buckley, Steve; Duer, Kreszentia, Mendel, Toby, et.al Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation, (The World Bank Group: Washington, DC, 2008), p.13.

¹⁴⁸ <http://www.nassnig.org/nass/actssearch.php?search=freedom+of+information&Submit=Search> (accessed on October 29, 2012).

the Nigerian press, which has for almost a century played a critical role in ensuring transparency in colonial and postcolonial governance.

1.8. Fiscal Measures of Attaining Accountability in the Expenditure of Public Funds in Nigeria

The Public Procurement Act Number 14 of 2007 came into effect on June 4, 2007, and the Fiscal Responsibility Act Number 31 of 2007 came into effect on July 30, 2007. Both enactments address the root causes of the lack of accountability in the management of public revenues in Nigeria, by political officeholders in leadership positions. President Umaru Musa Yar'Adua, on June 4, 2007, signed the Public Procurement Bill into law, after it had been passed by both the Senate and the House of Representatives, respectively, on May 17, 2007 and on May 30, 2007.¹⁴⁹ In July 2007 President Yar'Adua signed the Fiscal Responsibility Act (FRA) into law, and the statute established the Fiscal Responsibility Commission (FRC).¹⁵⁰

1.8.1. The Fiscal Responsibility Act, 2007¹⁵¹

Section 1 of the Fiscal Responsibility Act (FRA) established the Fiscal Responsibility Commission, which is saddled under section 3 with certain functions. It shall, according to section 3:

- a. Monitor and enforce the provisions of this Act and by so doing, promote the economic objectives in section 16 of the Constitution;
- b. Disseminate such standard practices including international good practice that will result in greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal matters;

¹⁴⁹ http://www.nassnig.org/nass/acts.php?pageNum_bill=8&totalRows_bill=194 (accessed on January 6, 2012).

¹⁵⁰ <http://frc-nigeria.org/> (accessed on January 6, 2012).

¹⁵¹ Act. No. 31 of 2007.

- c. Undertake fiscal and financial studies, analysis and diagnosis and disseminate the result to the general public;
- d. Make rules for carrying out its functions under the Act; and
- e. Perform any other function consistent with the promotion of the objectives of this Act.

The Fiscal Responsibility Act states that the Commission shall be independent in the fulfillment of its functions.¹⁵² Section 5 of the enabling act provides for:

- a. A chairman, who shall be the Chief Executive and accounting officer of the Commission;
- b. One member representing: i. The organized private sector, ii. Civil Society engaged in causes relating to probity, transparency and good governance, iii Organized labor
- c. A representative of the Federal Ministry of Finance of a level not below the rank of a director; and
- d. One member to represent each of the following six geographical zones of the country, that is North-Central, North-East, North-West, South-East, South-West, and South-South.

This is in contrast to the eighteen-member American version announced by President Barack Obama on February 18, 2010, the National Commission on Fiscal Responsibility and Reform, designed to lapse thirty days after the submission of its report on December 1, 2010. Its composition stipulated that there shall be

- a. Six members appointed by the President, not more than four of whom shall be from the same political party.

¹⁵² Ibid. section 3(a).

- b. Three members selected by the Majority Leader of the Senate, all of whom shall be current Members of the Senate;
- c. Three members selected by the Minority Leader of the Senate, all of whom shall be current Members of the Senate; and
- d. Three Members selected by the Minority leader of the House of Representatives, all of whom shall be current Members of the House of Representatives.¹⁵³

Getting back to the permanent Nigerian Commission, no member of civil society known for championing good governance, transparency, and accountability in governance can be a board member. Members of the commission are supposed to be persons of proven integrity with ten years of experience postgraduation. The president is empowered to appoint the chairperson and board members subject to Senate's confirmation. Appointees from the six geographical areas of Nigeria and the chairman are full-time members of the board who will serve for only five years in a single term.

On April 14, 2009, the late President Yar'Adua inaugurated the board and declared that

Fiscal responsibility is essential to creating a better, stronger, more prosperous nation for the next generation....It is important to remind you that our nation's economic future and fiscal responsibility are directly linked. There is a tie between fiscal responsibility and financial prudence today and what society can enjoy tomorrow. Facing up to both the short and long-term fiscal challenges, therefore, will help put the nation on a path to lasting prosperity and a rising standard of living. If on the other hand, we fail to quickly address the preponderance of fiscal inefficiencies and wasteful spending in our systems, we will squander the only opportunity to get our finances in order, and I charge you not to afford to do that.¹⁵⁴

In 2009, the Fiscal Responsibility Commission (FRC), during the conduct of its oversight functions under section 30(1) of the Fiscal Responsibility Act (FRA) evaluated the

¹⁵³ Executive Order 13521—National Commission on Fiscal Responsibility and Reform, <http://www.whitehouse.gov/the-press-office/executive-order-national-commission-fiscal-responsibility-and-reform> (accessed on April 8, 2012).

¹⁵⁴ Speech by his Excellency, President Alh. Umaru Musa Yar'Adua at the inauguration of the Fiscal Responsibility Commission, April 14, 2009, http://frc-nigeria.org/speech_mr-president.aspx (accessed on April 8, 2012).

three-month periodic Budget Implementation Reports the minister of finance was mandated to submit to it. The FRC discovered that only 361.20 billion Nigerian naira (NGN), got utilized out of 796.92 billion naira budgeted for capital projects.¹⁵⁵ This amounted to 45.32 percent performance on the part of the federal government of Nigeria in the implementation of capital projects in vital socioeconomic areas like poverty alleviation, education, and health care.¹⁵⁶

In the next chapter, I demonstrate that this legislation has been ineffective in addressing the accountability deficit in public governance in Nigeria. Ngozi Okonjo-Iweala, Nigeria's finance minister, explained that the Fiscal Responsibility Act was copied from Brazil's fiscal federalism model, and in 2012 on her second tour of duty as finance minister, she regretted that: "Unfortunately, by the time the bill was passed and signed into law, near the end of 2007, state governments had watered down some of the provisions they found restrictive, using constitutional-related arguments."¹⁵⁷

1.8.2. The Public Procurement Act¹⁵⁸

A veritable means of stealing public revenues in Nigeria has been through the award of highly inflated contracts, shoddily executed contracts, and the use of substandard construction materials. The Public Procurement Act was heralded as an attempt to curb the use of public contracts to steal public revenue. Section 1 of the Public Procurement Act established a National Council on Public Procurement, whose membership consists of:

- a. the Minister of Finance as Chairman
- b. the Attorney-General and Minister of Justice of the Federation

¹⁵⁵ In May 2013, 160 Naira exchanged for \$1 United States Dollar

¹⁵⁶ http://frc-nigeria.org/comment_Q3.aspx (accessed on January 6, 2012).

¹⁵⁷ Okonjo-Iweala, Ngozi, *Reforming the Unreformable: Lessons from Nigeria*, (Cambridge, Massachusetts: MIT Press, 2012), p. 24.

¹⁵⁸ Act No. 14, 2007.

- c. the Secretary to the Government of the Federation
- d. the Head of Service of the Federation
- e. the Economic Adviser to the President
- f. six part-time members to represent the Nigeria Institute of Purchasing and Supply Management, the Nigerian Bar Association, Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture, Nigerian Society of Engineers, Civil Society, the Media and the Director-General of the Bureau who shall be the Secretary of the Council

Section 3 of the Act enacted the Bureau of Public Procurement, while section 4 of the Act lays out its objectives among others as “the harmonization of existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process, the establishment of pricing standards and benchmarks...” Section 5 of the Act enumerates its functions to create a database of federal contractors, and formulate policies and guidelines on public sector procurement. In addition, it serves to certify contracts and prevent fraud, as well as publicize its activities to the public.

The Bureau of Public Procurement claimed that it helped to save over two billion dollars during the 2007 to 2010 fiscal years and that it has filed eleven cases at the Federal High Court relating to fraudulent procurement transactions.¹⁵⁹ But contrary to the terms of the Public Procurement Act, the National Council on Public Procurement has not been constituted to replace the Federal Executive Council of ministers, which currently awards contracts on behalf

¹⁵⁹ Bureau of Public Procurement, ‘Some Achievements to mention,’ p. 1, full text available at: <http://www.bpp.gov.ng/dyncnt/fileviewer.php?udsec=docs&fid=Mjk4&ft=&tr=DD> (accessed on April 8, 2012).

of the federal government of Nigeria.¹⁶⁰ This demonstrates the lack of political will of the ruling political elite to surrender contracts awards to a transparent process and focus on the formulation progressive policies. Clearly, the award of contract procedures that directly implicate socioeconomic policies of government need to be more transparent and less opaque to achieve efficient use of resources.

1.9. New Partnership for Africa's Development

In July 2001, in the Zambian capital, Lusaka, the Organization for African Unity adopted the New African Initiative (NAI) document; in October 2001, it was transformed into the New Partnership for Africa's Development (NEPAD) at the inaugural meeting of its implementation committee in Abuja, Nigeria.¹⁶¹ The document identified colonialism, corruption, inept leadership, and Cold War politics as the root causes for unaccountable governments across Africa.¹⁶² It promoted African development as an empowering process in self-reliance: "Africans must not be wards of benevolent guardians; rather they must be the architects of their own sustained upliftment."¹⁶³ NEPAD prides itself in being an African-owned and -managed transformation agenda for the Continent.

The long-term objectives of NEPAD are the eradication of poverty, and sustainable development and growth to stop African marginalization in a globalizing world.¹⁶⁴ NEPAD's

¹⁶⁰ Jacob, O.A. 'Procurement law in Nigeria: Challenge for attainment of its objectives,' The University of Botswana Law Review, Vol. 2 (December, 2010), pp. 131-151, at pp. 146-150.

¹⁶¹ Heyns, Christof and Kilander, Magnus Compendium of Key Human Rights Instruments of the African Union, Fourth Edition, (Pretoria: Pretoria University Law Press, 2010), p. 460.

¹⁶² The New Partnership for Africa's Development (NEPAD), October 2001, p. 5, paragraph 22, http://www.nepad.org/system/files/framework_0.pdf

¹⁶³ Ibid. at p. 6, paragraph 27.

¹⁶⁴ Ibid. at p. 14, paragraph 67.

adopted the United Nations 2015 Millennium Development Goals.¹⁶⁵ In order to achieve the lofty objectives and goals of NEPAD, African leaders are enjoined among a litany of responsibilities, to promote and protect “democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and subnational levels.”¹⁶⁶ NEPAD has eight guiding principles of which the second aims to promote and protect human rights, democracy, and good governance.¹⁶⁷ NEPAD operated as a program of the African Union up until January 2010, to realize the objectives of Africa’s development as well as facilitate African and regional integration, but in February 2010, NEPAD was incorporated into the AU structure as the NEPAD Planning and Coordinating Agency.¹⁶⁸

In January 2011, NEPAD adopted the National Resource Governance Program “based on a socio-economic assumption that the livelihoods of the poor would be enhanced through good governance of Africa’s natural resources.”¹⁶⁹ Good governance is a core principle of NEPAD required for sustainable development.¹⁷⁰ The African Peer Review Mechanism (APRM) is geared toward attaining “good governance and accountability in Africa.”¹⁷¹ It is premised on voluntary submission of African countries to a review process by fellow countries based on certain parameters of good governance.

The African Peer Review Mechanism (APRM) is a prime and credible model for good governance. A voluntary and novel monitoring instrument and direct offshoot of the AU Declaration, currently 31 AU member states have acceded to the Mechanism and opened up their

¹⁶⁵ Ibid. at p. 14, paragraph 68.

¹⁶⁶ Ibid. at p. 10, paragraph 49; see also the section titled “Democracy and Political Governance Initiative, pp. 17-19, paragraphs 79-85

¹⁶⁷ New Partnership for Africa’s Development, NEPAD Agency 2011 Annual Report, p.13, <http://www.nepad.org/system/files/NEPAD%202011%20Annual%20Report%20-%20FINAL.pdf>

¹⁶⁸ Ibid. at pp. 12-14.

¹⁶⁹ Ibid. at p. 37.

¹⁷⁰ Ibid. at pp. 66-70.

¹⁷¹ Ibid. at p. 71.

governance systems for review. The APRM focuses on four facets of governance, namely: Democracy and Political Governance; Economic Governance and Management; Corporate Governance; and Socio-economic Development. The mechanism is both a peer pressure on leadership and a shared learning of best practices in government among countries in order to accelerate progress towards Democracy and Good Political Governance that touch on the rule of law and equality of all before the law; individual and collective freedoms and the inalienable rights of individuals to participate in the choice of those who govern them.¹⁷²

NEPAD has a very narrow base in Nigerian civil society, with only a section of the media and a tiny percentage of intellectuals conversant with its activities.¹⁷³ It enjoyed much publicity within the federal government of Nigeria, particularly under the presidency of Olusegun Obasanjo.¹⁷⁴

Civil society has a vital role to play in the APRM of NEPAD to entrench accountability in public governance in African countries, because a crucial weakness of the APRM mechanism is its voluntary nature.¹⁷⁵ The 2008 APRM country review of Nigeria observed widespread poverty in spite of abundant government revenues; with 54 percent of the population living on less than \$1 per day, and most Nigerians lacking access to potable water, electricity, and basic necessities of life.¹⁷⁶ “It is the contention of the APR Panel that the lack of effective policy and programme implementation in Nigeria can be explained principally by the lack of strong political

¹⁷² Id.

¹⁷³ United Nations Educational, Scientific and Cultural Organization (UNESCO) Africa Department, Civil Society in Africa : Definition and Role in the process of the African Union programme-NEPAD, Pilot Project of a consultative approach by UNESCO with regard to Nigeria, Ghana, Gambia and Cameroon, 2009 p. 37 <http://unesdoc.unesco.org/images/0018/001832/183279m.pdf> ; according to the Nigerian Country Self- Assessment Report (CSAR) “There is very low awareness of the New Partnership for Africa’s Development (NEPAD) and the APRM and its processes among Nigerians.” Jinadu, L. Adele, The African Peer Review Process in Nigeria, Open Society for West Africa (OSIWA) African Governance Monitoring and Advocacy Project (AfriMAP) p.33, <http://www.afriMAP.org/english/images/report/APRM%20Nigeria%20ENG%20web.pdf>

¹⁷⁴ He was in power from May 29, 1999 to May 29, 2007.

¹⁷⁵ “Meanwhile, the best hope of prodding African regimes into adopting acceptable governance practices appears to rest with civil society and peer review pioneers. This requires the active engagement of civil society in establishing ‘parallel processes to hold African governments and leaders accountable’.” Anglin, Douglas G. ‘The African Peer Review of Political Governance: Precedents, Problematics & Prospects’ in Ndulo, Muna (ed.) Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation, (Oxford: James Currey, 2006), pp.237-275, at p. 266.

¹⁷⁶ APRM Country Review Report No. 8 African Peer Review Mechanism Country Review Report Federal Republic of Nigeria, p. 272, <http://aprm.tanzania.org/docs/APRM%20Nigeria%20report.pdf> (accessed on January 5, 2013).

will, coupled with weak accountability mechanisms.”¹⁷⁷ Its report also established ineffective policies to tackle high infant and maternal mortality rates as well as chronic hunger, making the realization of the Millennium Development Goals of 2015 a tall order.¹⁷⁸ It is very instructive to note that the country report recommended: “The enhancement of judicial enforcement of social, economic and cultural rights, as well as the right to development and the right to an environment conducive to health and development be part of the envisaged new Constitution.”¹⁷⁹

Conclusion

The mechanisms of accountability like the rule of law, separation of powers, among others existing in Nigeria have been assimilated into Nigeria’s legal system. International measures, such as NEPAD and the international bill of rights have also been embraced. Legislative enactments such as the 2007 enactments of the Fiscal Responsibility Act and the Public Procurement Act also permeate the legal system, ostensibly to improve accountability in public governance in Nigeria.

On the whole, the various mechanisms of accountability discussed in this chapter suffuse the administrative mechanism of the Nigerian state, but in reality, there are gaps in the accountability process. In the next chapter, I analyze the accountability deficit of public governance in Nigeria, and I identify gaps in the public governance accountability process

¹⁷⁷ Ibid. at p. 274, paragraph 913; see also paragraphs 195, 212, 213, 245, 262-266, 269, 275, 292, 295, 299, 305, 372, 389, 417, 426, 434, 448, 583, 590, 623, 696, 698, 699, p.248.

¹⁷⁸ Ibid. at p.295, paragraph 1022.

¹⁷⁹ Ibid. at p. 101, paragraph 261, third bullet point. Governance “at all levels has fallen far short of expectations raised by Nigeria’s own constitutional ‘Fundamental Objectives and Directive Principles of State Policy’, and accession to related international conventions, codes and standards on economic, social and cultural rights.” Jinadu, L. Adele, The African Peer Review Process in Nigeria, Open Society for West Africa (OSIWA) African Governance Monitoring and Advocacy Project (AfriMAP) p.34, <http://www.afriMAP.org/english/images/report/APRM%20Nigeria%20ENG%20web.pdf>

leading to massive hemorrhaging of public resources that could have been utilized in implementing socioeconomic policies in the areas of education and health care.

CHAPTER TWO

NIGERIA'S ACCOUNTABILITY DEFICIT

2.0. Introduction

The Chapter II provisions on Fundamental Objectives and Directive Principles of the 1999 Constitution of the Federal Republic of Nigeria states that “sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.”¹⁸⁰ Chapter II further states that “the security and welfare of the people shall be the primary purpose of government.”¹⁸¹ It then states that “The State shall abolish all corrupt practices and abuse of power.”¹⁸² In this chapter, using concrete examples, I show that these objectives have not been realized, and I prove conclusively that the accountability deficit in public governance in Nigeria is monumental.

Section 2.1 maps out the role of the military in the creation of an unaccountable Nigerian State reflected in military coups and the plunging into an abyss of a devastating civil war that resulted in over a million deaths. Section 2.2 embarks on an analysis of Nigeria's health-care data, and section 2.3 analyzes data from the education sector in Nigeria; both sectors reveal a dire and desperate situation. Section 2.4 analyzes and conclusively proves the deleterious effects of corruption on socioeconomic rights in Nigeria. Section 2.5 contains case studies of the accountability profiles of some Nigerian state governors, and the comprehensive financial data analyzed conclusively shows that billions of dollars of oil revenues still get stolen yearly in Nigeria. Sections 2.6 and 2.7 examine two American cases, *SEC v. Halliburton* and *KBR and United States of America v. Siemens Aktiengesellschaft*; prosecuted by the Securities and

¹⁸⁰ Section 14(2)(a)

¹⁸¹ Section 14 (2)(b)

¹⁸² Section 15(5)

Exchange Commission in the United States, these cases pertain to the negative impact of multinationals bribing the political leadership in Nigeria in order to win multibillion dollars contracts. I prove conclusively with content data analysis of the health and education sectors in Nigeria that socioeconomic policies of the Nigerian government are not accountable.

This dissertation argues that greater accountability in political governance will ameliorate the grim figures churned out in the past decade about the precarious nature of daily life for most Nigerians. British colonial authorities acceded to autochthonous wishes in 1954 to introduce a federal structure in Nigeria, which reached its glorious period from independence on October 1, 1960, to January 15, 1966, when the military aborted true federalism by commencing the series of bloody coups that plunged Nigeria into war from 1967 to 1970.¹⁸³ Lawmaking is not a neutral exercise; it is embedded within the cauldron of competing socioeconomic forces and the forces that attain political power formulate laws to concretize their ideological beliefs.

2.1. The Role of the Military in the Creation of an Unaccountable Nigerian State

Nigeria became independent on October 1, 1960, with a parliamentary form of government akin to the British model, but with a federal structure unlike the British unitary format. Nigeria was comprised of three regions and a national parliament based in Lagos. This period was the golden

¹⁸³ Adamolekun, Ladipo 'The Nigerian Federalism at the Crossroads: The Way Forward,' *Publius: The Journal of Federalism*, Vol. 35, No. 3 (2005), pp. 383-405. For a sympathetic view of the military which I completely disagree with see: Suberu, Rotimi 'The Nigerian Federal System: Performance, problems and prospects,' *Journal of Contemporary African Studies*, Vol. 28, Issue 4, (October 2010), pp. 459-477, also reproduced in in Adebani, Wale and Obadare, Ebenezer, (eds.), *Nigeria at Fifty: The Nation in Narration*, (London: Routledge Taylor & Francis Group, 2011), pp. 81-99. "Finally, while Nigeria has always been ripe for progressive social change, it is not clear if the anti-military and pro-democracy forces, wearied by the long and bloody struggle against repressive military rule from 1984 to 1999, are still intact. This is because of the increasing depoliticisation of the country's rich array of CSOs and NGOs and their strategic subordination to rampant neo-liberalism. Since 1999, Nigeria- like post-1994 South Africa-has become very safe for super-exploitation by capitalist globalization, transnational capital and the ruling elite. Popular resistance appears increasingly trumped by the protectionism of the state and capital." Amuwo, Adekunle, 'Between elite protectionism and popular resistance: The Political economy of Nigeria's fractured state since juridical independence,' in Adebani, Wale and Obadare, Ebenezer, (eds.), *Nigeria at Fifty: The Nation in Narration*, (London: Routledge Taylor & Francis Group, 2011), pp. 45-64, at p. 59.

era of Nigerian history, when healthy rivalry to develop social infrastructure existed between the governments of the different regions. The Ahmadu Bello University, Zaria was established in the north and the University of Nigeria, Nsukka was set in the east, while the west established the University of Ife.¹⁸⁴ They were all focused on attracting the best scholars from all over the world and sending their best products to world-class universities for doctorate degrees in keeping “an international academic gold standard.”¹⁸⁵ Five years into military rule and the civil war had a negative effect on the development of social infrastructure, including university education.¹⁸⁶ The legacy of military dictatorship for twenty-eight years out of fifty years of independence accentuated the creation of an unaccountable Nigerian state.¹⁸⁷

Socioeconomic goods featured prominently in the few years after Nigerian independence—the political parties and their leaders were in a hurry to build schools,¹⁸⁸ roads, and hospitals, and to industrialize the economy; all the things that Britain, the former colonial power, refused to do.¹⁸⁹ By the time Britain left Nigeria, only the University of Ibadan existed as

¹⁸⁴ Renamed after the founding Premier of Western Region, Obafemi Awolowo, upon his death in 1987.

¹⁸⁵ A.I Asiwaju, *Ashby Revisited: A Review of Nigeria's Educational Growth, 1961-1971*, *African Studies Review*, Vol.15, No. 1(Apr. ,1972)p.1 at p.13

¹⁸⁶ Id. p.15 “There is widespread lamentation on inefficiency and falling standards”

¹⁸⁷ Jega, Attahiru M. ‘The Impact of Military Rule on Governance in Nigeria’, in Jega, Attahiru M; Wakili, Haruna and Ahmad, Mustapha, (eds.), *Democracy and Democratisation in Nigeria: 1999-2001*, (Kano: The Centre for Democratic Research and Training, Mambayya House, 2002), pp.28-45; ¹⁸⁷ Adejumobi, Said, ‘Introduction: State, Economy, and Society in a Neo-Liberal Regime,’ in Adejumobi, Said (ed.) *State, Economy, and Society in Post-Military Nigeria*, (New York: Palgrave Macmillan, 2011), pp. 1-19; Adebawale, Wale and Obadare, Ebenezer, ‘Introducing Nigeria at fifty: the nation in narration,’ in Adebawale, Wale and Obadare, Ebenezer, (eds.), *Nigeria at Fifty: The Nation in Narration*, (London: Routledge Taylor & Francis Group, 2011), pp. 1-27.

¹⁸⁸ Krieger, Milton, ‘African Policy Linking Education and Development: Standard Criticisms and a New Departure’, *International Review of Education*, Vol.34, No.3, (1988), pp.293-311, at p.296; Krieger, Milton, ‘Education and Development in Western Nigeria: The Legacy of S.O. Awokoya, 1952-1985’, *The International Journal of African Historical Studies*, Vol.20, No.4 (1987), pp. 647-667.

¹⁸⁹ “All the same it remains true that many ex-colonial states have failed to deliver on the agenda of human rights, including social and economic rights. This shows the failure of decolonisation, as signifying a complex configuration of global politics of domination and the ethical incoherence of the postcolonial ruling classes and power elites. By the term ‘failed decolonisation’ I refer to this complex of causative factors. Indubitably, the normative impoverishment of global human rights discourse also plays a decisive role.” Baxi, Upendra, ‘Failed Decolonisation and the Future of Social Rights: Some Preliminary Reflections’, in Barak-Erez, Daphne and Gross, Aeyal, M. (eds.), (Hart Publishing: Oxford and Portland, Oregon, 2007), pp. 41-55, at p.49

a college of the University of London. This was at best an attempt to check American influence in its colonies.¹⁹⁰ Obafemi Awolowo, in the thoughts he expressed on the Nigerian constitution,¹⁹¹ placed a great premium on education and health care, which he implemented during his tenure as the first indigenous premier of Western Nigeria, with funds from taxes and cocoa exports. He stated that “the rights to education and health are among the fundamental rights which each family regarded—and properly so—as inalienable.”¹⁹²

Awolowo was the foremost Nigerian exponent of the right to free education at all levels in Nigeria.¹⁹³ In his words, as the Nigerian finance minister: “The issue of free education is about the most controversial subject in Nigeria today. Perhaps the main cause of this controversy is that I happen to be the chief advocate of education at all levels.”¹⁹⁴ He was also unrepentant about both the provision of clean pipe-borne water and a national minimum wage to create a well-nourished citizenry in order to prevent ill-health.¹⁹⁵ Awolowo believed that the provision of health care and education were among the key requirements an underdeveloped country needed to secure economic freedom to become prosperous.¹⁹⁶ “Health facilities do not consist in the provisions of hospitals alone. They embrace the whole compass of preventive medical facilities, good food, good water, decent housing and a clean and wholesome environment.”¹⁹⁷

The Nigerian state was held hostage by the military that ruled from 1966 to 1999, with an interlude of civilian rule from 1979 to 1983. Nigeria has failed to recover from the first coup

¹⁹⁰Nwauwa, Apollon O. ‘The British Establishment of Universities in Tropical Africa, 1920-1948: A Reaction against the Spread of ‘Radical’ American Influence’, *Cahiers d’Études Africaines*, Vol.33, Cahier 130 (1993), pp.247-274.

¹⁹¹ Awolowo, Obafemi, *Thoughts on the Nigerian Constitution*, (Ibadan: Oxford University Press, 1966), at pp. 106-152.

¹⁹² Awolowo, Obafemi, *The People’s Republic*, (Ibadan: Oxford University Press, 1968), at p.316.

¹⁹³ Awolowo, Obafemi, *The Strategy and Tactics of the People’s Republic of Nigeria*, (London: Macmillan and Co. Ltd, 1970) 47-57.

¹⁹⁴ *Ibid.* at p.47.

¹⁹⁵ *Ibid.* at p.58-62.

¹⁹⁶ Awolowo, Obafemi, *The Path to Economic Freedom in Developing Countries*, a lecture delivered at the University of Lagos, Lagos, Nigeria on 15 March, 1968, at p.9.

¹⁹⁷ Awolowo, Obafemi, *The Problems of Africa: The Need for Ideological Reappraisal*, (London: Macmillan, 1977), at p.68.

d'état of January 15, 1966.¹⁹⁸ The coup d'état eventually resulted in the northern-led July 1966, counter coup, which resulted in a civil war from 1967 to 1970.¹⁹⁹ The regime of Lieutenant Colonel Yakubu Gowon started with earnings of about £170 million in 1966/67 fiscal year, and by 1974/75, earnings rose to N5514.7 million,²⁰⁰ which was the equivalent of over \$10 billion.²⁰¹ The stupendous increase in revenue did not lead to improvement in the quality of life of the average Nigerian, and the social infrastructure crumbled.²⁰²

The Gowon regime institutionalized corruption among military officers in government positions, so much so that ten out of twelve state governors were discovered to have amassed millions of dollars from public coffers,²⁰³ as discovered by the regime of General Muritala Mohammed, who paid with his life on February 13, 1976 for having the audacity to carry out such a probe.²⁰⁴ Between 1976 and 1986, at least \$10-billion oil revenues were salted abroad by the Nigerian leadership.²⁰⁵ I will analyze in the following two sections the public health

¹⁹⁸ Achebe, Chinua, *There was a Country: A Personal History of Biafra*, New York, Penguin Press, 2012, p. 65.

¹⁹⁹ "The Ibos from the southeast of the country felt they had borne the brunt of ethnic tensions that exploded in the north of the country after the 1966 coup, in which northern leaders were killed in a military coup largely led by Ibo officers. Thousands of Ibos fled to the eastern part of the country, where they seceded as Biafra. The war lasted from 1967 to 1970, when hostilities ceased and the focus turned to reintegration, reconciliation and reconstruction." Okonjo-Iweala, Ngozi, *Reforming the Unreformable: Lessons from Nigeria*, (Cambridge, Massachusetts: MIT Press, 2012), p. 2.

²⁰⁰ B. Dudley, *An Introduction to Nigerian Government and Politics*, London, Macmillan, 1982, pp. 80-81

²⁰¹ This was the period N1 exchanged for \$2

²⁰² Op.cit. B. Dudley, p. 81

²⁰³ Id. "...but that rise was not reflected in the quality of life of the average Nigerian. In contrast, however, the military governors and those closely associated with the regime were not only believed to have amassed huge fortunes, they in fact flaunted their wealth in a manner which most people found extremely distasteful...in 1973/74, the administration contracted for the supply of 20 million tons of imported cement (demands by the Ministry of Defence alone accounted for 16 million tons) which was ten times the known handling capacity of the Nigerian ports. (The total demand by all African states was estimated at 30 million tons). By late 1974 there were over 450 ships laden with cement waiting to berth, and the government was having to pay over 500,000 dollars a day in demurrage charges and this at a time when the country was short of much-needed food items, a shortage which contributed to a steadily worsening domestic inflationary situation (estimated to be rising at over 34 per cent per annum).

²⁰⁴ Id.

²⁰⁵ G. Hancock, *Lords of Poverty*, Nairobi, Camerapix Publishers International, 2001, p. 182

care and public education sectors in Nigeria listed under Chapter II provisions on Fundamental Objectives and Directive Principles of State Policy of the 1999 Constitution of the Federal Republic of Nigeria.

2.2. Nigerian Health-Care Data Analysis

The social objectives contained under Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria stipulates “adequate medical and health facilities for all persons.”²⁰⁶ In 1988, a national health policy was decreed by the military aimed at achieving health care for all Nigerians, and this policy was revised in 2004 to provide through a functional referral system, primary, secondary, and tertiary health-care access for all Nigerians.²⁰⁷ In 2000, the World Health Organization ranked Nigeria 187 out of 191 other countries in its World Health Report.²⁰⁸ “Through a series of national development plans and annual budgets, modest progress was made, in the past. Over the past decade however, there have been major reversals on the gains of the health sector. Childhood immunization plummeted and life expectancy reportedly dropped to mid-40-years. Unfortunately, the strides in the sector have been much too slow. The country is largely challenged in achieving the Millennium Development Goals by 2015.”²⁰⁹

The foregoing statement by the Nigerian Federal Ministry of Health was a candid admission of the dire straits of the health status of most Nigerians. In 2010, 75 babies died out of 1,000 live births, and 157 infants out of 1,000 children died before the age of five in Nigeria.²¹⁰ The maternal mortality ratio was 545 per 100,000 women, and only 37 percent of women who

²⁰⁶ Section 17(3)(d), Constitution of the Federal Republic of Nigeria, Federal Government Press, Mobil Road, Apapa, Lagos.

²⁰⁷ National Population Commission, Nigeria: Demographic and Health Survey, 2008, p. 4, <http://www.population.gov.ng/images/Nigeria%20DHS%202008%20Final%20Report.pdf>

²⁰⁸ Federal Ministry of Health Nigeria, National Health Promotion Policy, February, 2006, <http://www.afro.who.int/en/nigeria/nigeria-publications.html>

²⁰⁹ Federal Ministry of Health, National Strategic Health Development Plan (NSHDP) 2010-2015, p. 5, <http://www.fmh.gov.ng/images/PolicyDoc/NSHDP.pdf> (accessed on January 5, 2013).

²¹⁰ Ibid. at p. 11.

gave birth in Nigeria had access to trained medical assistance.²¹¹ Nigeria's health plan, formulated in the 2001 Abuja declaration, was to achieve a budgetary increase of 15 percent to the health sector, but by November 2010, budgetary allocation was "far below the 15% Abuja declaration which was signed by the Nigerian government."²¹² Even the available budgetary allocation to the health sector at the "Local and state governments also demonstrate a critical lack of accountability."²¹³

The health-care financial burden of the average Nigerian in 2005 was 68.6 percent and in Northern Nigeria it was as high as 86 percent.²¹⁴ The health-care infrastructure in Nigeria is in a precarious position; medical personnel perform a yeoman's job on a daily basis trying to salvage the situation and offer succor to teeming patients. There are inadequate pharmacists, nurses, doctors, biochemists, nutritionists, and health technicians among the vast array of basic and necessary skills needed in a functional health-care program. Doctors in 2010, were 39,210 in number; nurses were 124,629; and midwives numbered 88, 796.²¹⁵ Primary health care, on which most Nigerians, depend is bedeviled with inadequate medications, irregular payment of workers' salaries, inadequate data and record keeping, and lack of capacity on the part of health-care providers, as medical personnel are concentrated in urban areas.²¹⁶ This reality is compounded by endemic poverty in Nigeria.²¹⁷

Potable water supply to facilitate safe drinking water and sanitation to prevent outbreak of diseases is scarce. Yet Nigeria is blessed with abundant raw water that can be treated and

²¹¹ Id.

²¹² Ibid. at p. 36.

²¹³ Id.

²¹⁴ Ibid. at p. 35.

²¹⁵ Ibid. at p. 38.

²¹⁶ Ibid. at p. 39.

²¹⁷ King, Gary and Murray Christopher J.L. 'Rethinking Human Security' *Political Science Quarterly* 2001-2002 116 (4) 585-610, 603.

piped as potable water all year round. States and local government complain of highly irregular electricity to power inadequate and aging water treatment plants. The Integrated Early Childhood Development (IECD) policy on preventive health-care education for infants is laudable. It promotes a health culture of illness prevention among infants from zero- to three-year-old infants. “This implies the involvement of several service delivery sectors, such as health, water and environmental sanitation and nutrition agencies. At the care centres catering for children in the 0-3 years age group, caregivers are expected to receive as much training as possible from these agencies.”²¹⁸ The policy is still in its infancy, and its impact is yet to be felt. “However, the child friendly school concept, which UNICEF is advocating for, is not comprehensively adopted by the various States in Nigeria. A majority of primary schools, especially in rural areas lack water, electricity and toilet facilities. For example, on average, there is only one toilet for 600 pupils in the primary school system.”²¹⁹ In 2010, 84 percent of Nigerians earned less than \$2 per day; life expectancy was fifty-one years.²²⁰

The 2012 figures from the office of the Ministry of Health indicate that 1 million out of 5.3 million children born yearly in Nigeria die before they attain five years of age. Every day, 528 newborn babies die in Nigeria, and annually 53,000 women die from childbirth or pregnancy complications in Nigeria, at the rate of 800 women per 100,000 who give birth. A data analysis of the maternal mortality rate in Nigeria indicates that the rate in the southwest is 165 per 100,000, while in the northeast it is a mind-boggling 1,549 per 100,000. It is 1,026 in the northwest and 268 in the southeast. The mortality rate of children under five years per 1,000 in

²¹⁸ UNESCO, Nigeria: Early Childhood Care and Education (ECCE) programmes, (Geneva: UNESCO, 2006), p.7, <http://unesdoc.unesco.org/images/0014/001472/147201e.pdf>

²¹⁹ UNICEF, Nigeria: The Children, 2005, http://www.unicef.org/nigeria/children_1937.html

²²⁰ UNESCO, UIS Statistics in Brief: Education (at all levels) profile- Nigeria, 2010, p. 1. http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=289&IF_Language=eng&BR_Country=5660&BR_Region=40540

the northwest is 269, in the northeast 260, the southwest 176, and the southeast 103. The Health Ministry recommended affordable health-care access improvement and supply of skilled medical personnel, particularly in the rural areas, and provision of potable water and sanitation at the states and local government levels.²²¹ The above figures indicate that Nigeria still has one of the worst maternal, newborn, and infant mortality rates in the world.

There are now belated efforts to meet the fourth and fifth of the United Nations Millennium Developments Goals of 2015, by facilitating child mortality reduction and maternal health improvement under a Nigerian National Integrated Maternal Newborn and Child Health Strategy.²²² On November 5, 2002, Nigeria flagged off the National Food and Nutrition Policy to reduce iodine deficiency syndrome by half in 2010, and this was achieved.²²³ This shows that change is possible in Nigeria, as evidenced by 97 percent of Nigerians who now consume iodized salt.²²⁴ Iodine deficiency causes infant mortality, still birth, learning difficulties, cretinism, and miscarriage.²²⁵

“While progress towards achievement of health-related MDGS is still constrained by the limited national health system capacity, the recent efforts of the government at removing these bottlenecks need to be appreciated. The Federal Government has played a key role in facilitating developments at state level, particularly through the policy dialogue that has taken place at the

²²¹ Mother, Newborn and Child Health and Mortality in Nigeria-General Facts, http://www.unicef.org/nigeria/ng_publications_advocacybrochure.pdf

²²² Integrated Maternal Newborn and Child Health (IMNCH) Strategy, http://www.unicef.org/nigeria/ng_publications_IMNCHbrochure.pdf

²²³ UNICEF, Universal Salt Iodization in Nigeria: Process, Successes and Lessons, http://www.unicef.org/nigeria/ng_publications_USI_in_Nigeria_Report.pdf

²²⁴ UNICEF, Sustainable Elimination of Iodine Deficiency, (New York: UNICEF, May, 2008), p.10, http://www.unicef.org/nigeria/ng_publications_Sustainable_Elimination_of_Iodine_Deficiency.pdf

²²⁵ Ibid. at p. 1.

National Council of Health and through ministerial advocacy visits to the states.”²²⁶ In 2011, 7.51 percent of the government expenditure went into health care.²²⁷ Adequate nutrition promotes good health, and on the average urban dwellers spend 70 percent of home expenses on food, while rural dwellers spend 75 percent.²²⁸ Poverty contributes to the problem, as the ability to afford adequate nutrition promotes good health. A constitutionally enforceable right to health care will subject government’s health policies to judicial scrutiny and will prod government policy-makers to formulate sound and effective health policies that will likely survive litigation challenges, or even be favorably accepted by the public.

2.3. Nigeria’s Education Sector Analysis

The educational objectives contained under Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria stipulates that “Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.”²²⁹ In furtherance of this policy on education, the Nigerian government enacted the Compulsory Free Universal Basic Education Act in May 2004, and it came into force on May 26, 2004. Section 2 of the Compulsory Free Universal Basic Education Act states that: “Every Government in Nigeria shall

²²⁶ WHO Country Office Nigeria: Annual Report 2007, p. 3, <http://www.afro.who.int/en/nigeria/nigeria-publications.html>

²²⁷ World Health Organization, Nigeria statistics summary (2002-present), <http://apps.who.int/gho/data/view.country.15000> (accessed on April 23, 2013).

²²⁸ United Nations Development Program, Africa Human Development Report 2012, p. 91 <http://www.undp.org/content/dam/undp/library/corporate/HDR/Africa%20HDR/UNDP-Africa%20HDR-2012-EN.pdf>

²²⁹ Section 18(1), Constitution of the Federal Republic of Nigeria, Federal Government Press, Mobil Road, Apapa, Lagos; the Constitution also states in: Section 18 (2) Government shall promote science and technology

18(3) Government shall strive to eradicate illiteracy; and to this end Government shall as when practicable provide-

- (a) free, compulsory and universal primary education;
- (b) free secondary education;
- (c) free university education; and
- (d) free adult literacy programme.

provide free, compulsory and universal education for every child of primary and junior secondary school age. Every parent shall ensure that his child or ward attends and completes his primary school education; and junior secondary education.” Section 3 of the Act provides that “services provided in public primary and junior secondary schools shall be free of charge,” and “a person who receives or obtains any fee contrary to the provisions subsection(1) of this section commits an offence and is liable on conviction to a fine not exceeding N10,000 or imprisonment for a term of three months or to both.” Section 4 of the Act provides that: “every parent shall ensure that his child receives full-time education suitable to his age, ability and aptitude by regular attendance at school.”

Education is on the concurrent list of the 1999 Constitution of the Federal Republic of Nigeria, which includes 36 states and 774 local governments. This implies that both the federal and state governments can provide for primary, secondary, and tertiary education. There has been lack of coordination between the states and federal government in policy formulation and implementation in the operation of the educational objectives of the Constitution.²³⁰ In 2004, education had a share of 10.5 percent of the federal budget.²³¹ In 2009, Nigeria’s education sector percentage of the federal budget was 7 percent and it decreased to 6.5 percent in 2010.²³²

²³⁰ “In practice however, both federal and state governments have worked against the spirit of the 1999 constitutional provisions...With every level of government, backed by its own laws and policies, often promulgated with little or no regards to other levels doing essentially the same thing, if (sic) means certain roles and functions such as school monitoring and inspection are over done while other, such as staff development and training as well as curriculum development are neglected. In summary, federation in Nigeria has enabled roles and functions for the delivery of education to be excessively fragmented, reducing the level of interest and responsibility in some essential functions and paying little attention to others.” Education Sector Analysis Unit, A Framework for Re-engineering the Education Sector, Federal Ministry of Education, Abuja, Nigeria, May, 2005, at p.31, <http://planipolis.iiep.unesco.org/upload/Nigeria/Nigeria%20Education%20Sector%20Diagnosis.pdf> (accessed on January 5, 2013).

²³¹ Ibid. at p. 223.

²³² Shu’ara, Jamila, Higher Education Statistics-Nigeria Experience in Data Collection, Paper presented at the UNESCO Institute of Statistics Workshop on Education Statistics in Anglophone Countries, Windhoek, 17th -21st October 2010, p.20,

Nigerian universities require about 50,000 lecturers but only 30,342 are available.²³³ This problem is compounded by brain drain, which negatively impacts the quality of pedagogy.²³⁴ According to the startling confession of the director of Tertiary Education at the Nigerian Federal Ministry of Education, the quality of data on higher education in Nigeria is unreliable, politicized, and in dire need of transparency.²³⁵ Revenue allocation permutations by local and states governments has colored data presentation in Nigeria. “One of the critical issues affecting the quality of data relates to the political use to which data has been put over the years...Most state and local governments have multiple versions of data and decide which to present—depending on perception of its use.”²³⁶

Infant education from ages zero to three years old, the foundation of all learning, is not provided for under the Nigerian 2004 Universal Basic Education Act. A UNESCO publication on Nigeria, titled “Early Childhood Care and Education” (ECCE) has rightly stated that this is a grave omission.²³⁷ Even the 2003 Nigerian Child Rights Act is silent on the above category of infant education. The Integrated Early Childhood Development (IECD) policy to remedy this

<http://www.uis.unesco.org/StatisticalCapacityBuilding/Workshop%20Documents/Education%20workshop%20dox/2010%20Windhoek%20Regional%20Workshop%20on%20Education%20Statistics%20for%20South%20and%20Eastern%20Africa/NIGERIA-Higher%20education%20statistics-%20National%20experience.pdf> (accessed on December 10, 2012).

²³³ Ibid. at p. 16.

²³⁴ Ibid. at p. 18.

²³⁵ Ibid. at p. 26-35.

²³⁶ Abani, Charles, Progress towards achieving EFA in Nigeria, 2003 pp. 4-5, <http://unesdoc.unesco.org/images/0014/001467/146732e.pdf>

²³⁷“However, only now is it being realized that early childhood care should not have excluded care of children in the 0-3 year age cohort, a critical period for optimal care and early stimulation upon which attainment of the child’s fullest development potential depends. Skill to deliver such care and stimulation require to be imbibed by caregivers in widely differing socio-cultural environments, well beyond classroom settings and perceived curricula.” UNESCO, Nigeria: Early Childhood Care and Education (ECCE) programmes, (Geneva: UNESCO, 2006), p.5, <http://unesdoc.unesco.org/images/0014/001472/147201e.pdf>

omission is still evolving.²³⁸ Nigeria's population growth has remained high, resulting in 45 percent of the country's population being under the age of fifteen. Children are mandated by the 2004 Universal Basic Education Act to be enrolled in primary school from ages six to eleven, but in 2005, 40 percent of them were not in school. Enrollments in primary schools have ironically increased over the years, but recruitment of teachers and provision of additional classrooms has not kept pace. This has led to overstretched facilities and overworked teachers. In some cases a teacher might teach a hundred children under trees due to inadequate classrooms.

A number of parents cannot afford the cost of textbooks and uniforms for their children as well as transportation to very distant schools. "Despite political commitment to trying to reverse years of neglect in the education sector and a significant increase of the Federal funding, investment in basic education is still low compared to other Sub-Saharan countries. For all these reasons, prospects of Nigeria achieving Education For All by 2015 remain frail."²³⁹ In 2005, only 56.7 percent of all Nigerians were literate.²⁴⁰ According to UNESCO, as of 2010, 42 percent of children in Nigeria between the ages of six to eleven were not enrolled in primary schools. Fifty-five percent of girls and 60 percent of boys from ages six to eleven were enrolled in primary schools. In addition, 61 percent of adults and 72 percent of the youth were literate.²⁴¹

In 2007, about 20 percent of girls in northwestern and northeastern Nigeria attended primary school, which meant about 5 million girls between the ages of six and eleven were not in

²³⁸ Ibid. at p. 6.

²³⁹ UNICEF, Nigeria: The Children, 2005, http://www.unicef.org/nigeria/children_1937.html

²⁴⁰ National Commission for Mass Literacy, Adult and Non-Formal Education (NMEC), The Development and State-of-the-Art of Adult Learning and Education (ALE): National Report of Nigeria, 2008, at p. 12, http://www.unesco.org/fileadmin/MULTIMEDIA/INSTITUTES/UIE/confintea/pdf/National_Reports/Africa/Africa/Nigeria.pdf

²⁴¹ UNESCO, UIS Statistics in Brief: Education (at all levels) profile- Nigeria, 2010, p. 1. http://stats.uis.unesco.org/unesco/TableViewer/document.aspx?ReportId=289&IF_Language=eng&BR_Country=5660&BR_Region=40540

school.²⁴² UNESCO Education for All (EFA) profile on Nigeria in 2012 revealed that an astonishing 10.1 million children were not attending primary school and 26 percent of enrolled primary school pupils drop out. More alarming is the fact that almost 30 percent of the youth cannot read and write properly. Forty million Nigerian adults can neither read nor write.

The 2012 EPA profile on Nigeria revealed that population growth and increase in enrollment figures at all levels of education impacted negatively “in ensuring quality education and satisfactory learning achievements as resources are spread more thinly.”²⁴³ This is also compounded by relatively low budgetary allocation to the education sector in spite of billions of dollars of oil and tax revenues generated annually by the Nigerian state. In 2008 only 2.9 percent of public spending was incurred on education.²⁴⁴ From 2004 to 2013, the UBE scheme envisaged the addition of 40,000 teachers annually for the first nine years of basic education, “to cope with the massive increase in enrolment as well as quality delivery of instruction and quality learning.”²⁴⁵ The education sector in Nigeria will be greatly assisted if education is vested with

²⁴² UNICEF, Information Sheet: Girls’ Education, (Nigeria Country Office, September, 2007), http://www.unicef.org/nigeria/Girl_Education_Infosheet_05-07-06.pdf

²⁴³ UNESCO, Education for All (EFA)- Global Status, Nigeria EFA Profile, (UNESCO: Dakar Office Regional Bureau for Education in Africa, 2012, http://www.unesco.org/pv_obj_cache/pv_obj_id_C2517ECF31212F70420F41884B056007A1180300/file_name/NigeriaEFAprofileoct2012.pdf

²⁴⁴ “The adoption of revenue sharing in Nigeria has not necessarily lead (sic) to improved or more accountable investment at the local level, much less to a targeted government effort to invest on education and other social services. In fact, the government of Nigeria has only committed 2.9% of its public spending to education. Instead, private actors (oil companies) have stepped in for the provision of social services and investments on education and health. Predictably, the private provision of such services has mostly benefitted oil producing communities, with varying quality and adequacy of these projects and not well adapted to local social standards (Sustainable Development Innovation Briefs 2008). In the context of a weak, resource dependent state, it is not surprising that corruption, rent seeking and vested interests have emerged as obstacles to the transparent management and usage of oil revenues.” Acosta, Andrés Mejía Using Natural Resources for Education, : Background Paper prepared for the Education for All Global Monitoring Report 2012, p.18, <http://unesdoc.unesco.org/images/0021/002180/218004e.pdf>

²⁴⁵ World Data on Education-Nigeria, 7th edition ,2010/11, September 2010, p. 20, http://www.ibe.unesco.org/fileadmin/user_upload/Publications/WDE/2010/pdf-versions/Nigeria.pdf

constitutional enforcement as a fundamental right. This will allow litigants to subject Nigeria's public education policies to judicial scrutiny within Nigeria and lead to the formulation of efficient but accountable policies on education in Nigeria.

2.4. The Impact of Corruption on Socioeconomic Rights in Nigeria

Nigeria earned at least \$300 billion from oil revenues between 1982 and 2007, and poverty is still the lot of most Nigerians.²⁴⁶ Corruption has significantly hindered Nigeria's socioeconomic growth and its citizens' prosperity.²⁴⁷ Nigeria ranked 154 out of 179 countries evaluated in the 2008 Human Development Index (HDI) of the United Nations Development Programme; which was released on December 18, 2008.²⁴⁸ Nigeria ranked 156 out of 187 countries in the 2011 HDI.²⁴⁹ Why do the majority of Nigerians continue to wallow in abject poverty, with the gains of the early years of independence reversed? The answer could be because of the conservative estimate of \$380 billion claimed to have been lost to corruption and waste between 1960 and 1999, according to Nuhu Ribadu, the former head of the Economic and Financial Crimes Commission (EFCC).²⁵⁰ Corruption has had a corrosive effect on accountable governance in Nigeria.²⁵¹ The military ruled Nigeria from 1966 to 1979 and from 1983 to 1999, and oil

²⁴⁶ Aderoju Oyefusi, Oil-Dependence and Civil Conflict in Nigeria, Centre for the Study of African Economies, Working Paper Series, June 2007, p.5, <http://www.csae.ox.ac.uk/workingpapers/pdfs/2007-09text.pdf> (accessed on May 30, 2011)

²⁴⁷ O'Neill, Jim, The Growth Map: Economic Opportunity in the BRICs and Beyond, (New York: Portfolio/Penguin, 2011), p. 109; Underkuffler, Laura S. Captured by Evil: The Idea of Corruption in Law, (New Haven: Yale University Press, 2013), pp. 228-229.

²⁴⁸ <http://hdr.undp.org/en/statistics/> (accessed on May 30, 2011).

²⁴⁹ http://hdr.undp.org/en/media/HDR_2011_EN_Complete.pdf (accessed on March 11, 2013).

²⁵⁰ Human Rights Watch, Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria, <http://www.hrw.org/sites/default/files/reports/nigeria010711.pdf> (accessed on May 30, 2011).

²⁵¹ Osoba, S.O. 'Corruption in Nigeria: Historical Perspectives', Review of African Political Economy, Vol.23, No. 69, (Sep., 1996), pp.371-386.

revenues were massively looted by its generals.²⁵²

The assumption of office of retired General Obasanjo on May 29, 1999, under the transitional civilian experiment to representative democracy raised a lot of hope about probity and accountability. This was due to the fact that Obasanjo had been actively involved in the global anticorruption movement as a member of the advisory board of Transparency International²⁵³ during the preceding years, and was earlier incarcerated by the kleptocratic General Abacha. These hopes were dashed from 1999 to 2007, with the brazen ostentatious display of wealth by “elected officials” from local government to state and national levels of government.

The influence of the czars of corruption led to the movement in 2006 of Finance Minister Ngozi Okonjo-Iweala to the Foreign Affairs Ministry and her resignation from government.²⁵⁴

²⁵² “The Nigerian political economy has come to depend on a spectacular system of corruption, involving systematic kickbacks for the award of contracts, special bank accounts in the control of the presidency, allocation of oil or refined products to the politically loyal to sell for personal profit, and sweeteners for a whole range of political favors. In effect across all sectors of the economy, this system of corruption is particularly entrenched in the oil sector its natural home. It is this corruption that ensures that the oil money is sent to private bank accounts in Zurich or the Cayman Islands rather than spent on primary health care or education in Nigeria.” *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities* New York, Human Rights Watch, 1999, p47, <http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf> (accessed on May 30, 2011).

²⁵³ http://www.transparency.org/about_us/organisation/adv_council (accessed on May 30, 2011).

²⁵⁴ “In fact, it is well known that my refusal to support duty waivers for importation of rice and other products for certain very influential business people and their politician patrons as a means of financing the 2007 elections contributed to my being moved from the post of Minister of Finance to that of Ministry of Foreign Affairs, and thus to my subsequent resignation from the government when I felt that the principles on which I had come to serve were no longer being respected. I had been approached on a certain night in mid 2006, first by a couple of well-known politicians and later again by one of them, who said they came with backing from even higher political quarters to ask that I grant waivers for zero import tariffs on very large shipments of rice (rice was then on the 50 percent tariff band to encourage domestic production), which would be brought into the country by well-known business people and sold at prevailing domestic prices. By my calculations, if they brought in and sold the quantities being talked about, they could easily make more than US\$1 billion equivalent in Nigeria’s large consumer market...My refusal to go along earned me a strong rebuke and a threat from one of the influential politicians: “Some people feel they are very important, but we shall soon show them they are not as important as all that.”” Okonjo-Iweala, Ngozi, *Reforming the Unreformable: Lessons from Nigeria*, (Cambridge, Massachusetts: MIT Press, 2012), pp. 64-65

Smugglers were also known to be very influential within the Obasanjo regime.²⁵⁵ President Obasanjo, according to Ngozi Okonjo-Iweala, was even lukewarm about reformation of the most corrupt government agency in Nigeria, the Nigerian Customs Service, despite having initially backed the use of a British company, Crown Agent, which had proven expertise in customs reforms.²⁵⁶ It is conservatively estimated by Western diplomats with access to classified financial intelligence reports that “Nigeria lost a minimum average of \$4billion to \$8billion per year to corruption over the eight years of the Obasanjo administration.”²⁵⁷ Government at all levels

²⁵⁵ “Nigeria must be one of the few countries in the world where smugglers are known and talked about openly, and where these same big-time smugglers walk around freely in the corridors of power.” Ibid. at p. 68.

²⁵⁶ “After I briefed the president, he expressed support for the proposed course of action. He then suggested that the next step should be a memorandum to the Federal Executive Council, which could be discussed and approved at one of that council’s weekly meetings. While discussions with Crown Agents and preparations of the council’s memo were under way, articles began to appear in the press accusing me of trying to re-colonize the Customs Service by bringing back our former British colonial masters in the guise of Crown Agents. I began to get direct and indirect feedback from various quarters that the top brass of NCS were against my proposals. There were innuendoes from those giving me this feedback that I could suffer adverse consequences if I did not desist from the proposed reforms. The outcry seemed orchestrated. I was told that traditional rulers, politicians, the Security Services, and even top bureaucrats at State House were all against the idea of bringing in Crown Agents. The level of hostility was high, but I remained completely defiant because it was clear to me that this was a fight to keep the last bastion of corruption going. I went again to see the president, and this time he was distinctively lukewarm about bringing the Council memo but told me I could go ahead if I wished-less than a full endorsement. On October 25, 2005, I brought a memorandum to the Council asking for approval to implement the full range of customs reforms identified by both the first and second Obasanjo Presidential Task Forces on Customs reforms. “It is imperative to mention,” the memo explicitly stated, “that the consultants Messrs Crown Agents in the pursuit of the above listed activities are not to take over the activities of the Nigerian Customs Service but to work in close collaboration with the NCS personnel with the aim of strengthening the Service.” I had just completed my presentation of the memo to the cabinet when seven hands shot up and cabinet member after cabinet member took the floor to criticize the memo and say it was unworkable, an unnecessary expense for consultants and so on. Based on this attack on the memo, the president concluded the discussion by saying that opposition within cabinet was such that the approvals sought within the memo could not be given and the memo should be withdrawn. It was a dramatic and painful end to an important set of reforms, and the only time I presented a memo to cabinet and failed to get it through. It was no less painful when I discovered later that the attack on the memo in the cabinet meeting had been carefully planned and orchestrated. This orchestration was carried out by some of the powerful forces within government and society, whose vested interests would be damaged by a reformed Customs Service.” Ibid, at pp. 70-71.

²⁵⁷ Human Rights Watch, *Criminal Politics: Violence, “Godfathers” and Corruption in Nigeria*, New York, Human Rights Watch, 2007, pp.31-32
http://www.hrw.org/sites/default/files/reports/nigeria1007webwcover_0.pdf (accessed on May 30, 2011).

refused to perform such basic constitutional roles as road repairs, elemental health care, power generation, and maintaining primary and secondary schools despite huge unprecedented revenues.²⁵⁸

Former President Obasanjo, his vice president, Atiku Abubakar, and ministers established their own private universities while the federal universities were starved of funds. Hospitals became consulting clinics, also starved of funds and dependent on charitable nongovernmental organizations or United Nations outfits like UNICEF, WHO, and UNDP. The philosophy of Obasanjo's cabinet was a vaunted disdain and destruction of public institutions, so that their private educational and health-care enterprises could make profits. In 2003, a watershed event took place when the acting auditor-general of the Federation published an audited account of federal ministries that revealed a huge misappropriation of almost N24 billion. The official was dismissed from service.²⁵⁹ Public uproar eventually led to his dismissal being commuted to retirement so that he could access his pension.

Power utilities have virtually collapsed despite \$16 billion spent on power generation by the Obasanjo administration, it has since come to light that a great degree of fraud was involved in the process.²⁶⁰ One of the largest multinational firms that operated for over forty years in Nigeria, Michelin, had to shut down its huge plant in Port Harcourt due to enormous overheads incurred on generating its own power, and another major tire company, Dunlop has cut losses in

²⁵⁸ Crawford Young, 'Politics in Africa', in Gabriel A. Almond and G. Bingham Powell, Jr.(eds.), *Comparative Politics Today*, 1992, p.536.

²⁵⁹ Ogbu, Osita Nnamani, 'Combating Corruption in Nigeria, A Critical Appraisal of the Laws, Institutions and the Political Will,' *Ann. Surv. Int'l & Comp.* [Vol. XIV], 2008, pp. 99-149, at p. 110.
<http://heinonline.org/HOL/PDF?handle=hein.journals/ansurintl14&collection=journals&id=101&print=52§ioncount=1&ext=.pdf> (accessed on May 30, 2011).

²⁶⁰ Nigerian deals, 'wasted billions' <http://news.bbc.co.uk/2/hi/africa/7296466.stm> (accessed on May 30, 2011).

the past five years due to power constraints.²⁶¹ It finally stopped production in 2009 and disengaged thousands of workers. Power goes off for a whole week at times and comes on for a few minutes or a few hours when available, despite compulsory monthly maintenance fees, in addition to charges for actual electricity consumption. The collapse of the power sector is reflected in the N1.022 trillion Nigerians spend annually on diesel to power their generating plants in order to keep their businesses running.²⁶²

Twenty-five percent of Nigeria's gross domestic product has been lost to corruption.²⁶³ It is symptomatic of lack of accountability in public finances and "governance failure."²⁶⁴ Corruption remains a big problem in Nigeria:

The organization of the Nigerian state has fostered corruption and rent distribution in ways that are detrimental to economic development. Weak central authorities are generally unable to exercise surveillance of state organizations or personnel. With no accountability to a clear principal, state agents have a permissive setting for corrupt activities and few injunctions to provide official services. This has resulted in multiple, competitive pressures for corruption and rents, along with the theft of state resources and the neglect of formal duties...Not only are public agencies arbitrary and venal, but they do not deliver effective outputs and are not held to standards of performance. Rather than confronting the problems of state weakness, governing elites have commonly utilized these conditions as an expedient means of distribution.²⁶⁵

²⁶¹ Raymond Mordi, 'Dunlop Battles for Survival' Broad Street Journal, Lagos, Edition 30, July 28, 2008, p.34.

²⁶² Sola Adebayo, 'How Nigeria loses N1.022 to import of power generators- Okoigun' http://www.punchng.com/Articl.aspx?the_artic=Art200811091333893 The Punch, Lagos, November 9, 2008,(accessed on May 30, 2011)

²⁶³ Olorok, Friday, 'Assets declaration: Conduct bureau evolves new way to tackle corruption', The Punch, Lagos, 11 May, 2011, http://www.punchng.com/Articl.aspx?theartic=Art201105112584525&sms_ss=facebook&at_xt=4dca10785ed7f7e2.0 (accessed on May 11, 2011); Oloosi-Simbine, Antonia T. 'Corruption in Nigeria,' in Adejumobi, Said (ed.) *State, Economy, and Society in Post-Military Nigeria*, (New York: Palgrave Macmillan, 2011), pp. 157-179; Adebawale, Wale, *Authority Stealing: Anti-Corruption War and Democratic Politics in Post-Military Nigeria*, (Durham, North Carolina: Carolina Academic Press, 2012); Adebawale, Wale and Obadare, Ebenezer, 'When corruption fights back: democracy and elite interest in Nigeria's anti-corruption war,' *Journal Of Modern African Studies*, Vol. 49, No.1 (2011), pp. 185-213.

²⁶⁴ Shah, Anwar, *Corruption and Decentralized Public Governance*, (Washington D.C.: The World Bank Policy Research Working Paper, No.3824, January 2006), 14.

²⁶⁵ Lewis, Peter M. *Growing Apart: Oil Politics, and Economic Change in Indonesia and Nigeria*, (Ann Arbor: The University of Michigan Press, 2007) at p. 285.

2.5. Case Studies of the Accountability Profiles of Some Nigerian State Governors

The United Nations High Commissioner for Human Rights, 2009 Report, identified the *raison d'être* for socioeconomic rights implementation to be improving the quality of human life,²⁶⁶ and identified states' budgets as a veritable tool for measuring the progressive realization of socioeconomic rights.²⁶⁷ General Comment 14, fourteen, issued on August 11, 2000, expounded upon the normative contents of Article 12 of the CESCR on the right to health.²⁶⁸ It clarified the difference between indicators that reflect achievement levels as opposed to benchmarks laying out targets for countries in light of their peculiar circumstances.²⁶⁹ "Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator."²⁷⁰

Indicators and benchmarks reflect the seriousness of political leadership in meeting the socioeconomic needs of their constituencies.²⁷¹ Hence, it becomes tragic when some Nigerian state governors steal billions of dollars of public revenues meant for socioeconomic development for their impoverished populace who pay taxes regularly.

The former governor of Edo State, Lucky Igbinedion, was tried for stealing N2.9 billion, and he was fined N3.5 million, while his company was fined N500 million for fraudulent

²⁶⁶ Report of the United Nations High Commissioner for Human Rights, 'on the implementation of economic, social and cultural rights,' Geneva, E/2009/90, June 8, 2009, full text available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/362/90/PDF/N0936290.pdf?OpenElement> (accessed on April 28, 2012).

²⁶⁷ Ibid. paragraphs 44-54.

²⁶⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement> (accessed on April 23, 2012)

²⁶⁹ Ibid. paragraphs 57-58.

²⁷⁰ Ibid. paragraph 58.

²⁷¹ Klein, Alana 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights,' *Columbia Human Rights Law Review*, Vol. 39 (2008), pp. 351-422; de la Porte, Catherine; Pochet, Philippe and Room, Graham 'Social Benchmarking, Policy Making and New Governance in the EU,' *Journal of European Social Policy* Vol. 11 (2001), pp. 291-307; Rosga, AnnJanette and Satterthwaite, Margaret L. 'Trust in Indicators: Measuring Human Rights,' *Berkeley Journal of International Law*, Vol. 27 (2009), pp. 253-315.

conduct during his eight-year term of office as the Peoples' Democratic Party (PDP) governor.²⁷² Bode George, a deputy chairman of the PDP was convicted in October 2009 over a N100 billion contract splitting scam.²⁷³ "Bode George was released from prison in February 2011. Far from being treated as a pariah because of his misdeeds, he was whisked away from his jail cell to a lavish welcome ceremony attended by prominent ruling party politicians including former President Obasanjo, then-Ogun State governor Gbenga Daniel, and then-minister of defence Ademola Olatokunbo."²⁷⁴

Chief DSP Alamieyeseigha, a former PDP governor of Bayelsa State from May 1999 to December 2005, stole billions of naira from Bayelsa State funds and was convicted in 2007. After his impeachment from office in 2005, he was succeeded by his deputy, Goodluck Ebele Azikwe Jonathan, who became vice president of Nigeria on May 29, 2007, in the most fraudulent election ever conducted in Nigeria. (Goodluck Ebele Azikwe Jonathan was sworn in as Nigerian president on May 5, 2010, after the death of President Yar'Adua, and he assumed office as an elected president on May 29, 2011, after the April 2011 elections.) One of the properties

²⁷² Adelani Adepegba, Igbinedion, convicted, fined, *The Punch*, Lagos, <http://www.punchng.com/Article.aspx?theartic=Art20081219205156> (accessed on May 30, 2011).

²⁷³ Economic and Financial Crimes Commission, High Profile Cases, <http://www.efccnigeria.org/jm15/index.php/information-center/high-profile-cases>, (accessed on January 8, 2012).

²⁷⁴ Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission, Human Rights Watch, New York, August, 2011, p. 27. <http://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf> (accessed on January 8, 2012). "Nigerians watched the ruling party establishment, including a sitting cabinet member from the same administration that supposedly backs the EFCC's anti-corruption agenda, welcome Bode George back into its arms as though he were a conquering hero rather than a convicted criminal. Meanwhile, the Lagos State judge who sent Bode George to prison was removed from criminal matters and sent to work in family court. While there is no proof that the move was connected to George's conviction, many Nigerians activists and commentators found it hard to believe it was a coincidence. Bode George's story is not an anomaly. Ten months after former Bayelsa State governor Diepreye Alamieyeseigha was convicted on corruption charges, Goodluck Jonathan who was vice president at the time, and late president Yar'Adua openly campaigned alongside Alamieyeseigha in May 2008 at a political rally in Bayelsa State. These images of senior government officials embracing convicted criminals only served to reinforce the broader trend of impunity that these convictions were meant to push back against." Ibid at p.27.

acquired by Alamieyeseigha with the stolen funds was Chelsea Hotel, Abuja, Nigeria, valued at N2.7 billion, which was handed over to Bayelsa State on July 14, 2009 by Farida Waziri, the then-chairperson of the Economic and Financial Crimes Commission.²⁷⁵ Alamieyeseigha had earlier jumped bail in London in November 2005, and he fled to Nigeria. In London Alamieyeseigha was docked for money laundering offences, and during his abortive application of sovereign immunity claim from criminal prosecution, certain facts were revealed.²⁷⁶ First, in December 2001, he deposited £420,000 into a HSBC bank account in London.²⁷⁷ Second, in March 2003, he expended £475,724 in buying a property at 68-70 Regents Park, London, and more shocking was the £920,000 in cash found in his London home.²⁷⁸

James Onanefe Ibori, the governor of Delta State from 1999 to 2007, is wanted in Nigeria by the Economic and Financial Crimes Commission for the theft of 9 billion, 200 million naira from the Delta State treasury.²⁷⁹ He fled from Nigeria in April 2010 to Dubai, where he was arrested in May 2010, and extradited to the United Kingdom to face charges of fraud and money laundering.²⁸⁰ Some accounts claim that he stole N450 billion from 1999 to 2007, when he ruled Delta State, and for assisting him to move £70 million through British banks, Christine Ibori-Ibie, his sister, and Udoamaka Okoronkwo-Onuigbo, his mistress, were each sentenced to five

²⁷⁵Remarks by the Executive Chairman, Mrs. Farida Waziri, AIG (Rtd.) at the Handover Ceremony of Chelsea, <http://www.efccnigeria.org/jm15/index.php/information-center/30/667-remarks-by-the-executive-chairman-mrs-farida-waziri-aigrtd-at-the-handover-ceremony-of-chelsea>, (accessed on January 8, 2012).

²⁷⁶The Queen on the application of Diepreye Solomon Alamieyeseigha v. The Crown Prosecution Service, Case No: C0/9133/2005, full text available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2704.html> (accessed on April 28, 2012).

²⁷⁷ Ibid. paragraph 2.

²⁷⁸ Ibid. paragraph 3.

²⁷⁹ EFCC Most Wanted: James Onanefe Ibori, April 13, 2011, <http://www.efccnigeria.org/jm15/index.php/information-center/efcc-most-wanted/1142-james-onanefe-ibori> (accessed on January 10, 2012).

²⁸⁰ BBC News UK, 'Nigerian ex-governor James Ibori remanded in custody,' April 16, 2011. <http://www.bbc.co.uk/news/uk-13102655> (accessed on January 10, 2012).

years imprisonment; in addition Theresa Ibori, his wife, and Bhadresh Gohli, his lawyer, were also jailed for money laundering in the United Kingdom.²⁸¹

Ibori was finally found guilty of fraud and money laundering totaling around £50 million by Judge Anthony Pitts of Southwark Crown Court, London, and on April 17, 2012, he was sentenced to thirteen years in prison. Judge Pitts noted that Ibori was the “man of corruption lining his own and families’ pockets with single-minded devotion and determination.”²⁸² The *Financial Times* estimates that Ibori stole close to £200 million.²⁸³ It was in the year 1991 that Ibori commenced the criminal phase of his life in Britain, and eight years later, he utilized his criminal expertise to commence the looting of Delta State funds from 1999 to 2007 in Nigeria, in alliance with his British contacts.²⁸⁴ The Department of International Department (DFID) of the British government in a press release stated that: “Ibori, a former governor of Nigeria’s Delta State, lived a life of luxury after he embezzled what the Met estimates to be \$250 million (approximately £157 million) of Nigerian public funds—equal to £38 from every person living

²⁸¹ Ibori offers to set up fund with stolen loot, 234next.com, January 10, 2012, <http://234next.com/csp/cms/sites/Next/News/National/5682491-146/story.csp> (accessed on January 10, 2012).

²⁸² Croft, Jane, ‘Former Niger Delta governor jailed for fraud,’ *Financial Times*, London, April, 17, 2012, <http://www.ft.com/cms/s/0/13e1ca04-889e-11e1-a526-00144feab49a.html#axzz1tMsNIWri> (accessed on April 27, 2012)

²⁸³ Id.

²⁸⁴ Mr. Ibori’s criminal career began in 1991, pilfering tills at Wilkes, a British hardware shop, where he worked. He forged ID documents to hide his crimes and sneaked back into Nigeria. there he entered politics, eventually becoming state governor and one of the country’s most powerful politicians. He amassed a large fortune which he spent lavishly, buying among other things, a house in Hampstead worth over \$3.5 m, which he paid for in cash, a \$5m mansion in South Africa and a fleet of cars worth over \$1m. The EFCC, Nigeria’s anti-corruption agency, tried to prosecute Mr. Ibori after he left office but his reputation and wealth allowed him to dodge any charges. He managed to transfer his court case from northern Nigeria to a court in Delta state, where the judge-his cousin-dismissed all the 170 charges against him. A former head of the EFCC, Nuhu Ribadu, alleged Mr. Ibori tried to bribe him with \$15 to drop investigations into his affairs. When he pursued the case, Mr. Ribadu was removed from office and later went into exile in Britain...Recently Timpire Sylva, another former state governor quarreled with the president and was sacked. The EFCC then said he had embezzled millions of dollars and promptly decalred him a fugitive. Corruption, it seems, is only a problem when you fall from grace.” G.P. ‘Corruption in Nigeria: Hard graft,’ Abuja, *The Economist*, London, April 29, 2012, <http://www.economist.com/blogs/baobab/2012/04/corruption-nigeria> (accessed on May 17, 2012).

in the state at the time of his crimes.”²⁸⁵ According to DFID’s research, the funds Ibori stole “could have provided books, uniforms and education for 400,000 girls or hand pumps to provide clean water for 450,000 households.”²⁸⁶ The last sentence of the press release assumed that there were no honest sectors of government in Nigeria, stating that: “No British aid to Nigeria is channeled through government institutions to protect our money from corruption, and to ensure that such aid reaches the beneficiaries for which any assistance in [*sic*] intended.”²⁸⁷

I will now examine the role of private international actors involved in the subversion of the accountability of Nigerian public officials, through the two cases of multinational companies prosecuted in the United States by the Securities and Exchange Commission.

2.6. *SEC v. Halliburton and KBR*

Under United States Foreign Corrupt Practices Act (FCPA)²⁸⁸ proceedings on February 11, 2009, Kellogg Brown and Root (KBR) entered guilty pleas to a five-count criminal information in a federal court in Houston before U.S District Judge Keith P. Ellison and agreed to pay a \$402 million criminal fine as part of a plea bargain agreement.²⁸⁹ This was the aftermath of KBR’s orchestration of a \$180 million bribe dispensation scheme from 1995 to 2004, allegedly in favor of Nigerian government officials, which led to the award to KBR of four engineering,

²⁸⁵ DFID Press release, ‘Success in fighting corruption as Ibori starts jail term,’ April 17, 2012, p. 1, full text available at: <http://www.dfid.gov.uk/Documents/publications1/press-releases/Success%20in%20fighting%20against%20corruption%20as%20Ibori%20starts%20jail%20term.pdf> (accessed on April 28, 2012).

²⁸⁶ Ibid. at p. 2.

²⁸⁷ Ibid. at p. 2.

²⁸⁸ Anti-Bribery and Books & Records Provisions of The Foreign Corrupt Practices Act Current through Pub. L. 105-366 (November 10, 1998) UNITED STATES CODE TITLE 15. COMMERCE AND TRADE CHAPTER 2B—SECURITIES EXCHANGES §78m. Periodical and other reports, <http://www.usdoj.gov/criminal/fraud/docs/statute.html> (Last visited May 30, 2011).

²⁸⁹ Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine: Enforcement Actions by DOJ and SEC Result in Penalties of \$579 Million for KBR’s Participation in a Scheme to Bribe Nigerian Government Officials to Obtain Contracts, Department of Justice February 11, 2009, <http://www.usdoj.gov/opa/pr/2009/February/09-crm-112.html> (Last visited May 30, 2011).

procurement and construction (EPC) contracts for the Bonny Nigerian \$6 billion liquefied natural gas.²⁹⁰ \$150 million of the bribes were handled by an agent in Gibraltar, and the balance of \$30 million by another agent in Tokyo.²⁹¹

KBR and its former parent company, Halliburton, also agreed to settle the civil aspect of the suit filed by SEC relating to violation of antibribery provisions of the FCPA, and both agreed to pay \$177 million in disgorgement of profits relating to books, records, and internal control violations that occurred during payment of the bribes. SEC Chairman Mary Schapiro stated that: “FCPA violations have been and will continue to be dealt with severely by the SEC, and other law enforcement agencies. Any company that seeks to put greed ahead of the law by making illegal payments to win businesses should beware that we are working vigorously across borders to detect and punish such illicit conduct.”²⁹² The sanctions above represent the second-largest fines ever paid by American firms since the inception of the FCPA in 1977.²⁹³ The former CEO of the above companies, Albert Jack Stanley, met with top Nigerian government officials and their representatives at least four times.²⁹⁴ The payments were to be concealed through sham contracts with an agent each in the United Kingdom and Japan.²⁹⁵

Nigerians have mounted pressure on the Nigerian government to release the names of its officials involved in the bribery scheme and prosecute them.²⁹⁶ In response to these pressures the Nigerian attorney general made a request of the United States through a Mutual Legal

²⁹⁰ Id.

²⁹¹ Id.

²⁹² Id.

²⁹³ U.S. Securities and Exchange Commission, Litigation Release No. 20897 / February 11, 2009, <http://www.sec.gov/litigation/litreleases/2009/lr20897.htm> (Last visited May 30, 2011).

²⁹⁴ Id.

²⁹⁵ Id.

²⁹⁶ Ayo Olesin et al, Halliburton: Senate, others demand identity of Swiss account owners, Punch, Lagos, April 10, 2009, <http://www.punch.ng.com/Article.aspx?theartic=Art200904091231893> (Last visited May 30, 2011).

Assistance Treaty (MLAT).²⁹⁷ \$150 million of the \$180 million was discovered by American investigators to be currently held in Swiss accounts upon inquiries made by Nigeria's attorney general.²⁹⁸ OECD antibribery corruption proceedings in France involving the Halliburton case above, led to the conviction, a 300,000 euro fine and a three-year imprisonment sentence of Dan Etete, a former Nigerian oil minister under the Abacha dictatorship of the 1990s.²⁹⁹ Etete expended 15 million euros in bribery payment received from British Attorney Jeffrey Tesler (Abacha's financial adviser) on purchase of properties in France from 1999 to 2000.³⁰⁰ Etete's French accomplice, Richard Granier-Defferre, was jailed for a year and fined 150,000 euros.³⁰¹ On February 23, 2012, Albert Jack Stanley was sentenced to thirty months imprisonment by Judge Keith P. Ellison, United States District Judge for the Southern District of Texas for a decade-long scheme in violation of the Foreign Corrupt Practices Act (FCPA), for bribing Nigerian rulers to secure a \$6 billion liquefied natural gas contract, which was inflated from the original \$3 billion contract sum:

Two of Stanley's co-conspirators also were sentenced by Judge Ellison. Today, Jeffrey Tesler, 63, a United Kingdom citizen and licensed solicitor, was sentenced to 21 months in prison, followed by two years of supervised release. Tesler was also ordered to pay a \$25,000 fine and previously was ordered to forfeit \$148, 964,568. Yesterday, Wojciech J. Chodan, 74, a United Kingdom citizen and former salesman at KBR's U.K. subsidiary was sentenced to one year of probation and ordered to pay a \$20,000 fine. Chodan was previously ordered to forfeit \$726,885. Tesler and Chodan were indicted on Feb. 17, 2009, and subsequently extradited to the United States from the United Kingdom. On Dec. 6, 2011, Chodan pleaded guilty to count one of the indictments charging him with conspiring to violate the FCPA. On March 11, 2011,

²⁹⁷ A Request for legal assistance, The Nation, Lagos, March 30, 2009,

<http://www.thenationonlineng.com/dynamicpage.asp?id=80765> (Last visited May 30, 2011).

²⁹⁸ Swiss hold '\$150 m Nigeria bribes', BBC News, <http://news.bbc.co.uk/2/hi/africa/7991447.stm> (Last visited March 4, 2013).

²⁹⁹ Hector Igbikiowubo, Money Laundering: French Court hands Dan Etete 3-yr jail term, Vanguard, Lagos, November 7, 2007,

http://www.vanguardngr.com/index.php?option=com_content&task=view&id=1681&Itemid=42 (Last visited May 30, 2011).

³⁰⁰ Id.

³⁰¹ Id.

Tesler pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA.³⁰²

2.7. *United States of America v. Siemens Aktiengesellschaft*³⁰³

Siemens became listed in the United States in 2001, and became subject to the FCPA. Siemens was the largest German engineering company with a global operation, and prior to the coming into the operation of the Organization for Economic Co-operation and Development Convention (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in Germany on February 15, 1999,³⁰⁴ Siemens regularly procured contracts all over the world, including in Nigeria, through bribery of government officials. Investigations into the bribery schemes of Siemens commenced in September 2000, with regard to bribery payments made to a former Nigeria dictator³⁰⁵ who stole billions of dollars of Nigeria's crude oil earnings.

These investigations snowballed into concerted efforts by the American DOJ, SEC, and German authorities, which resulted in the discovery of a \$1.36 billion slush fund employed by Siemens to bribe government officials globally in order to win contracts.³⁰⁶ According to Linda Chatman Thomsen, director of SEC's Division of Enforcement: "This pattern of bribery by Siemens was unprecedented in scale and geographic reach. The corruption involved more than \$1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the

³⁰² Department of Justice, 'Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes,' Thursday, February 23, 2012, <http://www.justice.gov/opa/pr/2012/February/12-crm-249.html> (accessed on February 29, 2012).

³⁰³ The United States District Court for The District of Columbia Cr. No. 08.367.R16 <http://www.usdoj.gov/opa/documents/siemens-ag-stmt-offense.pdf> (Last visited May 30, 2011).

³⁰⁴ Id. at 8.

³⁰⁵ Id. at 9.

³⁰⁶ Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of \$1.6 Billion, December 15, 2008, <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html> (Last visited May 30, 2011).

Americas...our success in bringing the company to justice is a testament to the close, coordinated working relationship among the SEC, the U.S. Department of Justice and other U.S. and international law enforcement, particularly the Office of the Prosecutor General in Munich.”³⁰⁷ Siemens agreed to pay a total of \$1.6 billion in fines and disgorgement of profits in the United States and Germany, including \$800 million in the United States, making it the largest combined sanction in an FCPA case since the FCPA Act was enacted in 1977.³⁰⁸

Conclusion

This chapter has focused on the lack of political will of successive Nigerian governments to implement socioeconomic rights provided for in their annual budgets and on the cancer of corruption that depleted and continues to deplete hundreds of billions of dollars of oil and tax revenues. This fact is buttressed by the two American cases analyzed in this chapter to demonstrate the corrosive effect of multinational oil corporations on the accountability of Nigerian political leaders.³⁰⁹ Nigeria’s underdevelopment has been accentuated by the military buccaneers Britain trained at Sandhurst, who captured power in 1966 and plunged Nigeria into a civil war that claimed over a million lives. The military effectively aborted the welfare state that emerged from 1960 to 1966, when politicians were by and large communitarians in spirit and practice in line with the communal ethos that for centuries undergirded Nigeria’s 250 ethnic

³⁰⁷ Id.

³⁰⁸ Id.

³⁰⁹ There is vast body of literature on this point and Thomas Pogge resource privilege has been the most convincing explanation for the paradox of poverty in the midst of abundant oil revenues in Nigeria. Pogge, Thomas, ‘Severe Poverty as a Human Rights Violation’, in Pogge, Thomas, (ed.), *Freedom from Poverty as a Human Right*, (Oxford: Oxford University Press, 2007), 48-50. See also Karl, Terry Lynn, ‘Ensuring Fairness: The Case for a Transparent Fiscal Social Contract’, In Humphreys, Macartan; Sachs, Jeffrey D. and Stiglitz, Joseph E. (eds.) *Escaping the Resource Curse*, (New York: Columbia University Press, 2007), pp.256-285; Ibeanu, Okey and Luckham, Robin, ‘Nigeria Political Violence, Governance and Corporate Responsibility in a Petro-State’, in Kaldor, Mary; Karl Terry Lynn and Said, Yahia (eds.), *Oil Wars*, (London: Pluto Press), p.41-99; Ghazvinian, John, *Untapped: The Scramble for Africa’s Oil*, (New York: Harcourt, 2007);

nationalities.

The military distorted the welfare developmental trajectory of the Nigerian state to create a hybrid class of politicians comprised of retired military officers and their civilian collaborators, infused with the worst political tendencies. The Nigerian state, through its political elites, has burned the development bridge by means of grand-scale corruption, and they are stuck between a rock and a hard place. The Nigerian state, through its political and legal elites, must make a conscious effort to create an enabling environment for Nigerians to thrive and realize their full potentials and capabilities in life. That entails the provision of affordable and qualitative health care and top-rate education, electricity supply, and potable water supply to undergird a revitalization of the textile, agricultural, and construction sectors so that Nigeria can clothe, feed, and house its citizens. Existing mechanisms of accountability need to be strengthened in Nigeria, and their deficiencies need to be ameliorated and complemented by justiciable socioeconomic rights to achieve a desirable level of government accountability in Nigeria.

CHAPTER THREE

SOCIOECONOMIC RIGHTS IN NIGERIA

3.0. Introduction

In this chapter, I will map out the current status and trajectory of socioeconomic rights in Nigeria's legal regime. Section 3.1 traces how the military juntas in Nigeria aborted the people's will to have socioeconomic rights entrenched as justiciable constitutional fundamental rights in the Nigerian Constitutions that were decreed by the military juntas. Section 3.2 then proceeds to highlight the Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria, on Fundamental Objectives and Directive Principles of State Policy. Section 3.3 evaluates Nigerian socioeconomic jurisprudence, while section 3.4 analyzes the concept of *locus standi* in Nigerian jurisprudence. Section 3.5 examines the Supreme Court of Nigeria and socioeconomic rights. Section 3.6 interrogates the autochthonous constitutional framework which is inclusive and representative of a broad spectrum of the aspirations of Nigerians. The chapter establishes a widespread support by Nigerians for constitutionally justiciable socioeconomic rights. Also discussed is why a constitutionally guaranteed relaxed right of access to courts in Nigeria is required to empower aggrieved citizens as litigants, to improve the accountability matrix of public governance.

The 1999 Constitution of the Federal Republic of Nigeria is almost identical to the 1979 Constitution, and were both drafted by military juntas of close affinity. The 1976 Constituent Assembly, heavily controlled by the military troika of generals Obasanjo, Yar'Adua, and Danjuma, which drafted the 1979 Constitution, "defined political power as 'the opportunity to acquire riches and prestige, to be in a position to hand out benefits in the form of jobs, contracts,

gifts of money etc. to relations and political allies.”³¹⁰ The army handed power to civilians in 1979 and reclaimed power in 1983.³¹¹

Chapter II of the 1999 Constitution, which provides for nonjusticiable socioeconomic rights, must be amended and made justiciable in order to empower citizens to initiate court actions to make public policies accountable and geared toward development policies. Poor countries like Nigeria have a greater advantage than, say, the United States in funding public health care and education at a much cheaper labor cost, thereby enhancing individual capabilities to catalyze democratic, economic, and industrial development. Amartya Sen has for decades demonstrated this fact with China, Costa Rica, Kerala State in India, and Sri Lanka.³¹²

3.1. Adoption of Socioeconomic Rights as Fundamental Objectives and Directive Principles of State Policy in Nigeria

The paradigmatic shift that occurred in 1978 after twelve years of military rule was the emergence of a military ruling-class that decreed the 1979 Constitution of the Federal Republic of Nigeria, modeled upon the executive presidential system of government, as opposed to the British model of parliamentary government that operated from 1960 to 1966, during the first republic.

³¹⁰ Bayart, Jean-Francois, *The State in Africa: Politics of the Belly*, (London and New York: Longman, 1993), at p. xvii.

³¹¹ Othman, Shehu, ‘Classes, Crises and Coup: The Demise of Shagari’s Regime, *African Affairs*, Vol. 83, No. 333(Oct. , 1984), at pp. 441-461.

³¹² “This is because both health and education are labour-intensive activities and this makes them much cheaper in poorer countries because of lower wages. Thus, even though a poor country is tremendously constrained in expending money on health and education because of general poverty, the money needed to pay for these services is also significantly less when a country is still poor. The fact of the relative cheapness of labour-intensive services (including health care and education) to some extent counteracts the constraint of poverty. When the proper economic calculations are made, taking note of relative costs, there is less reason for pessimism here-even for quite poor countries-than is frequently supposed. We must resist the tendency to rely on plain cynicism, based on over-theoretical reasoning, masquerading as cunning practical wisdom.” Sen, Amartya, *Public Action to Remedy Hunger*, The Fourth Annual Tanco Memorial Lecture, August 2, 1990, Queen Elizabeth II Conference Centre, London, at p. 17.

The 1979 Constitution also introduced Chapter II provisions on Fundamental Objectives and Directive Principles of State Policy, a euphemism for nonjusticiable socioeconomic rights.³¹³ It has been claimed that “there is no similarity between” Nigeria’s Chapter II provisions on directive principles and India’s.³¹⁴ What is not disputable, according to one of the most outstanding justices ever to have served on Nigeria’s Supreme Court, is that no one can point to a theory upon which the 1979 Constitution was grounded.³¹⁵

The problems that resulted from a “veil of ignorance”³¹⁶—or otherwise stated, lack of altruism—which led the Nigerian military ruling class in 1978 to abandon the socioeconomic development impetus of the 1960-1966 first republic, will be examined briefly. During the constitutional debates of 1978, there were Nigerians (who later birthed the 1979 Constitution),

³¹³ Akande, Jadesola, *The Constitution of the Federal Republic of Nigeria*, (London: Sweet & Maxwell, 1982), 13; full text of India’s Constitution is available at the website of the Ministry of Law and Justice (Legislative Department), India: <http://indiacode.nic.in/coiweb/welcome.html> (accessed on February 22, 2012).

³¹⁴ “Such provisions were first (in the Commonwealth) included in the Indian Constitution of 1949; suffice it now to record that there is no similarity between Chapter II of the Nigerian Constitution and the shorter, more specific Indian provisions.” Read, James S. ‘The New Constitution of Nigeria, 1979: “Washington Model”?’ *Journal of African Law*, Vol.23, No. 2 (Autumn, 1979), pp.131-174, at p. 148.

³¹⁵ “The political theory that forms the background of a constitution, if any, is important when it comes to examining the judicial theory adopted by the court in its interpretative stance on the Constitution. The Nigerian Judiciary has not got this advantage.” The Hon. Justice Kayode Eso, ‘The Problems of Interpretation and of Application of the Provisions of the Constitution,’ in *All Nigeria Judges Conference Papers*, Ilorin Kwara State, 8th -16th March 1982, (London: Sweet & Maxwell, 1983), pp. 127-173, at p.141 He added further that: “The socio-economic and political problems that arise in the United Kingdom or in the United States could not be and indeed are the same as exist in this country. Nigeria is a country of multi-tribes and tongues and diversified cultural background...It is in this context, therefore, with this background that the problems of the interpretation and application of the Nigerian Constitution should be viewed. And references to and illustrations of the United Kingdom and Commonwealth attitude should only serve as a guide for the recognition of our problems in the better understanding of the stance which is now taken, or ought to be taken, by the Nigerian Judiciary in this matter.” *ibid.* p. 145.

³¹⁶ “The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.” Rawls, John, *A Theory of Justice*, (Cambridge: Harvard University Press, 1971), at pp.136-137. For a nuanced view of Rawls see: Elkin, Stephen L. ‘The Constitutional Theory of the Commercial Republic,’ Vol. 69, *Fordham L. Rev.* (2000), pp. 1933- 1968, at pp. 1939-1943.

who felt that a constitution that guaranteed civil and political rights but was devoid of socioeconomic rights did not meet the yearnings and aspirations of the average Nigerian.

According to Bade Onimode and E. Osagie:

It has even been argued that if the state may not be able to provide free education at all levels, right to a job, shelter and free medical care, these should not be justiciable rights. But surely in the past, freedom of expression, the press, assembly, etc were justiciable even when the majority of our population was submerged in a 'culture of silence' through illiteracy which denied them freedom of expression in official English, when the press was officially gagged and peaceful assembly denied.³¹⁷

On the other hand, contrary views were offered by the Nigerian Constitutional Drafting Committee (CDC) appointed by the military junta. The CDC was headed by F.R.A. Williams, and its views on socioeconomic rights in its report submitted to the junta in 1976 were that:

By their nature, they are rights which can only come into existence after the government has provided facilities or them. Thus if there are facilities for education or medical services one can speak of the 'right' to such facilities. On the other hand, it will be ludicrous to refer to the 'right' to education or health where no facilities exist. If one has in mind the right of an individual to insist on the provision of these facilities then it is a 'right' which depends on the availability of resources and in the final analysis one is really referring to the obligation or duty of the government to provide the facilities. This is why majority of the members of the Committee feel that it is better and more realistic to make provision for economic and social rights in the portion of the Constitution dealing with fundamental objectives and directive principles rather than in the section dealing with fundamental rights. Most of the fundamental rights are in a sense, natural rights vested in every individual and to which he is entitled without any obligation or duty on the part of the government to provide facilities for their enjoyment. Thus, the rights to freedom of expression or to liberty of a person are rights which do not depend upon the provision of any facilities by the government. Moreover, all fundamental rights are, in the final analysis, rights which impose limitations on executive, legislative or judicial powers of government and are accordingly justiciable. By contrast, economic and social 'rights' are different. They do not impose any limitations on governmental powers. They impose obligations of a kind which are not justifiable. To insist that that the right to freedom of expression is the same kind of 'right' as the 'right' to free medical facilities and can be treated alike in a constitutional document is, the majority of us feel, basically unsound.³¹⁸

³¹⁷ Eze, Osita, *Human Rights in Africa: Some Selected Problems*, (Lagos: Macmillan Publishers, 1984), at p. 32.

³¹⁸ *Id.*

The great biases majority of the CDC members harbored against socioeconomic rights are apparent in their lexicon. They failed to note that administration of justice, policing to secure civil liberties, and elections, for example, have huge budgetary consequences that even exceed allocation for health care and education. Note that with socioeconomic rights the CDC tags them not justifiable as opposed to civil and political rights that are justiciable (and justified). The above narrative reinforces Karl Klare's position that "For present purposes it is enough to note that the very existence of this debate shows that rights discourse is socially constructed, that conceptions of rights are embedded within and framed by particular political and social visions."³¹⁹ More importantly, Henry Shue reinforces the point made earlier, that civil and political rights also demand positive action on the part of the state. According to Shue: "But such protection against the deprivation of subsistence is in all major respects like protection against deprivations of physical security or of other rights that are placed on the negative side of the conventional negative/positive dichotomy. I believe the whole notion that there is a morally significant dichotomy between negative and positive rights is intellectually bankrupt."³²⁰ Subsequently, in section 4.1, I demonstrate that the guarantee of civil and political rights require considerable budgetary expenditure.

3.2. The 1999 Nigerian Constitution Chapter II Provisions on Fundamental Objectives and Directive Principles of State Policy

The provisions of the 1999 Constitution of the Federal Republic of Nigeria dealing with socioeconomic rights are listed under its Chapter II, which is captioned Fundamental Objectives and Directive Principles of State Policy. The economic objectives stipulate "that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of

³¹⁹Klare, Karl E. 'Legal Theory and Democratic Reconstruction: Reflections on 1989', 25 U .Brit. Colum. L. Rev. Vol. pp.69-103, at p. 97.

³²⁰ Shue, Henry, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy, (Princeton, New Jersey: Princeton University Press, 1980), p.51.

production and exchange in the hands of few individuals or of a group.”³²¹ The economic objectives also require “that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.”³²²

Social objectives under the Nigerian Constitution³²³ states that: “exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.” In terms of employment the social objectives stipulate the following:

(3) The State shall direct its policy towards ensuring that-

(a) all citizens, without discrimination on any group whatsoever, have the

opportunity for securing adequate means of livelihood as well as adequate

opportunity to secure suitable employment;

(b) conditions of work are just and humane, and that there are adequate facilities for

leisure and for social, religious and cultural life;

(c) the health, safety and welfare of all persons in employment are safeguarded

and not endangered or abused;

(d) there are adequate medical and health facilities for all persons...³²⁴

It is pertinent to note that Nigeria is a far cry away from realizing the above lofty goals. This is not surprising, given the fact that they are nonjusticiable as opposed to civil and political rights that are justiciable under the 1999 Constitution of the Federal Republic of Nigeria. Socioeconomic rights are not ranked as items of importance by those who hold the reins of

³²¹ Section 6 (2) (c).

³²² Section 6 (2) (d).

³²³ Section 17.

³²⁴ Section 17 (3) (a)-(d).

power in Nigeria at the federal, state, and local tiers of government. It would then appear illusory to advocate for Nigeria the Indian jurisprudence on socioeconomic rights discussed in chapter 5, which has incorporated nonjusticiable socioeconomic rights under the justiciable civil right to life.³²⁵ But note that access to court is relaxed in India, unlike the strict regime of access in Nigeria. Moreover, Indian Supreme Court Indian judges shed conservatism decades ago, unlike their Nigerian colleagues, although there have been some exceptions.

Educational objectives under the 1999 Constitution have largely been observed in the breach by the Nigerian State at the federal, state, and local tiers of government. Section 18 of the Constitution stipulates that:

1. Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.
2. Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide-
 - (a) free, compulsory and universal primary education;
 - (b) free secondary education;
 - (c) free university education; and
 - (d) free adult literacy programme

Education has been one of the most neglected sectors of the Nigerian economy. Nigeria requires a highly skilled workforce to develop its economy and compete globally. Adding value to the crude oil and gas Nigeria exports, and utilizing such energy exports domestically to industrialize, requires using a labor-intensive massive manufacturing paradigm. Such a paradigm

³²⁵Lawan, Mamman, 'Law and Development in Nigeria: A Need for Activism,' (Journal of African Law, Vol. 55, No.1, 2011), pp. 59-85, at p.82.

requires a research- and development-driven education infrastructure. The Appropriation Bill for 2012 proposed by the Nigerian government does not reflect such a paradigm.³²⁶

3.3. Nigerian Socioeconomic Jurisprudence

Judicial powers are vested in the courts by section 6 of the 1999 Constitution of the Federal³²⁷ Republic of Nigeria, which in the same breath makes enforcement of Chapter II provisions on fundamental objectives and directive principles of the Constitution containing socioeconomic rights nonjusticiable. The judicial arm of government has acquitted itself creditably in the fifty years of Nigeria's independence, and this dissertation shows this to be relevant in the realization of accountable governance through socioeconomic rights in Nigeria.³²⁸ Judicial decisions in Nigeria relating to socioeconomic rights are almost nonexistent due to their nonjusticiable nature. The few cases on socioeconomic rights have resulted from adjudication upon justiciable civil and political rights and legislation relating to Chapter II provisions of the Constitution.

³²⁶ http://www.budgetoffice.gov.ng/2012_budget_pro_details/2012%20Bill.pdf (accessed on December 30, 2011).

³²⁷ How truly federal is Nigeria? That is another contentious field entirely which also kicks into the accountability deficit equation of an immensely powerful center headed by an imperial president immune from criminal prosecution while in office.

³²⁸ "The progressive aspect of legislative justice shows itself much more often in statutes, Acts of the legislature, than in case law, judgments of the higher courts. That is to be expected, as a consequence of the different political functions of the legislature and the judiciary. Politicians are elected to the legislature in order to express the will of the people, and one of their main tasks is to enact laws serving that purpose. Judges are appointed to apply the law, fairly and efficiently, not to change it. But from time to time there are good reasons for judges to change the law. The legislature is too preoccupied with the multifarious business of politics to make all the changes that are needed to iron out injustices (unfairness) in the law as it has developed over the years. When judges take on this task, they are sometimes a bit like legislators in reflecting general opinion of the day-but on broad moral principles, not on any and every contentious issue... Take as an example the celebrated case of *Brown v. Board of Education* in 1954... in... England... Lord Denning... said in (*Davis v. Johnson* [1979] AC 264, at 274)... that, while the law of the nineteenth century had attached great importance to rights of property, there had more recently been a change of course: 'Social justice requires that personal rights should, in a proper case, be given priority over rights of property.' In 1989 Lord Emslie, the Lord Justice-General of Scotland, changed the criminal law of that country by ruling that a husband could be guilty of rape against his wife. His examples prompted a Member of Parliament to propose that a similar change be made to English law by statute; it was in fact made in 1991 by the Court of Appeal in a judgement (sic) delivered by Lord Lane, the Lord Chief Justice, as was then confirmed by the House of Lords in its judicial capacity." Raphael, D.D. *Concepts of Justice*, (Oxford: Clarendon Press, 2001), pp.3-4.

Constitutionally guaranteed socioeconomic rights would empower the Nigerian judiciary to subject government policies to accountability tests, and Nigerian citizens would benefit from an added layer of judicial evaluation of public policies to promote their general welfare. The judiciary has always been an ally of the ordinary citizen in Nigeria, and its hands remain tied by the nonjusticiable socioeconomic rights provisions of the Nigerian Constitution.³²⁹ The Exclusive Legislative List under the 1979 Constitution of the Federal Republic of Nigeria conferred powers on the federal government to establish and regulate authorities “to promote and enforce the observance of the fundamental objectives and directives principles contained in the Constitution.”³³⁰ This same provision was drafted into the 1999 Constitution as item 60(a) under the Exclusive Legislative List.

The development of Nigerian jurisprudence on socioeconomic rights has been hampered by their nonjusticiable nature, courtesy of section 6(6)(c) of the 1999 Constitution of the Federal Republic of Nigeria, which states that

6.(6) The judicial powers vested in accordance with the foregoing provisions of this section...

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

The above provision was a carbon copy of a similar provision in the Nigerian 1979 Constitution. The few decisions of the courts dealing with directive principles will be examined here; they

³²⁹ Transcript of interview with the Justice of the Court of Appeal, Hon. Albert Gbadebo Oduyemi on file with the author .

³³⁰ Item 59(a).

were mainly decided under the 1979 Constitution. In a Lagos High Court decision of July 18, 1980, Justice Agoro observed that:

In any event, it seems to me that the Directive Principles of State Policy in Chapter II of the Constitution have to conform to and run as subsidiary to the Fundamental Rights under Chapter IV of the Constitution. If there is no infringement of any Fundamental Right there can be no objection to the State acting in accordance with the directive principles set out in Chapter II subject of course to the legislative and executive powers conferred on the State. See the Indian case of *State of Madras v Champakam* (1951) SCR 525.³³¹

In a subsequent Lagos High Court decision of August 22, 1980 the same verdict was reached that Chapter IV fundamental human rights provisions were superior to Chapter II provisions.³³² The Court of Appeal, on July 22, 1991, for the first time categorized Fundamental Objectives and Directive Principles of State Policy as rights but devoid of enforcement. According to the president of the Court of Appeal, Justice Nasir It is common ground that citizens and aliens alike enjoy legal rights popularly called civil rights which are ordinarily enforceable and justiciable in our courts. Out of the civil rights some have been chosen and elevated to the level of Fundamental Rights and are protected and enforced under the Constitution... There are other rights which may pertain to a person which are neither fundamental nor justiciable in the courts. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution.³³³

Nigeria operates a dualist legal system, as do most commonwealth former British colonies, and a treaty can only become binding when it is domesticated into the Nigerian legal system.³³⁴ In section 3.5, I show that the African Charter on Human and Peoples' Rights has been domesticated into Nigerian law.³³⁵ In a few decided cases its right to health care provisions have been utilized by prisoners as a secondary relief based upon a primary civil liberty claim.

³³¹ *Archbishop A.O. Okogie v The Attorney-General of Lagos State* [1981] 1NCLR, 218 at 232

³³² *Adewole and others v Governor of Lagos State and others*, [1981] 1 NCLR, 262, at 282-287.

³³³ *Uzouku and others v Ezeonu II and others* (1991) 6 NWLR (pt. 200), 708 at 761.

³³⁴ Egede, Edwin, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria,' *Journal of African Law*, Vol. 51, No.2 (October, 2007), pp. 249-284.

³³⁵ The Constitution of the Federal Republic of Nigeria 1999 provides that:

12(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation,

Civil liberties have been employed by the judicial system to incorporate medical treatment of prisoners under the custody of prison authorities in Nigeria. For example, four mentally ill prisoners incarcerated at the notorious Kirikiri maximum security prison in Lagos, were held to have had their personal dignity violated and were ordered to be transferred to a psychiatric hospital by a Federal High Court in compliance with sections 7 and 8 of the Prisons Act.³³⁶ Nigerian courts and lawyers utilized the civil liberties provisions of the Banjul Charter to effectively cushion the repressive decrees under military rule from 1983 to 1999. In 2003, a Federal High Court ruled that the federal government of Nigeria was mandated by Article 16(2) of the African Charter on Human and Peoples' Rights to provide medical care to four prisoners who were HIV positive.³³⁷ Nigerian courts are definitely well equipped to evaluate whether socioeconomic policies of government comply with the requirements under a proposed constitutional amendment transforming nonjusticiable Chapter II provisions of the 1999 Constitution into justiciable socioeconomic rights. Nigerian courts have a remarkable record of jealously guiding existing justiciable civil and political rights provisions under Chapter IV of the previous 1979 and the existing 1999 Constitutions.³³⁸

3.4. *Locus Standi*

Ease of access to the court is vital for the enforcement of human rights. It has been much easier

³³⁶Ishmael Azubuike & 3 Others v. Attorney-General of the Federation & 3 Others, unreported Suit No. FHC/PH/CS/679/2003, Justice R.O. Nwodo, Port Harcourt Division, judgment delivered on 23 February, 2004, cited in Odinkanlu, Chidi Anselm, 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights', in Gauri, Varun and Brinks, Daniel M. (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, (Cambridge: Cambridge University Press, 2008), pp. 183-223 at p. 214.

³³⁷Festus Odafe & 3Others v. Attorney General of the Federation & 3 Others, Suit No. FHC/PH/CS/680/2003, cited in Odinkanlu, Chidi Anselm, *ibid.* at p. 213

³³⁸Abacha v. Fawehinmi (2000) 6 NWLR (Pt. 660) 228 S.C.; Shugaba Darman v. Federal Minister of Internal Affairs (1981) 2NCLR 459; Bishop Olubunmi Okojie v. Attorney-General of Lagos State (1981) 1 NCLR 218; Attorney-General Imo State v. Ukaegbu (1981) 2 NCLR 568; Governor of Lagos State & Others v. Chief Odumegwu Ojukwu & Another (1986) 1 NWLR (Part 18) 621.

for class action cases relating to socioeconomic rights to be filed against Nigeria at the African Commission on Human and Peoples' Rights and at the Economic Commission for West Africa States Court of Justice than within Nigeria. This is because of the highly restrictive approach to right of access to the court in Nigeria, which is also compounded by the fact that socioeconomic rights are nonjusticiable under Chapter II provisions on Fundamental Objectives and Directive Principles of State Policy contained in the 1999 Constitution of the Federal Republic of Nigeria.

The Nigerian Supreme Court case of *Abraham Adesanya v. President of the Federal Republic of Nigeria* has become the definite authority on right of access to court or *locus standi* in Nigeria. The decision was handed down by the Nigerian Supreme Court in 1981. The precedent established by the case, requires an individual to disclose an interest which is personal to him or her before such an individual can be granted locus standi in a court of law in Nigeria.³³⁹ The decision has effectively shut the door against public interest litigation or class actions in Nigeria.³⁴⁰ Public interest litigation in India and class action in South Africa have utilized socioeconomic rights litigation to improve accountability of their governments in the allocation of scarce resources. The South African Constitution enables broad access to court and a more relaxed *locus standi*, as opposed to Nigeria's Constitution.

Nigerian courts, unlike Indian and South African courts, have been very conservative in granting access to court, and a nexus entailing personal interest must be the foundation of any claim filed in court. "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

³³⁹ [1981] 1 NCLR, 358.

³⁴⁰ Ogowewo, Tunde I. 'Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of a Law of Standing to Sue in Nigeria', Brook. J. Int'l L. Vol. 26. (2000-2001), pp.527-590; Ogowewo, Tunde I. 'The Problem with Standing to Sue in Nigeria', Journal of African Law, Vol. 39, No.1 (1995), pp. 1-18.

case and this must be personal interest ‘over and above’ those of the general public. This has been a major hurdle for groups desirous of bringing public interest cases before Nigerian courts.”³⁴¹ Since 2010, Access to Justice, a nongovernmental organization in Nigeria, and the Section on Public Interest and Development (SPIDEL) of the Nigerian Bar Association (NBA) have both been in partnership at the forefront of efforts to introduce public interest litigation into Nigeria and reduce the *locus standi* threshold access to Nigerian courts.³⁴² But leadership changes in the various sections of the NBA have led to a fizzling out of the SPIDEL initiative.³⁴³

3.5. The Supreme Court of Nigeria and Socioeconomic Rights

I highlighted earlier in section 3.3, that in the absence of justiciable socioeconomic rights in the Nigerian Constitution, lawyers made recourse to the African Charter on Human and Peoples’ Rights to secure the health of prisoners, as a subsidiary claim based on a primary claim of justiciable civil liberties. Under military rule, when civil liberties were suspended, lawyers employed the civil liberty provisions of the Charter to secure civil liberties. The Nigerian

³⁴¹ Ibe, Stanley, ‘Beyond justiciability: Realising the promise of socio-economic rights in Nigeria,’ *African Human Rights Journal*, (Volume 7, No.1, 2007), pp. 225-248, at p. 237.

³⁴² At a one day workshop for lawyers at Asaba, Delta State, Nigeria, in March 2010, the Chairperson of SPIDEL, Chief Joe-Kyari Gadzama (SAN), stated that: “we looked [at] the limitations, the problems of Locus standi, then we looked at chapter two of the constitution, which is not justiciable. We seek what we can do about it so that people can push their rights to economic emancipation, empowerment, social rights, cultural rights and so on as it is done in other countries such as India, Pakistan, South Africa and in other jurisdictions.” John Austin Unachukwu, ‘SPIDEL, others canvass public interest litigation,’ *The Nation*, Lagos, March 16, 2010, <http://thenationonlineng.net/web2/articles/39740/1/SPIDEL-others-canvass-public-interest-litigation/Page1.html> (accessed on March 18, 2012)

³⁴³ “The President of the NBA Joseph Bodunrin Daudu SAN on 30th of March 2011 inaugurated new Governing Bodies for the Section of Business Law, Section on Public Interest and Development Law, Women’s Forum and Young Lawyers Forum. The inauguration is coming shortly after the dissolution of the old Governing Councils of SBL and SPIDEL by the National Executive Committee of the NBA. The former Governing Councils of the SBL and SPIDEL were dissolved as a result of a disconnect between those sections and their parent body the NBA.” ‘New Governing Councils for Section on Business Law, Section on Public Interest and Development Law, Women’s Forum and Young Lawyers Forum,’ April 1, 2011, <http://www.nba.org.ng/web/news/2011/04/01/new-governing-councils-for-section-on-business-law-section-on-public-interest-and-development-law-womens-forum-and-young-lawyers-forum-inaugurated.html> (accessed on March 18, 2012)

Supreme Court has always maintained the supremacy of the Nigerian Constitution over domestic legislation and treaties entered into by the Nigerian State. This is premised on Section 1 of the 1979 and 1999 Constitutions, which both state that “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”; in subsection 3 it goes on to state that: “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and any other law shall to the extent of inconsistency be void.” This section will examine two of the most recent Supreme Court cases dealing with the African Charter on Human and Peoples’ Rights and Chapter II Provisions of the Constitution on Fundamental Objectives and Directive Principles of State Policy.

The case relating to the African Charter on Human and Peoples’ Rights, *Abacha and Others v. Fawehinmi*,³⁴⁴ is important because it is a treaty that provides for both the protection of civil and political rights as well as socioeconomic rights; but it is limited in application because the facts of case did not have a bearing on socioeconomic rights, but dealt with the arbitrary arrest and detention of a human rights lawyer and activist, Chief Gani Fawehinmi, by agents of the military dictator, General Sanni Abacha on January 30, 1996. Nevertheless the Supreme Court analyzed the position of the African Charter on Human and Peoples’ Rights with the 1979 Constitution in *pari materia* with the 1999 Constitution. Ogundare, Justice of the Supreme Court, in his lead judgment on April 28, 2000, held that:

Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap 10 Laws of the

³⁴⁴ (2001) AHLR 172 (NgSC 2000)

Federation of Nigeria 1990 (hereafter is referred to simply as Cap 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organization of African Unity (now African Union) rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions.³⁴⁵ It is very instructive that the Court refers to Chapter IV, which deals with Fundamental Human Rights relating to civil and political rights, and the Court makes no reference to Chapter II on Fundamental Objectives and Directive Principles of State Policy, which pertains to nonjusticiable socioeconomic rights.

Nevertheless the Court laid down the hierarchical status of the Nigerian Constitution vis-à-vis treaties, especially the African Charter on Human and Peoples' Rights, in the following terms:

No doubt Cap. 10 is a statute of with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses "a greater vigour and strength" than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously with respect, was submitted by Mr. Adegboruwa, learned counsel for the Respondent. Nor can its international flavour prevent the National Assembly...from removing it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another Statute necessarily affected by the mere fact that it violates the African Charter or any other treaty. For that matter see: *Chae Chan Ping v. United States* 130 US. 581 where it was held that treaties are of no higher dignity than Acts of

³⁴⁵ Ibid. at paragraph 14

Congress, and may be modified or repealed by Congress in like manner, and whether such modification or repeal is wise or just is not a judicial question.³⁴⁶

Justice Ogundare's position mirrors a large section of judicial opinion in Nigeria, and this is buttressed by the transcript of my interview with a retired justice of the Court of Appeal, Honorable Albert Gbadebo Oduyemi.³⁴⁷ An amendment to enact justiciable constitutionally enforceable socioeconomic rights under the Nigerian Constitution will enable Nigerian judges to adjudicate over infractions of its socioeconomic rights provisions.

The next case for consideration relates directly to the Chapter II provisions of the 1999 Constitution, under a constitutional challenge brought by one of the thirty-six states that comprise Nigeria, against the federal government, with thirty-five states joined as interested parties. In the year 2000, the Corrupt Practices and Other Related Offences Act got passed into law in Nigeria and it became operative on June 13, 2000. On September 29, 2000, the Independent Corrupt Practices Commission (ICPC), a creation of the Corrupt Practices and Other Related Offences Act, was inaugurated by President Olusegun Obasanjo. The ICPC was set up pursuant to section 15(5) of the Chapter II provisions of the Fundamental Objectives and Directive Principles of the 1999 Nigerian Constitution. Section 15(5) provides that: "The State shall abolish all corrupt practices and abuse of power."

As highlighted elsewhere in this dissertation, socioeconomic rights are provided for under the Chapter II provisions of the Fundamental Objectives and Directive Principles of State Policy of the 1999 Constitution of the Federal Republic of Nigeria. Subsection 6(c) of the provisions on judicial powers, provides that judicial powers "shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the

³⁴⁶ Ibid. at paragraph 15

³⁴⁷ Full text of February, 19 & 23, 2012, interview on file with the author.

Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.” Section 4 of the 1999 Constitution provides in subsection 2 that “The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.” Item 60 on the Exclusive Legislative List enumerates: “The establishment and regulation of authorities for the Federation or any part thereof- (a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.” The Ondo State government filed an originating summons on July 16, 2001, in the Supreme Court of Nigeria under the original jurisdiction clause of section 232(1) of the 1999 Constitution of the Federal Republic of Nigeria and sued the attorney general of the Federation, and the other thirty-five states were joined as interested parties.³⁴⁸ Two issues were formulated for determination, and two declarations were also sought, namely,

1. A determination of the question whether or not the Corrupt Practices and Other Related Offences Act, 2000 is valid and as a law enacted by the National Assembly and in force in every State of the Federal Republic of Nigeria (including Ondo State).
2. A determination of the question whether or not the Attorney-General of the Federation (1st defendant) or any person authorised by him can lawfully initiate legal proceedings in any court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the said Corrupt Practices and Other Related Offences Act, 2000.
3. A declaration that the Corrupt Practices and Other Related Offences Act 2000, is not in force as law in Ondo State.

³⁴⁸ Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 N.W.L.R. Part 772, pp. 222-474.

4. A declaration that it is not lawful for the Attorney-General of the Federation (1st defendant) or any person authorised by him to initiate legal proceedings in any court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the Corrupt Practices and Other Related Offences Act, 2000.³⁴⁹

On July 1, 2002, upon the conclusion of the case, the Chief Justice of Nigeria, Muhammadu Lawal Uwais, ruled that the Corrupt Practices and Other Related Offences Act was validly passed, but he annulled two sections of the Act. These were section 26(3), which violated the separation of powers doctrine and amounted to legislative usurpation of judicial powers; and section 35, which authorized indefinite detention violated the liberty provision of the 1999 Constitution. In his analysis of section 15(5) of the Fundamental Objectives and Directive Principles Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria, Uwais (CJN) held that

The ICPC is by the provisions of item 60 (a), to promote and enforce the observance of the Fundamental Objectives and Directive Principles of State Policy as contained under Chapter II of the Constitution. The question is: how can the ICPC enforce the observance? Is it to use force? Is it to legislate or what? The ICPC cannot do either of these because the use of force or coercion in enforcing the observance will require legislation. The ICPC has no power to legislate. Only the National Assembly can legislate. The Constitution of India has similar provisions to ours on Directive Principles of State Policy in Part IV thereof. In the Indian case of *Mangru v. Commissioners of Budge Budee Municipality* (1951) 87 CLJ 369, it was held that the Directive Principles of State Policy require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive neither the State nor an individual can violate any existing law or legal right under the color of following a Directive. See also the *Shorter Constitution of India 12th Edition* by Dr.D.D. Basu at pages 296-297. Since the subject of promoting and enforcing the observance comes under the Exclusive Legislative List it seems to me...incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act which contains provisions in respect of both the establishment and regulation of ICPC and the authority for the ICPC to enforce the observance of the provisions of section 15 subsection (5) of the Constitution. To hold otherwise is to render the provisions of item

³⁴⁹ Ibid. at p. 284.

60 (a) idle and leave the ICPC with no authority whatsoever. This cannot have been the intendment of the Constitution.³⁵⁰

In his concurring judgment, Samson Odemwingie Uwaifo, justice of the Supreme Court observed that

And comparing Fundamental Rights with Directive Principles, Basu makes reference to the Indian Supreme Court case of *State of Madras v. Champakam* (1951) S.C.R. 525 at 531 where it was said that:

‘The Directive Principles of State Policy have to run subsidiary to the Chapter on Fundamental Rights. That is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there can be no objection to the State acting in accordance with the Directive Principles set out in Part IV, but subject again to the Legislative and Executive powers and limitation conferred on the State under different provisions of the Constitution.’

What I have managed to say from the foregoing shows that every effort is made to from the Indian perspective to ensure that the Directive Principles are not a dead letter. Whatever is necessary is done to see that they are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand. I believe this is what has been done in respect of section 15(5) by the present Act.³⁵¹

It would seem that the Nigerian government has not fully accepted the admonitions from Justice Uwaifo to “give expression” to Chapter II provisions of the Constitution. For instance, the social objectives contained under Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria stipulates that “Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.”³⁵² In furtherance of this

³⁵⁰ Ibid. at pp. 304-305.

³⁵¹ Ibid. at p. 391.

³⁵² Section 18(1), Constitution of the Federal Republic of Nigeria, Federal Government Press, Mobil Road, Apapa, Lagos; the Constitution also states in: Section 18 (2) Government shall promote science and technology

18(3) Government shall strive to eradicate illiteracy; and to this end Government shall as when practicable provide-

(e) free, compulsory and universal primary education;

policy on education, the Nigerian government enacted the Compulsory Free Universal Basic Education Act in May 2004, and it came into force on May 26, 2004. But as I highlight in section 4.4, the Nigerian government has shirked its responsibilities under the Compulsory Free Universal Basic Education Act, arguing that its provisions are nonjusticiable courtesy of the nonjusticiable status of socioeconomic rights under the 1999 Constitution.

3.6. What Constitutional Framework Is representative of the Aspirations of Nigerians?

The first decade of Nigeria's present democratic experience under the 1999 Constitution has opened nationwide and widespread demands for constitutional amendments. One of the demands is for the abrogation of section 6(6)(c) of the Constitution, which debars the judiciary from adjudicating upon socioeconomic rights contained in the Chapter II provisions on Fundamental Objectives and Directive Principles of State Policy. Further, there is also the urgent demand that socioeconomic rights must be made constitutionally justiciable to address the dire and precarious nature of socioeconomic rights in Nigeria.³⁵³

A document that authoritatively expresses the common will of the Nigerian people devoid of overbearing colonial influence or military coercion was the *Memorandum Submitted*

-
- (f) free secondary education;
 - (g) free university education; and
 - (h) free adult literacy programme.

³⁵³ Atsenuwa, Ayodele, 'Between Chapter Two and Chapter Four of the 1999 Constitution: Justifying Economic, Social and Cultural Rights in Support of Civil and Political Rights,' in Azinge, Epiphany and Owasanoye Bolaji (eds.), *Justiciability and Constitutionalism: An Economic Analysis of Law*, (Lagos: Nigerian Institute of Advanced Legal Studies, 2010), pp. 215-242; Dakas CJ Dakas, 'A Panoramic Survey of the Jurisprudence of Indian and Nigerian Courts on the Justiciability of Fundamental Objectives and Directive Principles of State Policy,' in Azinge, Epiphany and Owasanoye Bolaji (eds.), *Justiciability and Constitutionalism: An Economic Analysis of Law*, (Lagos: Nigerian Institute of Advanced Legal Studies, 2010), pp. 262-323.

by the Delegations to the Ad Hoc Conference on Constitutional Proposals for Nigeria.³⁵⁴ The part relevant for the current analysis is titled “Social Objectives.”³⁵⁵

SOCIAL OBJECTIVES

7. In the field of education, it should be provided in the constitution:

1. that within 2 years, post-secondary education of any kind whatsoever shall be free to all who are capable of pursuing, and benefitting from, this type of education;
2. that free and compulsory primary education and free post-primary education shall be introduced throughout the Federation within 5 years;
3. that a scheme for compulsory adult education, including functional literacy, the equivalent of primary and secondary education for adult, agricultural, commercial and industrial extension, and liberal adult education, shall be introduced within 5 years;
4. that a scheme for the provision of suitable literature for literate adults shall be introduced within 5 years:

Note: For the avoidance of misunderstanding, instructions to adults are usually given in the evening, after the day’s work; or at such other times as may be convenient to adults in a particular locality.

8. In the field of health, there should be provisions in the constitution to the following effect:

1. that free medical treatment shall be available to all within 5 years;

³⁵⁴ MEMORANDUM SUBMITTED BY THE DELEGATIONS TO THE AD HOC CONFERENCE ON CONSTITUTIONAL PROPOSALS FOR NIGERIA, (Apapa, Lagos: Nigerian National Press Limited, 1966).

³⁵⁵ Sections 7 and 8 on education and healthcare respectively, Ibid. at pp. 37-38.

2. that a scheme whereby the production of medical practitioners will reach, within fifteen years, a target of 1 doctor to at least 2,000 people, shall be introduced annually or quinquennially; and
3. that within 5 years such preventive measures as will improve the health of the Nigerian communities, namely: improved sanitation, nutrition, inoculation against infectious diseases, such as tuberculosis, measles, typhoid, and smallpox, will be implemented.³⁵⁶

The fundamental objectives and directive principles of state policy Chapter II provisions of the 1999 Constitution are similar to some of the above provisions. Constitutionally enforceable Chapter II provisions of the 1999 Constitution will reflect the aspirations and yearnings of Nigerians, thereby representing the authentic will of the people.

Conclusion

This chapter shows conclusively that there is widespread support in Nigeria for constitutionally justiciable socioeconomic rights. Nigerian courts, unlike Indian and South African courts, have been very conservative in granting access to court, and a nexus entailing personal interest must be the foundation of any claim filed in court. The common will of the Nigerian people devoid of overbearing colonial influence or military coercion was comprehensively expressed by the 1966 *Memorandum Submitted by the Delegations to the Ad Hoc Conference on Constitutional Proposals for Nigeria*. The memorandum demanded in unequivocal terms constitutionalized and justiciable socioeconomic rights. Justiciable socioeconomic rights will certainly make government socioeconomic policies in Nigeria accountable under the scrutiny of a constitutionally empowered judiciary that can adjudicate over socioeconomic rights. This process will greatly complement existing mechanisms of accountability in Nigeria. A

³⁵⁶ Ibid. at pp. 40-41.

constitutionally guaranteed and relaxed right of access to courts in Nigeria is also required for aggrieved citizens to contribute to the accountability matrix of public governance.

CHAPTER FOUR
THE INTERNATIONAL JURISPRUDENCE OF SOCIOECONOMIC RIGHTS
APPLICABLE IN NIGERIA

4.0. Introduction

In this chapter I show the salience of socioeconomic rights at the United Nations, the African Union, and the Economic Community of West African States that are applicable to Nigeria as a member of these international bodies. Section 4.1 briefly traces the theoretical debates on whether socioeconomic rights are fundamental rights, like civil and political rights. Section 4.2 subsequently analyzes the General Comments jurisprudence of the committee set up by the International Covenant on Economic, Social and Cultural Rights. Section 4.3 then proceeds to examine the socio-economic jurisprudence of the African Commission on Human and Peoples' Rights, and uses the famous SERAC decision against Nigeria on socioeconomic rights as a case study. Section 4.4 analyzes the socioeconomic jurisprudence of the Court of Justice of the Economic Community of West African States (ECOWAS) and Nigeria. The chapter concludes that the SERAC decision and ECOWAS Court of Justice jurisprudence on Nigeria conclusively shows that socioeconomic rights can complement existing mechanisms of accountability and ameliorate the accountability deficit of Nigerian public governance by subjecting socioeconomic policies of government to judicial scrutiny.

4.1. Socioeconomic Rights Examined

Theoretical debates about socioeconomic rights focus on a variety of challenging questions. Human requirements for gainful employment, wholesome food, mental and physical health, shelter, and clothing are natural needs just like breathing oxygen to survive. The poor, the young, the elderly and physically and mentally challenged individuals in any given society are

extremely vulnerable in meeting these basic needs. These are some basic human needs or entitlements that are collectively called socioeconomic rights contained in the International Covenant on Economic, Social and Cultural Rights of 1966, which came into force in 1976.³⁵⁷ Legislation is one of the means of actualizing these rights.³⁵⁸ It behooves on the political and socioeconomic arrangements in a particular society to decide how these needs are met.³⁵⁹

Are needs necessarily met through rights entitlements?³⁶⁰ Political actions empower the judiciary to adjudicate over what some viewed previously as political matters.³⁶¹ Maurice Cranston belongs to the school of thought that believes civil and political moral liberties are the real human rights, while socioeconomic needs are merely ideals and aspirations.³⁶² For him, classifying socioeconomic needs as human rights “is to push all talk of human rights out of clear realm of the morally compelling into the twilight world of utopian aspiration.”³⁶³ In modern society, basic education is required at the minimum, to have a functional purpose, because

³⁵⁷ Full text available in Ramcharan, Bertrand, *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*, (Leiden/Boston: Martinus Nijhoff Publishers, 2005), pp.5-16.

³⁵⁸ *Ibid.* at p.22.

³⁵⁹ Reich, Robert B. *Supercapitalism: The Transformation of Business, Democracy and Everyday Life*, (New York: Alfred Knopf, 2007), pp. 123-130; Unger, Roberto, *False Necessity*, (Cambridge: Cambridge University Press, 1987), pp. 508-510; Douzinas, Costas, *The End of Human Rights*, (Cambridge: Hart Publishing, 2000), p. 7.

³⁶⁰ Goldewijk, Berma Klein and Fortman, Bas de Gaay, *Where Needs Meet Rights: Economic, Social and Cultural Rights in a New Perspective*, (Geneva: WCC Publications, 1999), pp.45-54; Tushnet, Mark, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (Princeton: Princeton University Press, 2008), particularly Chapter 8: Enforcing Social and Economic Rights, pp. 227-264; Schwartz, Herman, ‘Do Economic and Social Rights Belong in a Constitution’, 10 *Am. U. J. Int’l L. & Pol’y*, (1994-1995), pp. 1233-1244 and Economic and Social Rights, 8 *Am. U. J. Int’l L. & Pol’y*, (1992-1993), pp. 551-565; Sen, Amartya, ‘Human Rights and Development’, in Andreassen, Bard and Marks, Stephen P. (ed.), *Development as a Human Right: Legal, Political and Economic Dimensions* (2nd edn.), (Antwerp: Intersentia, 2003), pp. 3-11; Liebenberg, Sandra, ‘Making a Difference: Human Rights and Development-Reflecting on the South African Experience’, in Andreassen, Bard and Marks, Stephen P. (ed.), *Development as a Human Right: Legal, Political and Economic Dimensions* (2nd edn.), (Antwerp: Intersentia, 2003), pp. 209-244.

³⁶¹ Vignarajah, Krishanti, ‘The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases’, *The University of Chicago Law Review*, Vol. 77, No. 2 (Spring 2010), pp. 781-845.

³⁶² Cranston, Maurice, ‘Human Rights, Real and Supposed’, in Raphael, D.D. *Political Theory and the Rights of Man*, (Bloomington: Indiana University Press, 1967), pp. 43-53.

³⁶³ *Ibid.* at p. 52.

reading and writing skills are needed to get by in a globalized world. Most countries have adopted compulsory child education to keep children from being exploited and abused in the labor market.

Both negative duties and positive duties are required in the realization of socioeconomic rights. Positive and negative actions with budgetary consequences are equally needed to implement civil and political rights as well.³⁶⁴ This neutralizes the dominant myth of negative restraint on the part of the Leviathan State from invasion of individual liberties. Negative restraint of the state was always proposed by some scholars as the major requirement for the enforcement of civil and political rights.³⁶⁵ But in order to enforce civil and political rights, states need to fund elections, judicial services must be funded; security services must be funded to safeguard free speech and personal security.

There are those who classify socioeconomic rights, like Cranston above, as inferior to civil and political rights. This school of thought believes that grouping socioeconomic rights with civil and political rights under a bill of rights in a constitution would render all rights unenforceable, thereby devaluing already protected civil and political rights. For this class of thinkers, the strategy should be to make socioeconomic rights unenforceable and focus on needs of vulnerable members of society that could be met by executive policies backed by budgetary allocations in line with the separation of powers doctrine. The judiciary should not be empowered to dabble in purely policy and budgetary considerations of the executive arm of

³⁶⁴ “Many civil and political rights such as the rights to vote, equality, freedom of speech and a fair trial also involve questions of social policy and have budgetary implications.” Liebenberg, Sandra, *The Protection of Economic and Social Rights in Domestic Legal Systems*, in Eide, Asbjørn et al (eds.) *Economic, Social and Cultural Rights* (2nd Ed.) (Dordrecht: Martinus Nijhoff Publishers, 2001), pp. 55-84, at p. 58.

³⁶⁵ Cranston, Maurice, ‘Are There Any Human Rights?’ *Daedalus*, Vol. 112, No. 4, *Human Rights* (Fall, 1983), pp.1-17, at p.13

government, whose budget has been passed by the legislative arm.³⁶⁶ This is a strictly formalistic doctrine of separation of powers. This argument is rebutted in sections 4.3 and 4.4 of this chapter by the decisions of the African Commission on Human and Peoples' Rights and the Economic Community of West African States Court of Justice. I also demonstrate, in the next chapter, the capacity of courts in the States of New York, New Jersey, and Kentucky, as well as in India, to adjudicate over the fidelity of socioeconomic policies of government with constitutional mandates. This capacity is further demonstrated by the South African Constitutional Court,, discussed in chapter 6.

No state is neutral, and political arrangements in place are determined by the interests of the dominant political elite, which might not necessarily reflect the common will.³⁶⁷ Infusing positive duties into the matrix of the state's arrangement is primarily a political decision.³⁶⁸ Empowering the courts to guide the infusion process is one of the diverse tools for realizing socioeconomic development in any given society.³⁶⁹ The courts can also innovatively ameliorate poverty in society and empower the downtrodden to access the justice system through "taking suffering seriously."³⁷⁰ "Taking suffering seriously," a term coined by Professor Upendra Baxi, is the Indian approach to public interest litigation developed by its former chief justice, Honorable Justice P.N. Bhagwati.³⁷¹ But Bhagwati "would prefer to call this enterprise as social action litigation rather than Public Interest Litigation."³⁷² South Africa, just like Nigeria, has to

³⁶⁶ Osiatyński, Wictor, *Human Rights and Their Limits*, (Cambridge: Cambridge University Press, 2009,), pp. 105-143.

³⁶⁷ Fredman, Sandra, *Human Rights Transformed*, (Oxford: Oxford University Press, 2009), pp. 18-23.

³⁶⁸ *Ibid.* at pp.65-91.

³⁶⁹ *Ibid.* pp.92-123.

³⁷⁰ Bhagwati, P.N. *Public Interest Litigation*, Lecture Delivered at the Nigerian Institute of Advanced Legal Studies on April 21, 2010, at p.6.

³⁷¹ *Id.*

³⁷² *Id.*

contend with taking poverty seriously.³⁷³ But the South African judiciary, unlike Nigeria's judiciary, has been empowered to address poverty through justiciable constitutionally provided socioeconomic rights. South Africa's highest court has formulated the reasonableness concept to evaluate the efficacy of government policies in the fulfillment of socioeconomic rights, especially with regard to the most vulnerable in society, the poor.³⁷⁴

African countries have had an ambivalent relationship with human rights in their quest for socioeconomic development.³⁷⁵ The negative effects of colonialism and neocolonialism in its shade of globalization have influenced the drafting of an autochthonous African Charter on Human and Peoples' Rights, which places socioeconomic rights on the same level with civil and political rights.³⁷⁶ Are there other ways of meeting basic human needs in society besides the rights entitlement path? Nigeria is an example of the above ambivalence, as its 1960 and 1963 constitutions did not recognize basic needs. But the 1979 and 1999 Nigerian constitutions recognize them as nonjusticiable fundamental objectives and directive principles of state policy.

During World War II, President Franklin Roosevelt of the United States of America delivered his 1944 State of the Union address in the aftermath of over a decade of socioeconomic depression in his country and the horrors of an ongoing war. In his "New Deal," he envisaged adding socioeconomic rights to the American bill of rights, which has remained unfulfilled to

³⁷³ Wilson, Stuart and Duggard, Jackie, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stellenbosch Law Review*, Vol. 22, No. 3, (2011), pp. 664-682.

³⁷⁴ Quinot, Geo and Liebenberg, Sandra, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' *Stellenbosch Law Review*, Vol. 22, No. 3, (2011), pp. 639-664.

³⁷⁵ Baah, Richard Amoako, *Human Rights in Africa: The Conflict of Implementation*, (Lanham, Maryland: University Press of America, Inc., 2000), at pp. 40-41 ; Weinstein, Warren, 'Human Rights and Development in Africa', *Daedalus*, Vol. 112, No. 4. (Fall, 1983), pp. 171-196.

³⁷⁶ Mutua, Makau, 'The Banjul Charter: The Case for an African Cultural Fingerprint', in An-Na'im, Abdullahi A. (ed.), *Cultural Transformation and Human Rights in Africa*, (New York: Zed Books Ltd, 2002), pp. 68-107.

this day.³⁷⁷ But various educational, health, and social security programs exist at both state and federal levels in the United States.³⁷⁸ The courts have even ruled against the exclusion of children of illegal immigrants from state-funded education.³⁷⁹ In his 1944 address, President Roosevelt stated that:

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.

“Necessitous men are not free men.” People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident.

We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.³⁸⁰

In the aftermath of World War II, the victorious allied powers on June 26, 1945 appended their signatures in San Francisco to the Charter of the United Nations, and it came into force on

³⁷⁷ Tushnet, Mark, *Taking the Constitution Away from the Courts*, (Princeton, New Jersey: Princeton University Press, 1999), pp. 169-172.

³⁷⁸ Sager, Lawrence G. *Justice in Plainclothes: A Theory of American Constitutional Practice*, (New Haven: Yale University Press, 2004), pp. 95-102.

³⁷⁹ *Plyler v. Doe* 457 U.S. 202 (1982).

³⁸⁰ Woods, Jeanne M. and Lewis, *Human Rights and the Global Marketplace: Economic, Social, and Cultural Dimensions*, (Ardsley, NY: Transnational Publishers, 2005), at pp. 76-77.

October 24, 1945.³⁸¹ Egypt, Ethiopia, Liberia, and a white-led South Africa were the only African countries represented in San Francisco, others were still colonies.³⁸² In the nineteenth century, there had been international law abolition of slave trade, international law treatment of aliens. In the early twentieth century, the status of minorities was the focal point of international law and the International Labour Organization fought for the right of workers.³⁸³

The United Nations Charter is definitely not the origin of international concern with human rights law.³⁸⁴ To begin with, Louis B. Sohn persuasively establishes centuries-old international law traditions in Europe, dating back to the inception of international law, which privileged citizens of states, who indirectly benefited from the rule that a harm done to a citizen was done to its state, which could then claim reparation on behalf of the citizen.³⁸⁵ Article 1 of the United Nations Charter of 1945 states among its purposes, the promotion and respect for human rights.³⁸⁶ Chapter IX of the Charter of the United Nations mandates the organization to promote both civil and political rights, as well socioeconomic rights.³⁸⁷

4.2. International Covenant on Economic, Social, and Cultural Rights

January 3, 1976 was the day the thirty-fifth country ratified the International Covenant on Economic, Social and Cultural Rights, which made the United Nations' multilateral treaty come into force.³⁸⁸ Divisions still existed in 2006, when Article 14 of the Optional Protocol of the

³⁸¹ Full text available at: <http://www.un.org/en/documents/charter/intro.shtml>

³⁸² Adegbite, Latif. O. 'African attitudes to the international protection of human rights', in Eide, Asbjörn and Schou, August, (eds.), *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium Oslo, September 25-27, 1967*, (New York: Interscience Publishers, 1968), pp. 69-81, at p.69.

³⁸³ Addo, Michael K. *The Legal Nature of International Human Rights*, (Leiden: Martinus Nijhoff, 2010), at pp. 146-147.

³⁸⁴ Ibid. at pp. 139-144.

³⁸⁵ Sohn, Louis B. 'The New International Law: Protection of the Rights of Individuals rather than States', 32 *Am. U.L. Rev.* 1 (1982-1983), pp. 1-64, at pp. 1-9.

³⁸⁶ Ramcharan, Bertrand, G. *The Fundamentals of International Treaty Law*, (Leiden: Martinus Nijhoff Publishers, 2011), at p.20.

³⁸⁷ See Articles 55-60, full text available at: <http://www.un.org/en/documents/charter/chapter9.shtml>

³⁸⁸ Craven, Mathew C.R. *The International Covenant on Economic, Social, and Cultural Rights*, (Oxford: Clarendon Press, 1995), p.1.

ICESCR was being drafted with regard to the binding nature of extraterritorial international assistance and cooperation, where countries do not possess the resources to meet the socioeconomic needs of their citizens. This was a throwback to the unresolved extraterritorial international assistance and cooperation implications of Articles 2(1), 11, 15, 22, and 23 of the ICESCR.³⁸⁹ In Canada's reading of Article 14, extraterritorial international assistance and cooperation was one of a nonlegal moral obligation. The interpretation of Article 14 of the Optional Protocol by the United Kingdom, Netherlands, Spain, and Sweden was: "that the State had the primary responsibility to implement its obligations."³⁹⁰

On the other hand, South Africa, India, Nigeria, and the African team led by Egypt "emphasized again, the legally binding character of international assistance and cooperation."³⁹¹ A similar controversy surrounds the socioeconomic provisions of Article 4 of the Convention on the Rights of the Child, which is a carbon copy of Article 2(1) of the ICESCR.³⁹² The United Nations Human Rights Council adopted the Optional Protocol to the ICESCR on June 18, 2008.³⁹³ The United Nations General Assembly adopted the Optional Protocol to the ICESCR on December 10, 2008, and it was opened for signature in 2009.³⁹⁴ Nigeria acceded to the ICESCR on July 29, 1993, India on April 10, 1979, while South Africa signed on October 3, 1994.³⁹⁵

It must be noted that between 1981 and 2011, the Human Rights Committee of the International Covenant on Civil and Political Rights (CCPR) issued thirty-four general comments interpreting the normative contents of numerous articles of the CCPR.³⁹⁶ Some of

³⁸⁹ Gondek, Michal, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties*, (Antwerp: Intersentia, 2009), pp.295-297.

³⁹⁰ Ibid. p. 331

³⁹¹ Ibid. p. 332.

³⁹² Ibid. p.297.

³⁹³ Resolution 8/2. <http://www2.ohchr.org/english/bodies/cescr/> (accessed on April 23, 2011).

³⁹⁴ Resolution A/RES/63/117 <http://www2.ohchr.org/english/bodies/cescr/> (accessed on April 23, 2011).

³⁹⁵ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed on 12 April, 2011).

³⁹⁶ <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (accessed on April 22, 2012)

these comments have a direct bearing on socioeconomic rights. For instance, General Comment 17, which interpreted Article 24 of the CCPR on the rights of the child, declared that “For example, every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children...”³⁹⁷ Similarly, General Comment 28 on Article 3 of the CCPR issued on March 29, 2000, at the sixty-eighth session of the Human Rights Committee, stated that “The obligation of State parties to protect children (art. 24) should be carried out equally for boys and girls. State parties should report on measures taken to ensure that girls are treated equally to boys in education, in feeding and in health care...”³⁹⁸

On January 8, 1987, the Economic and Social Council of the United Nations released a report of experts, which became one of the first set of modern normative baselines for countries to realize the socioeconomic rights listed in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The experts focused on problems encountered by developing countries in achieving socioeconomic rights. Their report is famously referred to as the Limburg Principles.³⁹⁹ The International Commission of Jurists; the Urban Morgan Institute for Human Rights of University of Cincinnati, Ohio; the United States; and the Faculty of Law of the University of Limburg in Maastricht, the Netherlands, jointly assembled the group of experts at Maastricht from June 2-6, 1986. They considered “...the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties Reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation

³⁹⁷ Paragraph 3, General Comment 17, Thirty-fifth session, 1989,
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument)
 (accessed on April 22, 2012)

³⁹⁸ Paragraph 28, General Comment 28, March 29, 2000,
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument)
 (accessed on April 22, 2012)

³⁹⁹ UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17, available at:
<http://www.unhcr.org/refworld/docid/48abd5790.html> [accessed 24 April 2012]

under Part IV of the Covenant.”⁴⁰⁰ There were twenty-nine experts from different parts of the world, with one from Africa, and with Asia and South America unrepresented.⁴⁰¹

The different organizations that formulated the Limburg Principles, marked its tenth anniversary on January 22-26, 1997, with a follow-up meeting at Maastricht. The thirty-three experts were predominantly from Western Europe and the United States.⁴⁰² They came up with thirty-two set of guidelines known as the Maastricht Guidelines.⁴⁰³ Interestingly the United Nations High Commissioner for Refugees website, where I accessed the Maastricht Guidelines, put up a disclaimer on its site with regard to the Guidelines.⁴⁰⁴ The Maastricht Guidelines highlighted the legal obligations of states parties to the International Covenant on Economic, Social and Cultural Rights, to respect, protect, and fulfill the enumerated rights just as with their civil and political rights legal obligations.⁴⁰⁵

Progressive realization of full enjoyment of socioeconomic rights dependent on judicious

⁴⁰⁰ Ibid. at p. iv.

⁴⁰¹ “The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization, the Commonwealth Secretariat, and the sponsoring organizations. Four of the participants were members of the ECOSOC Committee on Economic, Social and Cultural Rights.” Ibid. p. iv.

⁴⁰² ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,’ Human Rights Quarterly, Vol. 20 (1998), pp. 691-704, at pp. 702-704.

⁴⁰³ International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, available at: <http://www.unhcr.org/refworld/docid/48abd5730.html> [accessed 24 April 2012]

⁴⁰⁴ “This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.” Id.

⁴⁰⁵ “Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States; the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation. Ibid. Guideline 6.

and reasonable expenditure of available resources is the requisite state obligation of states parties to the International Covenant on Economic, Social and Cultural Rights. They must respect, protect, and fulfill the enumerated rights under the International Covenant on Economic, Social and Cultural Rights. The only exception to non-fulfillment of socioeconomic rights by a state is a proven lack of resources. The concerned state must prove that limited resources are hampering its best attempts to respect, protect and fulfill socioeconomic rights. Accession to a treaty is recognized by the Vienna Convention on Treaties as one of the means by which a state becomes bound by the contents of a treaty.⁴⁰⁶ Nigeria, through accession on July 29, 1993, became a state party to the International Covenant on Economic, Social and Cultural Rights.⁴⁰⁷ Therefore, Nigeria is morally obliged to pursue policies that do not detract from the Covenant and strive to progressively realize socioeconomic rights within its territory through the judicious use of available resources. For a treaty to be legally binding upon dualist Nigeria, it must domesticate it, as I explained in the previous chapter.⁴⁰⁸ Nigeria has not domesticated the Covenant; therefore it is not legally bound by its provisions.⁴⁰⁹

The Committee on Economic, Social and Cultural Rights was created in May 1986, and it is comprised of eighteen members nominated by states' parties to the International Covenant on

⁴⁰⁶ Article 15, full text available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed on February 18, 2013).

⁴⁰⁷ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed on February 18, 2013)

⁴⁰⁸ The Constitution of the Federal Republic of Nigeria 1999 provides that:

12(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation,

⁴⁰⁹ Egede, Edwin, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria,' *Journal of African Law*, Vol. 51, No.2 (October, 2007), pp. 249-284.

Economic, Social and Cultural Rights (CESCR) for a term of four years.⁴¹⁰ Half of the membership seats were due to be filled in 2012, based on the Economic and Social Council (ECOSOC) Resolution 1985/17 of May 28, 1985.⁴¹¹ The Committee is expected to meet for a minimum of three times in a year with alternating meetings in Geneva and New York offices.⁴¹² The Committee also considers states' reports under Articles 16 and 17 of the CESCR.⁴¹³ Its forty-fourth and forty-fifth sessions took place in 2010.⁴¹⁴ The Committee on Economic, Social and Cultural Rights from 1989 to 2009, issued twenty-one general comments clarifying the norms of various articles of the CESCR.⁴¹⁵ The Committee has essentially played the role of norm clarification, as well as making clear what to expect from the socioeconomic rights provided for by the CESCR. Alston, a former chairman of the Committee elaborated upon the norm clarification role of the Committee.⁴¹⁶ In addition, the thirty-five thematic Fact Sheets issued from June 1996 to August 2010, by the Office of the High Commissioner for Human Rights of the United Nations in Geneva, have sought to clarify and publicize both civil and political rights as well as socioeconomic rights to a wider audience than lawyers, diplomats, and academics.⁴¹⁷

General Comment 1 of 1989 addressed the reporting procedure of states' parties'

⁴¹⁰ Alston, Philip, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights,' Human Rights Quarterly, Vol. 9, No. 3 (Aug., 1987), pp. 332-381.

⁴¹¹ Election of the Members of the Committee of Economic, Social and Cultural Rights to replace those whose terms are due to expire on 31 December 2012,
<http://www2.ohchr.org/english/bodies/cescr/elections2012.htm> (accessed on May 1, 2012)

⁴¹² Office of the High Commissioner for Human Rights,
<http://ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1985-17.doc> (accessed on May 1, 2012)

⁴¹³ Committee on Economic, Social and Cultural Rights Sessions,
<http://www2.ohchr.org/english/bodies/cescr/sessions.htm> (accessed on May 1, 2012)

⁴¹⁴ Committee on Economic, Social and Cultural Rights: Report on the forty-fourth and fifty-fifth sessions, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/422/91/PDF/G1142291.pdf?OpenElement> (accessed on May 1, 2012)

⁴¹⁵ <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed on April 22, 2012).

⁴¹⁶ Alston, Philip, 'The Committee on Economic, Social and Cultural Rights', in Alston, Philip (ed.) The United Nations and Human Rights: A Critical Appraisal, (Oxford: Clarendon Press, 1992), pp., 473-508 at pp.490-496.

⁴¹⁷ <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx> (accessed on April 23, 2012)

compliance with the provisions of the CESC, and it formulated seven objectives necessary to attain compliance.⁴¹⁸ The first objective required a state party within two years of the CESC coming into force in its territory, to bring domestic legislation, rules, and procedure in tandem with provisions of the CESC. The second objective is for the state party to monitor compliance and realization of the rights provided by the CESC within its territory, by striving toward addressing regional and group deficiencies; and if national resources are inadequate, international assistance must be sought in data collection and remedial measures to attain maximum realization of socioeconomic rights by its citizens. The third objective is to develop a time-specific plan to remedy the deficiencies realized in the nonrealization of socioeconomic rights by the state party.

A fourth objective of the reporting process is to involve members from a wide spectrum of representative interest groups in society, in the critique and formulation of proactive plans to remedy socioeconomic deficits in the state party. A fifth objective is to set goals or benchmarks on which to assess state performance: “Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction in infant mortality, the extent of vaccination of children, the intake of calories per person...”⁴¹⁹ The Committee emphasized a qualitative and quantitative progressive data-based realization of socioeconomic rights over a time scale, which demonstrates their evidentiary concrete realization in the assessment of a state party’s performance.⁴²⁰ The sixth objective is the identification of obstacles hindering a state party seriously committed to realizing socioeconomic rights from their effective realization, and the formulation of remedial policies to overcome the identified obstacles.⁴²¹ The last objective is for state parties to share their varied experiences and improve on domestic and international

⁴¹⁸ General Comment 1 of February 24, 1989,
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/38e23a6ddd6c0f4dc12563ed0051cde7?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/38e23a6ddd6c0f4dc12563ed0051cde7?Opendocument)
(accessed on April 22, 2012)

⁴¹⁹ Ibid. paragraph 6.

⁴²⁰ Ibid. paragraph 7.

⁴²¹ Ibid. paragraph 8.

remedial policies to attain socioeconomic rights in their respective countries.⁴²²

General Comment 2, issued on February 2, 1990, interpreted Article 22 of the CESCR on international assistance, and it elaborated on a default mechanism of technical international assistance mobilized by the Economic and Social Council from the various bodies of the United Nations. Those bodies were also advised to follow the lead of the United Nations Development Program in factoring in human rights in the pursuit of economic growth and refrain from involvement with projects that would violate human rights. Rather they should be participate in programs and projects that promote and fulfill human rights.⁴²³ “As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular.”⁴²⁴

General Comment 3 dealt with the minimum core concept. Essentially this was an interpretation of Article 2(1) of the CESCR, which provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In its interpretation the Committee stated that from its decade-long experience as at 1990, there was a minimum core threshold a country must meet to fulfill the conditions of Article 2(1):

In order for a State Party to be able to attribute its failure to meet at least its minimum core obligation to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁴²⁵

⁴²² Ibid. paragraph 9.

⁴²³ General Comment 2, February 2, 2012,
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3659aaf3d47b9f35c12563ed005263b9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3659aaf3d47b9f35c12563ed005263b9?Opendocument)
(accessed on April 22, 2012)

⁴²⁴ Ibid. paragraph 8(a)

⁴²⁵ Paragraph 10, reproduced in Eide, Asbjørn ; Krause, Catharina and Rosas, Allan, Economic, Social and Cultural Rights, second (ed.) (Dordrecht: Martinus Nijhoff Publishers, 2001), pp.618-621, at p.620

This interpretation of the minimum core concept would prove very useful to the Nigerian judiciary when socioeconomic rights become constitutionally enforceable in Nigeria. The Nigerian judiciary will be able to subject public socioeconomic policies to Constitutional requirements of accountability.

In extraterritorial terms, the Committee interpreted international obligations of States parties to the CESCR to mean:

A final element of article 2(1), to which attention must be drawn, is that the undertaking given by all States parties is ‘to take steps, individually and through international assistance and cooperation, especially economic and technical ...’ The Committee notes that the phrase ‘to the maximum of its available resources’ was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), [discussed in section 4.5 below] to some of the opportunities and responsibilities that exist in international cooperation. Article 23 also specifically identifies ‘the furnishing of technical assistance’ as well as other activities, as being among the means of ‘international action for the achievement of the rights recognized....’⁴²⁶

General Comment 3 is in tandem with the nonjusticiable economic objective of the 1999 Nigerian Constitution to “harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy.”⁴²⁷

General Comment 4, issued on December 13, 1991, interpreted the right to housing component of Article 11(1) of the CESCR.⁴²⁸ Housing is also a nonjusticiable economic objective under the 1999 Nigerian Constitution.⁴²⁹ But in the next section I will elaborate upon Nigeria’s housing obligations through the SERAC case. General Comment 5, issued in 1994, elaborated upon the application of the specific provisions of the CESCR to persons with

⁴²⁶ Paragraph 13, full text available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En) (accessed on May 18, 2009).

⁴²⁷ Section 16(1)(a)

⁴²⁸ [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument) (accessed on April 22, 2012)

⁴²⁹ Section 16(2)(d)

disabilities.⁴³⁰ The “welfare of the disabled” is also a nonjusticiable economic objective under the 1999 Nigerian Constitution.⁴³¹ General Comment 6 of 1995 deals with the economic, social, and cultural rights of elderly persons.⁴³² “Old age care and pensions” is also a nonjusticiable economic objective under the 1999 Nigerian Constitution.⁴³³ General Comment 7, issued in 1997, examined Article 11(1) of the CESCER in respect of right to housing and freedom from forced evictions. The State must not engage in forced evictions.⁴³⁴ I will evaluate Nigeria’s obligations not to engage in forced evictions under the CESCER and the African Charter on Human and Peoples Rights in the next section on the SERAC case. “Moreover, this approach is reinforced by article 17.1 of the International Covenant on Civil and Political Rights which complements the right not to be forcefully evicted without adequate protection.”⁴³⁵ General Comment 8 of 1997 stated that unilateral, regional, and multilateral economic sanctions must be designed not to affect socioeconomic rights of citizens of targeted countries.⁴³⁶

General Comment 9 issued on December 3, 1998, goes to the heart of this dissertation: it addresses the domestic application of the CESCER. Nigeria would be at an advantage if it domesticated the CESCER into its domestic legal regime. But the section 6(6)(c) provision in Nigeria’s Constitution, which renders socioeconomic rights nonjusticiable, must be amended or

⁴³⁰ [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument) (accessed on April 22, 2012)

⁴³¹ Section 16(2)(d)

⁴³² [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/482a0aced8049067c12563ed005acf9e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/482a0aced8049067c12563ed005acf9e?Opendocument) (accessed on April 22, 2012) “...includes access to adequate food, water, shelter, clothing and healthcare...older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse...” Ibid. paragraph 5.

⁴³³ [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/482a0aced8049067c12563ed005acf9e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/482a0aced8049067c12563ed005acf9e?Opendocument) (accessed on April 22, 2012) “...includes access to adequate food, water, shelter, clothing and healthcare...older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse...” Ibid. paragraph 5.

⁴³⁴ [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/959f71e476284596802564c3005d8d50?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/959f71e476284596802564c3005d8d50?Opendocument) (accessed on April 22, 2012)

⁴³⁵ Ibid. paragraph 8.

⁴³⁶ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G97/197/19/PDF/G9719719.pdf?OpenElement> (accessed on April 22, 2012)

abrogated as analyzed in the previous chapter.⁴³⁷ States have a duty to give effect the provisions of the CESCRR at the domestic level.⁴³⁸ The domestic legal order must enable citizens' access to effective remedies in respect of violations of the CESCRR.⁴³⁹ "Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law."⁴⁴⁰ Administrative remedies can be utilized to realize socioeconomic rights, and where they do not suffice judicial remedies can be employed.⁴⁴¹

The debate over the relative ease of the judicial remedies in civil and political rights as opposed to the constraints of applying resource allocation implications of adjudicating socioeconomic rights is also addressed by General Comment 9, though it also refers to General Comment 3 above. It observed:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁴⁴²

⁴³⁷ Section 9 (2) of the 1999 Constitution of the Federal Republic of Nigeria provides for such amendment which "shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States." A greater percentage of votes are required for amending the fundamental human rights provisions in Chapter four and for the creation of new states as well as boundary adjustments.

⁴³⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/148/36/PDF/G9814836.pdf?OpenElement> (accessed on April 22, 2012) paragraphs 1-3.

⁴³⁹ Ibid. paragraphs 4-8.

⁴⁴⁰ Ibid. paragraph 8.

⁴⁴¹ Ibid. paragraph 9.

⁴⁴² Ibid. paragraph 10.

This clarification reinforces the argument of my dissertation that courts are well equipped to adjudicate over the constitutionality and soundness of government's socioeconomic policies. The same competencies required in adjudication over civil and political rights that implicate budgetary expenditures also apply to adjudication over socioeconomic rights.

General Comment 11, issued on May 10, 1999, clarified Article 14 of the CESCR, on the provision of compulsory primary education; in addition, it referred to complementary provisions of the Convention on the Rights of the Child of November 20, 1989, which entered into force on September 2, 1990. General Comment 11 bemoaned the failure of several states to formulate concrete plans for provision of free and compulsory primary education within two years of becoming parties of CESCR.⁴⁴³ It observed that: "The right to education, recognized in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties...is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights."⁴⁴⁴ Article 10 of Elimination of Discrimination Against Women (CEDAW) guarantees equal treatment and opportunities in education for both female and male children.⁴⁴⁵ A child is defined as every human being under the age of eighteen by Article 1 of the Convention on the Rights of the Child (CRC).⁴⁴⁶ Article 28 of the CRC mandates the provision of free and compulsory primary education for children.⁴⁴⁷ General Comment 11, implicates the noncompliance by Nigeria with the decisions of the Economic Community of West Africa States, discussed in section 4.4 below, which ordered Nigeria to implement the provisions of the 2004 Compulsory Free Universal

⁴⁴³ Paragraph 1, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/422/76/PDF/G9942276.pdf?OpenElement> accessed on April 23, 2012).

⁴⁴⁴ Ibid. paragraph 2.

⁴⁴⁵ <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article10>

⁴⁴⁶ <http://www2.ohchr.org/english/law/pdf/crc.pdf> (accessed on April 23, 2012)

⁴⁴⁷ Ibid. Article 28(1)(a).

Basic Education Act and provisions of the Convention on the Rights of the Child of November 20, 1989, domesticated into Nigerian legal system.

General Comment 12, issued on May 12, 1999, articulated the right to adequate food component of Article 11 of the CESC.R.⁴⁴⁸ It stated that only a few states have provided sufficient data to evaluate compliance and challenges needed to be addressed in realizing the right to adequate food.⁴⁴⁹ It then articulated the normative contents of the right to adequate food.

The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.⁴⁵⁰

Nine hundred and twenty-five million people in the world are undernourished.⁴⁵¹ Hunger will still be a daily problem for six hundred million people by 2015, when the Millennium Development Goals are supposed to have been achieved, with the halving of hunger as one of its goals.⁴⁵² Fact Sheet 34, issued in April 2010, by the office of the United Nations High Commissioner for Human Rights in Geneva, also clarified the normative concept surrounding the socioeconomic right to adequate and regularly accessible food.⁴⁵³ “Suitable and adequate

⁴⁴⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?OpenElement> (accessed on April 23, 2012)

⁴⁴⁹ Ibid. paragraph 1.

⁴⁵⁰ Ibid. paragraph 6.

⁴⁵¹ Food and Agricultural Organization of the United Nations, *The State of Food and Agriculture: Women in Agriculture-closing the gender gap for development*, (Rome: FAO, 2011), full text available at: <http://www.fao.org/docrep/013/i2050e/i2050e.pdf> (accessed on April 23, 2012). See also, Food and Agricultural Organization of the United Nations, *The State of Food Insecurity in the World: Economic crises impacts and lessons learned*, (Rome: FAO, 2009), full text available at: <ftp://ftp.fao.org/docrep/fao/012/i0876e/i0876e.pdf> (accessed on April 23, 2012).

⁴⁵² Food and Agricultural Organization of the United Nations, *The State of Food Insecurity in the World: How does international price volatility affect domestic economies and food security?* (Rome: FAO, 2011), full text available at: <http://www.fao.org/docrep/014/i2330e/i2330e.pdf> (accessed on April 23, 2012). Aquaculture if embraced in Sub-Sahara including Nigeria as has been the case in South-East Asia, can contribute to the reduction of hunger in Africa, Food and Agricultural Organization of the United Nations, *The State of World Fisheries and Aquaculture 2010*, (Rome: FAO, 2010), pp. 138-142, full text available at: <http://www.fao.org/docrep/013/i1820e/i1820e.pdf> (accessed on April 23, 2012)

⁴⁵³ <http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> (accessed on April 23, 2012)

food” is also a nonjusticiable economic objective under the 1999 Nigerian Constitution.⁴⁵⁴

General Comment 13, released on December 8, 1999, further developed the normative contents of the right to education under Article 13 of the CESCR. The right to receive an education under Article 13, paragraph 2 of the CESCR was interpreted to imply availability and accessibility to all persons no matter the gender or group.⁴⁵⁵ It reiterated the pivotal and emancipatory catalytic role of education in the eradication of poverty and attainment of economic development.⁴⁵⁶ Schools and the programs they run would “...require buildings or other protection from all elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.”⁴⁵⁷ This general comment buttresses my previous analysis, in section 2.3, of deficiencies in Nigeria’s education sector. My analysis of the American States’ jurisprudence on education, in the next chapter shows that justiciable socioeconomic rights enables judicial scrutiny to make public educational policies conform with constitutional mandates, thereby improving accountability of public governance.

General Comment 14, issued on August 11, 2000, expounded upon the normative contents of Article 12 of the CESCR on the right to health.⁴⁵⁸ It clarified the difference between indicators that reflect achievement levels as opposed to benchmarks laying out targets for

⁴⁵⁴ Section 16(2)(d)

⁴⁵⁵ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement> (accessed on April 23, 2012)

⁴⁵⁶ “Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.” Ibid. paragraph 1.

⁴⁵⁷ Ibid. paragraph 6 (a).

⁴⁵⁸ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement> (accessed on April 23, 2012)

countries in light of their peculiar circumstances.⁴⁵⁹ “Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator.”⁴⁶⁰ Health care for millions of people, mired in poverty, is still an illusion.⁴⁶¹ The right to health is linked with sanitation, potable water supply, and regular access to adequate food, among other enabling conditions.⁴⁶² Health-care provision entails availability and accessibility.⁴⁶³ It is predicated upon “...safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs...”⁴⁶⁴ The elimination of infant and maternal mortality also comes under the umbrella of the right to health under Article 12(2)(a) of the CESCR.⁴⁶⁵ Safety in the workplace and environmentally friendly modes of production are encompassed by the right to health.⁴⁶⁶

Fact Sheet 31, released in June 2008, by the office of the United Nations High Commissioner for Human Rights in Geneva, also clarified the normative concept surrounding the socioeconomic right to health.⁴⁶⁷ “States must show that they are making every possible effort, within available resources, to better protect and promote all rights under the Covenant.”⁴⁶⁸

⁴⁵⁹ Ibid. paragraphs 57-58.

⁴⁶⁰ Ibid. paragraph 58.

⁴⁶¹ Ibid. paragraph 5.

⁴⁶² Ibid. paragraph 11.

⁴⁶³ Ibid. paragraph 12.

⁴⁶⁴ Ibid. paragraph 12 (a).

⁴⁶⁵ Ibid. paragraph 14. Article 24 of the Convention of the Rights of the Child enjoins States: (a) “To diminish infant and child mortality”; (d) “To ensure appropriate pre-natal and post-natal health care for mothers”; (e) “To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents.” full text available at: <http://www2.ohchr.org/english/law/pdf/crc.pdf> (accessed on April 23, 2012); Article 12(2) of CEDAW also stipulates that: “State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.” Full text available at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12> (last visited on April 23, 2012).

⁴⁶⁶ Ibid. paragraph 15.

⁴⁶⁷ <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (accessed on April 23, 2012)

⁴⁶⁸ Ibid. at p. 23.

This is in tandem with my previous analysis in section 2.2 of the challenges in Nigeria's health-care sector, which will benefit from judicial scrutiny if health-care policies of government can be litigated upon.

General Comment 15 of 2002, issued on January 20, 2003, distilled the right to water from Articles 11 and 12 of the CESCR.⁴⁶⁹ It declared that the legal bases for the right to water were derived from the two articles. "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements."⁴⁷⁰ August 2010 witnessed the publication of Fact Sheet 35 on the right to water by the office of the United Nations High Commissioner for Human Rights in Geneva.⁴⁷¹ It observed that, conservatively, close to 900 million people lack access to water and 2.5 billion people lack water for sanitation purposes, which required a human rights approach to resolve the crisis.⁴⁷² "While these numbers shed light on a worrying situation, the reality is much worse, as millions of poor people living in informal settlements are simply missing from national statistics. The roots of the current water and sanitation crisis can be traced to poverty, inequality and unequal power relationships..."⁴⁷³

General Comment 16, published on August 11, 2005, interpreted Article 3 of the CESCR

⁴⁶⁹ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/402/29/PDF/G0340229.pdf?OpenElement> (accessed on April 20, 2012); "Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover the Committee has previously recognized that water is a human right contained in article 11, paragraph 1. (General Comment No. 6. The right to water to water is also inextricably related to the right to the highest attainable standard of health (art. 12(1) and the rights to adequate housing and adequate food (art. 11(1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity." Ibid. paragraph 3.

⁴⁷⁰ Ibid. paragraph 2.

⁴⁷¹ <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf> (accessed on April 23, 2012)

⁴⁷² Ibid. at p. 1.

⁴⁷³ Ibid. at p. 1.

on equal enjoyment of the substantive rights in the Covenant by both men and women.⁴⁷⁴ “While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.”⁴⁷⁵ States have three levels of legal obligations to implement equality, which translate to obligations to respect,⁴⁷⁶ to protect,⁴⁷⁷ and to fulfill.⁴⁷⁸ The tripod of respect, protection, and fulfillment have become well accepted in the human rights lexicon detailing states’ human rights obligations.⁴⁷⁹

General Comment 18, which was adopted on November 24, 2005, was issued on February 6, 2006, and it elaborated upon the respective right to work, safe work place and labor union association provisions of Articles 6, 7, and 8 of the CESCR.⁴⁸⁰ States parties to the CESCR have three-layered legal obligations to respect, protect, and fulfill the right to work. “The obligation to respect the right to work requires States parties to refrain from interfering

⁴⁷⁴ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/435/39/PDF/G0543539.pdf?OpenElement> (accessed on April 23, 2012)

⁴⁷⁵ Ibid. paragraph 6.

⁴⁷⁶ “The obligation to respect requires States parties to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of economic, social and cultural rights. Respecting the right obliges State parties not to adopt, and to repeal laws and rescind, policies, administrative measures and programmes that do not conform with the rights protected by article 3. In particular, it is incumbent upon States parties to take into account the effect of apparently gender-neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.” Ibid. paragraph 18.

⁴⁷⁷ “The obligation to protect requires States parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women...” Ibid. paragraph 19.

⁴⁷⁸ “The obligation to fulfill requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include:

- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes;

- To establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women...” Ibid. paragraph 21.

⁴⁷⁹ Office of the United Nations Human Rights Commissioner, Fact Sheet 33: Frequently Asked Questions on Social, Economic and Cultural Rights, (Geneva: United Nations, 2008), pp. 11-12, full text available at: <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (accessed on April 23, 2012).

⁴⁸⁰ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/403/13/PDF/G0640313.pdf?OpenElement> (accessed on April 24, 2012)

directly or indirectly with the enjoyment of that right.”⁴⁸¹ Protection dictates that states parties implement measures to stop the interference of third parties with workers’ right to work. Fulfillment entails the provision, facilitation, and promotion of the right to work.⁴⁸² There must be access to effective administrative or judicial remedies for violations of the right to work.⁴⁸³ Private actors are equally duty-bound, like state parties, not to violate the right to work.⁴⁸⁴

General Comment 19 of February 4, 2008, clarified the normative contents of the right to social security, provided for by Article 9 of the CESCR.⁴⁸⁵ The Committee on Economic, Social and Cultural Rights expressed concern “...over the very low levels of access to social security with a large majority (about 80 per cent) of the global population currently lacking access to formal social security. Among these 80 per cent, 20 per cent live in extreme poverty.”⁴⁸⁶ The normative core of the right to social security has nine pillars. They are health care,⁴⁸⁷ disability or sick benefits,⁴⁸⁸ social security schemes for elderly persons,⁴⁸⁹ unemployment benefits,⁴⁹⁰ employment injury,⁴⁹¹ family and child support,⁴⁹² paid maternity leave coupled with medical benefits,⁴⁹³ dignified support for persons with disabilities,⁴⁹⁴ and support for survivors and

⁴⁸¹ Ibid. paragraph 22.

⁴⁸² Id.

⁴⁸³ Ibid. paragraph 48.

⁴⁸⁴ “While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, local communities, trade unions, civil society and private sector organizations—have responsibilities regarding the realization of the right to work. States parties should provide an environment facilitating the discharge of these obligations. Private enterprises—national and multinational—while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work.” Ibid. paragraph 52.

⁴⁸⁵ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement> (accessed on April 24, 2012)

⁴⁸⁶ Ibid. paragraph 7.

⁴⁸⁷ Ibid. paragraph 13.

⁴⁸⁸ Ibid. paragraph 14.

⁴⁸⁹ Ibid. paragraph 15.

⁴⁹⁰ Ibid. paragraph 16.

⁴⁹¹ Ibid. paragraph 17.

⁴⁹² Ibid. paragraph 18.

⁴⁹³ Ibid. paragraph 19.

orphans.⁴⁹⁵ Social security falls under the nonjusticiable economic objectives of the 1999 Nigerian Constitution.⁴⁹⁶

General Comment 20 of July 2, 2009, clarified the nondiscrimination provisions of Article 2, paragraph 2 of the CESC.R.⁴⁹⁷ Elimination of formal discrimination in laws and policies must be matched substantively in practice.⁴⁹⁸ Discrimination is prohibited, and some listed examples are on the basis of race and color,⁴⁹⁹ sex,⁵⁰⁰ language,⁵⁰¹ religion,⁵⁰² political,⁵⁰³ national or social origin,⁵⁰⁴ property status,⁵⁰⁵ birth,⁵⁰⁶ disability,⁵⁰⁷ age,⁵⁰⁸ and nationality; in particular, children of undocumented immigrants must have access to education, health care, and adequate food.⁵⁰⁹ The Committee on Economic, Social and Cultural Rights expressed concern that: “Discrimination undermines the fulfillment of economic, social and cultural rights for a significant proportion of the world’s population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.”⁵¹⁰

General Comment 21 of December 21, 2009, articulated the right of everyone to take part in cultural life provided for by Article 15, paragraph 1, subparagraph a of the CESC.R.⁵¹¹

⁴⁹⁴ Ibid. paragraph 20.

⁴⁹⁵ Ibid. paragraph 21.

⁴⁹⁶ Section 16(2)(d)

⁴⁹⁷ <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc> (accessed on April 24, 2012)

⁴⁹⁸ Ibid. paragraph 8.

⁴⁹⁹ Ibid. paragraph 19.

⁵⁰⁰ Ibid. paragraph 20.

⁵⁰¹ Ibid. paragraph 21.

⁵⁰² Ibid. paragraph 22.

⁵⁰³ Ibid. paragraph 23.

⁵⁰⁴ Ibid. paragraph 24.

⁵⁰⁵ Ibid. paragraph 25.

⁵⁰⁶ Ibid. paragraph 26.

⁵⁰⁷ Ibid. paragraph 28.

⁵⁰⁸ Ibid. paragraph 29.

⁵⁰⁹ Ibid. paragraph 30.

⁵¹⁰ Ibid. paragraph 1.

⁵¹¹ <http://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc> (accessed on April 24, 2012)

The Committee considered “that culture for the purpose of implementing article 15(1)(a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food...Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.”⁵¹²

On December 20, 1993, the United Nations General Assembly Resolution 48/141 established the office of the “High Commissioner for the promotion and protection of all human rights.”⁵¹³ The office is located in Geneva, with a liaison office in New York.⁵¹⁴ The key functions of the High Commissioner are to “To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights.”⁵¹⁵ In addition to above duties, the High Commissioner is “To promote and protect the realization of the right to development and to enhance support from the relevant bodies of the United Nations system for this purpose.”⁵¹⁶ General Assembly Resolution 48/141 requested “the High Commissioner for Human Rights to report annually on his/her activities, in accordance with his/her mandate, to the Commission on Human Rights and, through the Economic and Social Council, to the General Assembly.”⁵¹⁷ It must be noted that with effect from March 15, 2006, via United Nations General Assembly Resolution 60/251,⁵¹⁸ the Commission on Human Rights transformed into the forty-seven United Nations Member States Human Rights Council.⁵¹⁹ The High Commissioner for

⁵¹² Ibid. paragraph 13.

⁵¹³ United Nations General Assembly Resolution A/RES/48/141, December 20, 1993, full text available at: <http://www.un.org/documents/ga/res/48/a48r141.htm> (accessed on April 28, 2012).

⁵¹⁴ Ibid. paragraph 6.

⁵¹⁵ Ibid. paragraph 4(a)

⁵¹⁶ Ibid. paragraph 4(c)

⁵¹⁷ Ibid. paragraph 5.

⁵¹⁸ United Nations General Assembly Resolution 60/251, March 15, 2006, full text available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement> (accessed on April 28, 2012).

⁵¹⁹ United Nations Human Rights Council, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (accessed on April 28, 2012).

Human Rights has been issuing annual reports,⁵²⁰ and a few recent ones relevant to socioeconomic rights will be examined in this section. These annual reports have been in tandem with the emerging trend in the general comments of using indicators and benchmarks alluded to above “to monitor the progressive realization of economic and social rights.”⁵²¹

On June 25, 2007, the High Commissioner for Human Rights issued the 2007 Report, which was deliberated upon from July 2 through 27, 2007, at the substantive Geneva session.⁵²² The 2007 Report emphasized that verifiable data backed developmental national programs, and strategies needed to be set to implement socioeconomic rights.⁵²³ “In this regard, one important requirement is to ensure that strategies set realistic, achievable targets and that adequate funds are made available for their realization. In doing so, Governments must not only seek to make the most efficient use of often limited public resources, but also seek to mobilize private and community resources for the implementation of economic, social and cultural rights.”⁵²⁴ A minimum threshold of fulfillment/performance is expected from states, in the realization of socioeconomic rights, as highlighted elsewhere in this section of the dissertation. “The fulfillment of minimum core obligations must be a first priority on policy and budget decisions. Governments must make a best effort to ensure that limited resources are directed towards satisfying, at the very least, minimum levels of rights fulfillment, such as ensuring universal access to compulsory primary education free of charge, and that everyone has access to basic medical care and essential drugs.”⁵²⁵

The 2009 Report identified the *raison d’être* of socioeconomic rights implementation to

⁵²⁰ Reports of the Secretary General and High Commissioner, full text available at: <http://www2.ohchr.org/english/issues/escr/escr-general-info.htm#HCreports> (accessed on April 28, 2012).

⁵²¹ Henkin, Louis et al Human Rights (New York: Thompson Reuters/Foundation Press, 2009), p.1423.

⁵²² Report of the United Nations High Commissioner for Human Rights, ‘on the concept of progressive realization of economic, social and cultural rights in international human rights law,’ Geneva, E/2007/82, June 25, 2007, full text available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/394/33/PDF/N0739433.pdf?OpenElement> (accessed on April 28, 2012).

⁵²³ Ibid. paragraphs 37-40.

⁵²⁴ Ibid. paragraph 41.

⁵²⁵ Ibid. paragraph 43(d)

be the transformative emancipatory potential to improve the quality of human life.⁵²⁶ “Implementation of economic, social and cultural rights implies transformative action oriented towards ensuring the full enjoyment of rights, or preventive action to prevent a potential violation or a remedial action to offer redress when rights have been violated. Monitoring implementation is an indispensable means to assess whether these required types of action are actually taking place and are sufficient, or are absent. Failure to adopt adequate transformative or preventive action may amount to a violation of the rights at stake.”⁵²⁷

The 2009 Report also identified states’ budgets as a veritable tool of measuring progressive realization of socioeconomic rights. The ratio or proportions of budgetary allocations of states to specific areas are indicative barometers of their socioeconomic commitments. States are enjoined to provide evidence based on verifiable data to establish levels of commitment to the realization of socioeconomic rights.⁵²⁸

As for all human rights, achieving economic, social and cultural rights requires budget allocations and corresponding expenditures, in particular in regard to the positive obligations that they entail. The provision of educational services, the promotion and facilitation of the enjoyment of the right to food, the monitoring of the duties of employers regarding workers’ rights, for instance, necessarily require financial resources, sustainable over time. Therefore, the budget-as the instrument that determines the extent of the States’ resources, their allocation and prospective expenditures-is particularly relevant for the realization of economic, social and cultural rights. The budget is a useful source of information to evaluate which normative commitments are taken seriously by the state, because it provides a demonstration of the State’s preferences, priorities and trade-offs in spending. For example, low apportionments in health care, education or social programmes when there are visible implementation gaps could show inadequate prioritization or insufficient estimation of the required funds to realize economic, social and cultural rights.⁵²⁹

⁵²⁶ Report of the United Nations High Commissioner for Human Rights, ‘on the implementation of economic, social and cultural rights,’ Geneva, E/2009/90, June 8, 2009, full text available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/362/90/PDF/N0936290.pdf?OpenElement> (accessed on April 28, 2012).

⁵²⁷ Ibid. paragraph 22.

⁵²⁸ Ibid. paragraphs 44-54.

⁵²⁹ Ibid. paragraph 46.

On April 26, 2011, the 2011 Report was released.⁵³⁰ The 2011 Report reiterated the repeated importance ascribed by the General Comments of the Committee on Economic and Social and Cultural Rights on “the need for State parties to adopt appropriate indicators and benchmarks in their national strategies and policies, including disaggregated statistics and time frames in order to allow effective implementation and monitoring of the rights under the International Covenant on Economic, Social and Cultural Rights.”⁵³¹ More importantly, the 2011 Report recommended a paradigmatic shift from the use of “traditional, generic analysis of ‘economic and social situations’ that fail to articulate a clear linkage with the human rights framework. In this context, methodologies which link statistical and other data to human rights standards are needed to capture the enjoyment of economic, social and cultural rights of individuals and the meeting of obligations by States, not only the overall economic or social situation.”⁵³²

To summarize, the Committee on Economic, Social and Cultural Rights has from 1989 to date clarified the contents of the CESCR through twenty-one general comments.⁵³³ The Committee has clarified the substantive socioeconomic rights provided for by the CESCR. The thirty-five thematic Fact Sheets issued from June 1996 to date by the Office of the High Commissioner for Human Rights of the United Nations in Geneva, have clarified and publicized both civil and political rights as well as socioeconomic rights to a wider audience than lawyers, diplomats, and academics.⁵³⁴

This dissertation has focused on education and health care under the umbrella of socioeconomic rights; General Comments 3, 13, and 14 are germane to my research. General Comment 13 developed the normative contents of the right to education under Article 13 of the

⁵³⁰ Report of the United Nations High Commissioner for Human Rights, ‘on the use of indicators in realizing economic, social and cultural rights.’ Geneva, E/2011/90, April 26, 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/427/16/PDF/G1142716.pdf?OpenElement> (accessed on April 28, 2011).

⁵³¹ Ibid. paragraph 6.

⁵³² Ibid. paragraph 9.

⁵³³ <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed on April 22, 2012).

⁵³⁴ <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx> (accessed on April 23, 2012)

CESCR. The right to receive an education under Article 13,, paragraph 2 of the CESCR was interpreted to imply availability and accessibility to all persons, no matter the gender or group they belong to. It reiterated the pivotal and emancipatory catalytic role of education in the eradication of poverty and attainment of economic development. Schools must be situated in habitable, well-equipped, and sanitary buildings to enhance pedagogy. General Comment 14 expounded upon the normative contents of Article 12 of the CESCR on the right to health. It clarified the difference between indicators that reflect achievement levels as opposed to benchmarks laying out targets for countries in light of their peculiar circumstances. Health-care provision entails availability and accessibility. Health care for millions of people, mired in poverty, is still an illusion. The right to health is linked with sanitation, potable water supply, and regular access to adequate food, among other enabling conditions. General Comment 3 dealt with the minimum core concept of progressive realization of socioeconomic rights. A state claiming inadequate resources would meet its requirement if it could show that it made its best efforts in the utilization of all resources at its disposal in a timely manner, in an attempt to realize progressively socioeconomic rights. These general comments will prove to be useful in the Nigerian legal system when constitutionally enforceable socioeconomic rights become a reality and complement existing mechanisms of accountability.

4.3. SERAC Decision of the African Commission on Human and Peoples' Rights

The Organization of African Unity (OAU) was bogged down by the abysmal human rights records of members like Idi Amin Dada of Uganda, Francisco Marcias Nguema of Equatorial Guinea, and Jean Bokassa of Central African Republic.⁵³⁵ In April 1979, Bokassa led his troops to massacre about a hundred schoolchildren who had defied his ban on the use of school uniforms. The Franco-African summit of May 1979 in Rwanda confirmed Bokassa's

⁵³⁵ Ojo, Olusola and Sesay, Amadu, 'The O.A.U. and Human Rights Prospects for the 1980s and beyond', Human Rights Quarterly, Vol.8, No.1 (Feb., 1986), pp.89-103, at p.92.

involvement in the massacre.⁵³⁶ This was the background for the 1979 OAU Summit in Monrovia Liberia, where President William Tolbert of Liberia made a scathing “attack on Africa’s human rights record, and the unwillingness of his colleagues to speak out against human rights transgressions.”⁵³⁷

The speech galvanized his colleagues to mandate the OAU Secretary General to set up a panel of experts who drew up a charter of rights in Dakar, Senegal, between November 28 and December 8, 1979. The African Charter on Human and Peoples’ Rights was eventually adopted on January 19, 1981, in Banjul, Gambia.⁵³⁸ (This dissertation will henceforth refer to the African Charter on Human and Peoples’ Rights as the Banjul Charter.) The Banjul Charter was enacted into law in Nigeria in 1983, under the civilian administration of President Usman Shehu Shagari, and it came into force on March 17, 1983.⁵³⁹ It enumerates civil and political rights,⁵⁴⁰ right to property,⁵⁴¹ as well as socioeconomic rights.⁵⁴² Individuals’ duties to the family, nation, and African unity are also well detailed.⁵⁴³ The Banjul Charter established the African Commission on Human and Peoples’ Rights (the Commission) to “promote human and peoples’ rights and ensure their protection in Africa.”⁵⁴⁴ Compliance with the decisions of the Commission has been a mixed record.⁵⁴⁵

⁵³⁶ Ibid. at p. 93.

⁵³⁷ Id.

⁵³⁸ Ibid. 94-95.

⁵³⁹ Chapter 10. Laws of Federation of Nigeria 1990.

⁵⁴⁰ Articles 2-13.

⁵⁴¹ Article 14.

⁵⁴² Articles 15-24.

⁵⁴³ Articles 28-29.

⁵⁴⁴ Article 30; Heyns, Christof, ‘The African Regional Human Rights System: The African Charter,’ 108 Penn St. L.Rev. (2003-2004), pp. 679-702.

⁵⁴⁵ Viljoen, Frans ‘A Human Rights Court for Africa and Africans,’ 30 Brook. J. Int’l L. (2004-2005), pp. 1-66; Viljoen, Frans and Louw, Lurette ‘State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004, The American Journal of International Law, Vol. 101, No.1 (Jan., 2007), pp. 1-34; Murray, Rachael, ‘International Human Rights: Neglect of

The Banjul Charter deviated from the ICESCR formula of progressive realization of socioeconomic rights. “The Charter does not make the ‘fulfillment’ of any of its provisions dependent on ‘available resources’ or ‘progressive realization.’”⁵⁴⁶ This is in contrast with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights evaluated under General Comment 3 in the preceding section. In June 1998 a protocol to the Banjul Charter was adopted by the member States of the OAU, which established the African Court on Human and Peoples’ Rights, and it entered into force in January 2004.⁵⁴⁷ The OAU was transformed into the African Union at Lome, Togo, upon the adoption of the Constitutive Act of the transformed body.⁵⁴⁸

The Social and Economic Rights Action Centre (SERAC) and the *Centre for Economic and Social Rights v. Nigeria*⁵⁴⁹ decision of the Commission relating to socioeconomic rights violations in Nigeria will be the focus of this section. The SERAC communication was received by the Commission on March 14, 1996, and it alleged that the Nigerian military leadership and the Nigerian National Petroleum Corporation (NNPC) in a joint venture with Shell, while carrying out oil drilling in Ogoniland in the Niger Delta area of Nigeria, had violated numerous provisions of the Banjul Charter. These were the rights to life, environment, disposal of wealth and natural resources, as well as implicitly the rights to food and shelter.⁵⁵⁰ The Commission

Perspectives from African Institutions,’ International and Comparative Law Quarterly, Vol. 55, No.1 (Jan. 2006), pp. 193-204.

⁵⁴⁶ Viljoen, Frans, International Human Rights Law in Africa, (Oxford: Oxford University Press, 2007), p.240.

⁵⁴⁷ <http://www.african-court.org/en/court/history/> (accessed on May 18, 2011).

⁵⁴⁸ Murray, Rachel, Human Rights in Africa: From the OAU to the African Union, (Cambridge: Cambridge University Press, 2004), p.31.

⁵⁴⁹ (2001) AHLR 60 (ACHPR 2001); Henkin, Louis, et al Human Rights: 2003 Supplement (New York: Foundation Press, 2003), pp. 70-81.

⁵⁵⁰ Ibid. Paragraphs 1-9.

thanked both organizations for bringing the communication as an *actio popularis*.⁵⁵¹

Nigeria transited to civilian rule on May 29, 1999. At the twenty-eighth ordinary session of the Commission held in Cotonou, Benin, from October 26 to November 6, 2000, Nigeria submitted a note verbale, which admitted the allegations in the SERAC Communication.⁵⁵² The note verbale indicated that remedial actions were being taken by Nigeria, which included the establishment of the first ever Ministry of Environment, the enactment of the Niger Delta Development Commission, and the setting up of a Judicial Commission of Inquiry.⁵⁵³

In its method of analysis the Commission evaluated the obligations of the Nigerian state on four levels of its duties to respect, protect, promote, and fulfill both civil and political rights and socioeconomic rights. The Commission stated that both positive and negative duties attach to the obligations of Nigeria.⁵⁵⁴ The Commission focused on the health-care and environmental obligations of Nigeria, as a treaty member of both the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights:

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter and the right to a general

⁵⁵¹ In accordance with articles 60 and 61 of the African Charter, this communication is examined in the light of the provisions of the African Charter and the relevant international and regional human rights instruments and principles. The Commission thanks the two human rights NGOs which brought the matter under its purview: the Social and Economic Rights Action Centre (Nigeria) and the Centre for Economic and Social Rights (USA). This is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter. It is a matter of regret that the only written response from the government of Nigeria is an admission of the gravity of the complaints which is contained in a *note verbale*....Ibid. paragraph 49.

⁵⁵² Ibid. Paragraph 30

⁵⁵³ Id.

⁵⁵⁴ Ibid. paragraph 44.

satisfactory environment favourable to development (article [24])...obligate governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.⁵⁵⁵

Article 16 of the African Charter on Human and Peoples' Rights provides that

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 24 of the Charter provides that "All people shall have the right to a general satisfactory environment favourable to their development."

According to the Commission, a government's obligations in terms of the rights to health and the environment entails crafting and implementing inclusive social policies that receive inputs from individuals in affected communities.

Government compliance with the spirit of articles 16 and 24 of African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁵⁵⁶

It is very instructive that the Commission stated that "Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties."⁵⁵⁷ The Commission reiterated the nature of the duty: "This duty calls for positive action on the part of

⁵⁵⁵ Ibid. paragraph 52.

⁵⁵⁶ Ibid. paragraph 53.

⁵⁵⁷ Ibid. paragraph 57.

governments in fulfilling their obligation under human rights instruments.”⁵⁵⁸ The Commission stated that this position was also buttressed by the practice of other regional human rights tribunals and highlighted in the famous Inter-American Court of Human Rights decision of 1988, *Velásquez Rodríguez v Honduras*, where the Court “held that when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized, it would be in clear violation of its obligations to protect the human rights of its citizens.”⁵⁵⁹

The Commission then noted that: “...despite its obligations to protect persons against interferences in the enjoyment of their rights, the government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of article 21 of the African Charter.”⁵⁶⁰

The Commission analyzed Nigeria’s violation of Article 11(1) on the right to housing provision of the ICESCR through General Comments 4 and 7, which I adumbrated in the

⁵⁵⁸ Id.

⁵⁵⁹ Id.

⁵⁶⁰ Ibid. paragraph 58.

Article 21-

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

previous section. The Commission analyzed the forcible eviction and destruction of the houses of inhabitants of the Niger Delta area by soldiers and operatives of Shell:

The particular violation by the Nigerian government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term ‘forced evictions’ by the Committee on Economic, Social and Cultural Rights which defines this as ‘the permanent removal against their will of individuals, families and/or communities from the homes ...which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’ Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths. Evictions break up families and increase existing levels of homelessness. In this regard, General Comment no 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that ‘...all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats...The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right.’⁵⁶¹

The Commission derived a right to food in the African Charter, upon which a host of other rights depend on to be realizable.

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.⁵⁶²

The Commission subsequently found Nigeria in violation of Articles 2 (protection from discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18(1) (family life), 21 (freedom over wealth and natural resources), and 24 (environmental rights) provisions of the Banjul Charter.⁵⁶³ It then appealed “to the government of the Federal Republic of Nigeria to

⁵⁶¹ Ibid. paragraph 63.

⁵⁶² Ibid. paragraph 65.

⁵⁶³ Paragraph 70.

ensure protection of the environment, health and livelihood of the people of Ogoniland...”⁵⁶⁴ It proceeded to recommend the cessation of military attacks, prosecution of security officials involved in atrocities, compensation and resettlement of victims, as well as environmental and social impact assessments for future oil mining operations.⁵⁶⁵

Dinah Shelton observed that the SERAC decision dependent on Nigeria’s compliance with the recommendations could have “an impact on human rights law and practice well beyond Africa.”⁵⁶⁶ A more robust and critical analysis of the SERAC case is offered by Oloka-Oyango.⁵⁶⁷ He raised the very important question of how to formulate an accountability standard to hold powerful nonstate global actors like Shell directly responsible for their operations that violate human rights.⁵⁶⁸ The gap still exists in international law regarding how to hold transnational nonstate actors directly responsible for human rights violations. The suggestion has been made to amend the Statute of the International Criminal Court to enable it to assume jurisdiction over egregious violations of human rights by transnational corporations like Shell perpetrated in Ogoniland, where operational base countries such as Nigeria have been unable or unwilling to prosecute them.⁵⁶⁹

Socioeconomic rights might contribute to the judicious use of state resources in Africa by improving the accountability of state officials in control of such resources. An additional layer to

⁵⁶⁴ Paragraph 71.

⁵⁶⁵ *Id.*

⁵⁶⁶ Shelton, Dinah, ‘Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1, AJIL, Vol.96, No.4(Oct., 2002), pp. 937-942 at p. 942.

⁵⁶⁷ Oloka-Onyango, J. ‘Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa,’ American University International Law Review, Vol. 18, pp. 851-914.

⁵⁶⁸ *Ibid.* at p.884.

⁵⁶⁹ Ezeudu, Martin-Joe, ‘Revisiting Corporate Violations of Human Rights in Nigeria’s Niger Delta Region: Canvassing the Potential of the International Criminal Court,’ (2011) 11 African Human Rights Law Journal, pp.23-56.

the African human rights framework, which complements the African Commission on Human and Peoples' Rights is the African Court for Human and Peoples' Rights. On June 10, 1998, its protocol of establishment was adopted and it came into force on January 1, 2004.⁵⁷⁰ Nigeria ratified the treaty on May 20, 2004, but has not domesticated it.⁵⁷¹ In addition, Nigeria is not among the five African countries that made a declaration upon ratification that permits individuals and NGOs to file petitions.⁵⁷²

After the SERAC case, Nigeria, at the international level, has adopted the nonjusticiable status of socioeconomic rights under the 1999 Constitution, so that it does not have to comply with decisions of the Court of Justice of the Economic Community of West African States relating to Nigeria's nonimplementation of the 2004 Universal Basic Education Act and breaches of the socioeconomic provisions of the African Charter on Human and Peoples' Rights, which has been domesticated into Nigerian legal system. Nigeria has failed to abide with the socioeconomic aspects of African Charter on Human and Peoples' Rights treaty, which it willingly domesticated into its domestic legal regime in 1983. A constitutional amendment is therefore imperative to make socioeconomic rights justiciable under the 1999 Constitution, so that Nigeria will have no excuse not to comply with its treaty obligations under international human rights law. Justiciable socioeconomic rights will also complement existing mechanisms of accountability within Nigeria, and subject government's socioeconomic policies to judicial

⁵⁷⁰ Ndulo, Muna, 'The African Commission and Court under the African Human Rights System', in Akokpari, John and Zimble, Daniel Shea, (eds.), *Africa's Human Rights Architecture*, (Auckland Park, South Africa: Fanele and Centre for Conflict Resolution, 2008), pp. 182-203, at pp. 194-195; Wright, Rebecca 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights,' *Berkeley Journal of International Law*, Vol.24, pp. 463-498, at pp. 476-477; http://www.au.int/en/sites/default/files/PROTOCOL_AFRICAN_CHARTER_HUMAN_PEOPLES_RIGHTS_ESTABLISHMENT_AFRICAN_COURT_HUMAN_PEOPLES_RIGHTS_1.pdf (accessed on April 24, 2013).

⁵⁷¹ List of ratification available at : <http://www.au.int/en/sites/default/files/achpr.pdf> (accessed on April 24, 2013).

⁵⁷² Ibid. at p.3.

scrutiny at the domestic level. Time is of the essence in reversing the downward spiral in the socioeconomic conditions of most Nigerians. In the next section I shall analyze decisions of the Court of Justice of the Economic Community of West African States relating to Nigeria.

4.4. The Court of Justice of the Economic Community of West African States (ECOWAS) and Nigeria

The Economic Community of West African States (ECOWAS) was established on May 28, 1975, with sixteen members, and aimed to create a common market and free movement of citizens; the withdrawal of Mauritania in 2001 reduced the membership to fifteen West African countries.⁵⁷³ The Court of Justice of ECOWAS was established in 1991.⁵⁷⁴ Article 4(h) of the revised ECOWAS treaty of July 24, 1993 states that one of the principles of ECOWAS is “accountability, economic and social justice and popular participation in development.”⁵⁷⁵ In furtherance of this principle article 34(2) of the 2001 Democracy and Good Governance Protocol to the ECOWAS treaty requires that: “Member States shall ensure accountability, professionalism, transparency and expertise in the public and private sectors.”⁵⁷⁶

Article 4(g) of the revised ECOWAS treaty of July 24, 1993, adopted and incorporated the provisions of the African Charter on Human and Peoples’ Rights.⁵⁷⁷ This was further

⁵⁷³ <http://www.ecowas.int/?lang=en>
⁵⁷⁴

http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=53&Itemid=9

⁵⁷⁵ Treaty of ECOWAS, full text available at:

<http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> (accessed on January 20, 2013).

⁵⁷⁶ Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Executive Secretariat Dakar, December, 2001,

<http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf> (accessed on January 20, 2013).

⁵⁷⁷ Under Chapter II provisions of the treaty entitled: Establishment, Composition, Aims and Objectives and Fundamental Principles of the Community, article 4 entitled ‘Principles’ states amongst its principles in paragraph “(g) recognition promotion and protection of human and peoples’ rights in accordance with

reiterated by the constitutional convergence principles of the 2001 Democracy and Good Governance Protocol to the ECOWAS treaty, which states that “The rights set out in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organization shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights to ensure the protection of his/her rights.”⁵⁷⁸

The 2001 Democracy and Good Governance Protocol to the ECOWAS treaty also proposed that “Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.”⁵⁷⁹ In January, 2005 the Court’s empowerment to adjudicate over human rights issues was finally effected.⁵⁸⁰ This was done through a new Article 9, which states that “The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.”⁵⁸¹ Article 4 of the 2005 Protocol also introduced a new Article 10 into the Protocol of the Community Court of Justice, which simplified access to the Court by individuals in human rights matters. “Access to the Court is open to the following: ...(d) individuals on application for relief for violation of their human rights; the submission of application for which shall: (i) Not be

the provisions of the African Charter on Human and Peoples’ Rights.”

<http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en>

⁵⁷⁸ Article 1(h), <http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf>

⁵⁷⁹ Article 39.

⁵⁸⁰ Article 3, Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1,2,9 and 30 Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the said Protocol, Done at Accra, January 19, 2005, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed on January 20, 2013).

⁵⁸¹ Article 9 (4).

anonymous; nor (ii) Be made whilst the same matter has been instituted before another international Court for adjudication.”⁵⁸²

The Court in 2009 confirmed its jurisdiction over human rights issues in a preliminary objection to its jurisdiction filed by the federal government of Nigeria in a case brought against it by the Registered Trustees of the Socio-Economic Rights and Accountability Project. SERAP claimed that the Nigerian government had failed to provide basic education, deprived access to the people of Nigeria’s wealth and resources, as well as socioeconomic development in violation of its signatory obligations to Articles 1, 2, 17, 21, and 22 of the African Charter.⁵⁸³

The Court ruled that it had jurisdiction over human rights issues despite objections raised by Nigeria:

The court has jurisdiction over human rights enshrined in the African Charter and the facts that these rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust the jurisdiction of the court. Second defendant’s reliance on article 9(1) (a), (b) and (c) of the Supplementary Protocol of the Court to argue that the court does not have subject-matter jurisdiction over human rights issues is misconceived as they failed to take cognizance of the entire provisions of article 9. In law, an enactment must be read as a whole. This court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples’ Rights which is adopted by article 4(g) of the Revised Treaty of ECOWAS. As the plaintiff’s claim is premised on articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples’ Rights, the Court does have subject matter jurisdiction of the suit filed by the plaintiff.⁵⁸⁴

It was also contended by the second defendant, the Universal Basic Education Commission (UBEC), a Nigerian government agency, that the right to education is not justiciable courtesy of Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria. The Court observed that

⁵⁸² Article 10 (d).

⁵⁸³ Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria & Universal Basic Education Commission (2009) AHRLR 331 (ECOWAS 2009)

⁵⁸⁴ Ibid. at p.334, paragraph 13.

The directive principles of state policy of the Federal Republic of Nigeria are not justiciable before this court as argued by second defendant and the fact was not contested by the plaintiff. And granted that the provisions under the directive principles of state policy were justiciable, it would be the exclusive jurisdiction of the Federal High Court, being a matter solely within the domestic jurisdiction of the Federal Republic of Nigeria. However, plaintiff alleges a breach of the right to education contrary to the provisions of the African Charter on Human and Peoples' Rights. The right to education recognized under article 17 of the African Charter on Human and Peoples' Rights and not a breach of the right to education contained under section II [*sic*] of the 1999 Federal Constitution of Nigeria.⁵⁸⁵

The Court then proceeded to analyze the international applicability of human rights treaties and the responsibilities of signatory nations:

It is essential to note that most human rights provisions are contained in domestic legislations as well as international human rights instruments. Some of the fundamental human rights such as the right to life, have even been elevated to the status of *jus cogens*, peremptory norms of international law from which no derogation is permitted. Hence the existence of a right in one jurisdiction does not automatically oust its enforcement in another. They are independent of each other. Under article 4(g) of the Revised Treaty of ECOWAS, member states of ECOWAS, affirmed and declared their adherence to the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. the first defendant is a signatory to the African Charter on Human and Peoples' Rights and reenacted it as the laws of the Federal Republic of Nigeria to assert its commitment to same. The first defendant is also a signatory to the Revised Treaty of ECOWAS and is therefore bound by their provisions.⁵⁸⁶

The Court concluded that plaintiff's action was brought under Article 17 of the African Charter on Human and Peoples' Rights, which it was empowered to adjudicate upon, and not under the Chapter II provisions of the 1999 Nigerian Constitution. It ruled that

It is trite law that this court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter on Human and Peoples' Rights, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.⁵⁸⁷

⁵⁸⁵ Ibid. at p. 335, paragraph 17.

⁵⁸⁶ Ibid. at pp.335-336, paragraph 18.

⁵⁸⁷ Ibid. at p.336, paragraph 19.

The second defendant also contended that since the plaintiff had not suffered any personal injury, damage, or loss in relation to the claims filed, the plaintiff lacked *locus standi* to file the current suit. The plaintiff argued that flexibility as opposed to restriction was the contemporary international norm guiding standing in human rights litigation. The court agreed with the plaintiff and concluded that:

“The doctrine *action popularis* was developed under Roman law, in order to allow any citizen to challenge a breach of public right in court. This doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of public right in court.⁵⁸⁸ ... A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.⁵⁸⁹

The Court then overruled and ordered a refusal of the preliminary objections.

In the December 14, 2012 decision of the ECOWAS Court, *SERAP v. Federal Republic of Nigeria*, similar objections raised above, got canvassed by the Nigerian state.⁵⁹⁰ The claim regarded the failure of the Nigerian State to use its authority to fulfill its international obligations to regulate the oil extraction activities of Nigerian National Petroleum Corporation and foreign Western multinationals in the Niger Delta region of Nigeria, in order to protect the quality of life, including right to food, health, livelihood, and environmental safety of the inhabitants of the region. The corporations were struck off as parties and leave was granted to the plaintiff to file an action against the president of Nigeria and the attorney general. The action claimed a violation of Articles 1-5, 9, 14-17, and 21-24 of the African Charter on Human and Peoples’ Rights; Articles 1, 2, 6, 8, 10, 11, 12.1, 12.2, and 12.2(b) of the International Covenant on Economic, Social and Cultural Rights; Articles 1, 2, 6, 7, and 26 of the International Covenant on Civil and

⁵⁸⁸ Ibid. at p.338, paragraph 31.

⁵⁸⁹ Ibid. at p.339, paragraph 33.

⁵⁹⁰ *SERAP v Federal Republic of Nigeria* Judgment No. ECW/CCJ/JUD/18/12 http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed on January 20, 2013)

Political Rights; and Article 15 of the Universal Declaration of Human Rights. The preliminary objections considered were as follows: first, whether the Court lacked jurisdiction to consider certain treaties, of which Nigeria was a state party. The second objection was that the plaintiff lacked *locus standi*. And, thirdly, the inadmissibility of a report by Amnesty International was raised.

In relation to the first objection: “The Court notes that behind the thesis developed by the Federal Republic of Nigeria is the principle contained in its own Constitution that the economic, social and cultural rights, being mere policy directives, are not justiciable or enforceable.”⁵⁹¹ The Court noted that Nigeria was bound by the international treaties to which it was a party, and those were the instruments the Court would have recourse to, and not the Nigerian Constitution. It reasoned: “But it should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights.”⁵⁹²

The Court further addressed the proposition so ingrained in Nigerian domestic jurisprudence, which is that the 1999 Constitution prevails over all local enactments domesticating or incorporating treaty agreements into Nigerian law. According to the Court: “As held by the jurisprudence of this Court, in the Ruling of 27 October 2009, *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission*, once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is

⁵⁹¹ Ibid. paragraph 34.

⁵⁹² Ibid. paragraph 35.

binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.”⁵⁹³

The Court added that “This view is consistent with paragraph 2, Article 5 of the International Covenant on Economic, Social and Cultural Rights which Nigeria is party to by adhesion since 29 July 1993 which provides: ‘No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.’”⁵⁹⁴ The Court then held that: “In these circumstances, invoking lack of justiciability of the concerned right, to justify non accountability before this Court is completely baseless.”⁵⁹⁵

It is instructive that the Court demolished the federal government of Nigeria’s defense of nonjusticiability of socioeconomic rights mandated by section 6(6(c) of the 1999 Constitution of the Federal Republic of Nigeria. According to the Court: “It is thus evident that the Federal Republic of Nigeria cannot invoke the nonjusticiability or enforceability of ICESR as a means of shirking its responsibility in ensuring protection and guarantee for its citizens within the framework of commitments it has made vis-à-vis the Economic Community of West African States and the Charter.”⁵⁹⁶ The Court then ruled that it had “jurisdiction to examine matters in which applicants invoke ICCPR and ICESCR.”⁵⁹⁷ The Court addressed the issue of *locus standi* and ruled that SERAP had standing to initiate the suit.⁵⁹⁸

⁵⁹³ Ibid. paragraph 36.

⁵⁹⁴ Ibid. paragraph 37.

⁵⁹⁵ Ibid. paragraph 38.

⁵⁹⁶ Ibid. paragraph 39.

⁵⁹⁷ Ibid. paragraph 40.

⁵⁹⁸ Ibid. paragraph 45.

With regard to the third objection dealing with the admissibility of a report by Amnesty International, the Court ruled it admissible “without prejudice to the authenticity of the report.”⁵⁹⁹ In its judgment the Court held that: “It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that it has taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.”⁶⁰⁰ The Court further affirmed that “And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterizes the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples’ Rights.”⁶⁰¹

The Court adjudged that the “Federal Republic of Nigeria, by comporting itself in the way it is doing, in respect of the continuous and unceasing damage caused to the environment in the Region of the Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples’ Rights and has violated Articles 1 and 24 of the said instrument.”⁶⁰²

It then ordered the Federal Republic of Nigeria to

- i. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;

⁵⁹⁹ Ibid. paragraph 55.

⁶⁰⁰ Ibid. paragraph 110.

⁶⁰¹ Ibid. paragraph 111.

⁶⁰² Ibid. paragraph 112.

- ii. Take all measures that are necessary to prevent the occurrence of damage to the environment;
- iii. Take all measures to hold the perpetrators of the environmental damage accountable.⁶⁰³

This decision clearly demonstrates that existing mechanisms of accountability operating within Nigeria would be greatly enhanced by justiciable socioeconomic rights under the 1999 Constitution of the Federal Republic of Nigeria, which would enable aggrieved litigants to subject government's policies to judicial scrutiny. This will also subject the opaque relationship between the Nigerian government and powerful transnational nonstate corporations operating in the Niger Delta area of Nigeria to judicial scrutiny in the public law courts to account for egregious violations of socioeconomic rights as well as civil liberties. Nigeria, unlike its 1983 domestication of the Banjul Charter, has not domesticated the human rights instruments of ECOWAS into its domestic legal regime, which might also explain its aloofness regarding decisions made by the ECOWAS Court of Justice.⁶⁰⁴

Conclusion

The SERAC case, decided against Nigeria by the African Commission on Human and Peoples' Rights, conclusively establishes the fact that judicial intervention can make a difference and ameliorate the accountability deficit of public governance in Nigeria. It is important to note that ten years after the SERAC case above, which extracted accountability from the Nigerian government policies, domestic Nigerian jurisprudence on the nonenforceability of

⁶⁰³ Ibid. paragraph 121.

⁶⁰⁴ The African Charter on Human and Peoples' Rights is also known as the Banjul Charter in the human rights community.

socioeconomic rights has not changed.⁶⁰⁵ The *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria & Universal Basic Education Commission* and *SERAP v. Nigeria* cases, decided by the Court of Justice of the Economic Community of West African States (ECOWAS), support the case for the amendment of the Nigerian Constitution to convert socioeconomic rights as directive principles of state policy to enforceable human rights.

The ECOWAS cases both show conclusively that the Nigerian government has been obstinately hiding under the cover of the nonjusticiability of socioeconomic rights proviso of section 6(6)(c) of the 1999 Constitution of Federal Republic of Nigeria, in order to shirk its socioeconomic rights commitments under the African Charter, which it has domesticated; the International Covenant on Economic, Social and Cultural Rights; as well as the ECOWAS Treaty and its protocols. Constitutionally protected rights have always been vigorously defended and enforced by the Nigerian judiciary and bar association, even during military regimes. A constitutional amendment and relaxed access to court by litigants would neutralize the Nigerian government's position that socioeconomic rights are constitutionally nonjusticiable and subject government's socioeconomic policies to judicial scrutiny.

Constitutionally guaranteed socioeconomic rights will subject Nigeria's socioeconomic policies to international human rights law obligations and domestic constitutional mandates, thereby improving public governance accountability. More importantly, the forces in the Nigerian legal system that have utilized relaxed access to the African Commission on Human and Peoples' Rights and the ECOWAS Court of Justice would have their toolkit of existing domestic mechanisms of accountability complemented by constitutionally guaranteed socioeconomic rights, and knock off the bottom of persistent arguments by government lawyers

⁶⁰⁵ Nwauche, E.S. 'Enforcing ECOWAS Law in National Courts,' (Journal of African Law, Vol. 55, No. 2, 2011), pp. 181-202, at p. 198.

that the 1999 Nigerian Constitution recognizes socioeconomic rights as nonjusticiable fundamental principles and objectives of state policy. Nigerian governments have by and large respected domestic court judgments, including the despotic military regimes. Court judgments based on constitutionally enforceable socioeconomic rights under an amended 1999 Constitution of the Federal Republic of Nigeria would also be respected and complied with by a Nigerian government that respects only constitutionally enforceable human rights.

Nigerian judges would be empowered to subject government policies to thresholds of accountability if socioeconomic rights are made constitutionally justiciable and the nonjusticiable clause is deleted from the 1999 Nigerian Constitution.⁶⁰⁶ That is implicit in the full text of my interview with Honorable Albert Oduyemi, retired justice of the Nigerian Court of Appeal.⁶⁰⁷ Public interest litigation can only flourish in Nigeria if *locus standi* or access to court is also relaxed from its conservative restrictive nature in Nigerian jurisprudence. Very few Nigerians can access the international tribunals for enforcement of socioeconomic rights, and the availability of domestic remedies will regularly subject government socioeconomic policies to public scrutiny in the law courts.

⁶⁰⁶ Section 6(6) (c)

⁶⁰⁷ Full text available on file with the author.

CHAPTER FIVE

THE COMPARATIVE CONTEXT OF SOCIOECONOMIC RIGHTS

5.0. Introduction

Section 5.1 of this chapter substantially focuses through the scholarship of American professors Mark Tushnet, Lawrence Sager, and Frank Michelman to learn how America has ameliorated the limitations of a constitutional tradition strongly opposed to constitutionalized socioeconomic through the use of ordinary legislation by both the federal government and the states, in order to provide welfare rights through welfare benefits in health and education. I juxtapose the American experience with that of Nigeria, where socioeconomic rights are also not justiciable, but unlike in America, they are listed as fundamental objectives and directive principles of state policy under Chapter II of the 1999 Constitution of the Federal Republic of Nigeria. This theoretically gives the Nigerian political class greater leeway to enact the provisions into ordinary legislation, just the way welfare rights have been legislated upon in the United States. But as I highlighted at the beginning of this dissertation, such legislation in Nigeria has not been respected by the Nigerian state, which still maintains that socioeconomic rights are nonjusticiable under the terms of the 1999 Constitution, even when it relates to legislation, which it passed. I proceed, in section 5.2, to analyze the jurisprudence on education in the U.S. states of Kentucky, New Jersey, and New York. I establish that education jurisprudence has improved accountability in public governance in these three states in the provision of free qualitative public education for their children.

Subsequently, in section 5.3, I analyze the attempt of India's Supreme Court socioeconomic jurisprudence to entrench accountability in government's socioeconomic policies through public interest litigation. In section 5.4, I conduct a brief analysis of the transformative constitutions of Argentina and Colombia, both of which contain enforceable socioeconomic rights. In section 5.5, I show that a number of African countries have incorporated justiciable socioeconomic rights in their constitutions in the past two decades. I then conclude the chapter by stating that Nigeria can benefit immensely from the experiences of Argentina, Columbia, and India in improving accountability of public governance through the subjection of government policies to a minimum threshold of scrutiny by the judicial branch. Nigeria can benefit from the United States' experience in the realization of educational and health standards through ordinary legislation and states' constitutions, despite a strong aversion to the entrenchment of enforceable socioeconomic rights in the U.S. Constitution. India has also amended its constitution to make education an enforceable socioeconomic right for children up until fourteen years of age, while at the same time, the Indian Supreme Court has expanded the constitutionally guaranteed right to life to encompass a right to health care. All mechanisms of accountability, including constitutionally enforceable socioeconomic rights, must be available to ameliorate Nigeria's accountability deficit in public governance.

5.1. An Analysis of the American Constitutional Model in the Area of Socioeconomic

Rights The United States does not offer constitutionally protected socioeconomic rights, but rather ordinary legislation has been used by both the federal government and the states to provide welfare rights in areas like health, and education. The limitations on having nonjusticiable socioeconomic rights have in a sense been ameliorated in the United States, as we shall see in the analysis of the scholarship of Michelman, Tushnet, and Sager in this section. In Nigeria,

socioeconomic rights are not justiciable under both the 1979 and the current 1999 Constitutions. However, they are listed as fundamental objectives and directive principles of state policy, which theoretically gives the Nigerian political class a greater leeway than their counterparts in the United States to enact the provisions into ordinary legislation, just the way welfare rights have been legislated upon in the United States.

The ruling political party, the People's Democratic Party, passed the Compulsory Free Universal Basic Education Act in May 2004, and it came into force on May 26, 2004; it must be noted that the same party has been in power in Nigeria since 1999, at the federal level and in most of the states. Section 2 of the Compulsory Free Universal Basic Education Act states that "Every Government in Nigeria shall provide free, compulsory and universal education for every child of primary and junior secondary school age. Every parent shall ensure that his child or ward attends and completes his primary school education; and junior secondary education." Section 3 of the act provides that "services provided in public primary and junior secondary schools shall be free of charge," and "a person who receives or obtains any fee contrary to the provisions subsection(1) of this section commits an offence and is liable on conviction to a fine not exceeding N10,000 or imprisonment for a term of three months or to both." Section 4 of the Act provides that "every parent shall ensure that his child receives full-time education suitable to his age, ability and aptitude by regular attendance at school."

But the Nigerian People's Democratic Party-led government, for example, has persistently objected to judicial enforcement of provisions of the 2004 Universal Basic Education Act and claims that education is merely a prerogative of government policy under the nonjusticiable Chapter II provisions of the Constitution of the Federal Republic of Nigeria on Fundamental Objectives and Directive Principles of State Policy. The tendency of the Nigerian

government not to accord respect to Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria was addressed in section 4 of chapter 4, on decisions pertaining to Nigeria at the ECOWAS Court of Justice

According to Michelman, the institutional objection to justiciable socioeconomic rights can be addressed by making them nonjusticiable, to conform to the separation of powers doctrine. The indeterminacy or lack of precise contours of socioeconomic rights reservations expressed by constitutional contractarians, can be addressed by regarding them as directive principles as opposed to negative-based fundamental rights in a constitution. Michelman attributes this solution to John Rawls; directive principles will bring about a constraint of public reason and result in basic justice. Civil and political rights will be justiciable and socioeconomic rights will nonjusticiable directive principles attributes of social citizenship. This theory has not worked out in Nigeria, where Michelman's support for directive principles hold true in the wordings of the 1999 Constitution; the directive principles of state policy have been ignored by the political elites solely interested in feathering their personal nests and not interested in the welfare of the citizens of Nigeria. Michelman's theory has been strongly debunked by the real world of the politics practiced by the People's Democratic Party in Nigeria.

The move to public reason eases the strain on constitutional contractarians who honestly believe that a political commitment to the state's constant, good faith pursuit of social citizenship for all must be a term of any universally reasonably acceptable constitution. The case in which every parliamentarian and indeed every voter stands ready, in all sincerity, to explain and defend all their votes, on matters affecting the structural conditions of social citizenship, as expressions of their honest best judgments about which choice is most conducive to assurance of social citizenship for all, is a case of what Rawls would call fulfillment of the ideal of public reason. If citizens could have sufficient confidence that public reason in that sense prevails in public decision-making over matters affecting the structural conditions of social citizenship, then that confidence (combined with formal, legal guarantees of everyone's enjoyment at all times of the core, basic negative liberties) might give every reasonable person a sufficient basis for accepting the legislative outcomes, whatever they turn out to be, of a democratic constitutional regime. And notice, then, the converse: If the facts on the ground are such

that citizens cannot reasonably maintain confidence in the effective constraint of public reason on political choices affecting the structural conditions of social citizenship, then the extant system of positive legal ordering is unjust. It fails to measure up to the moral demand for justice in politics, as political-liberal, constitutional contractarian thought conceives of that demand.⁶⁰⁸

The majoritarian or democratic objection to socioeconomic rights as a restraint on democratic choices is addressed by naming social rights as social citizenship to influence political public reasoning representative of the whole gamut of the political spectrum in society during the formulation of public policies:

By contrast, a constitutionally declared right of everyone to the enjoyment of social citizenship would leave just about every major issue of public policy still to be decided. Its maximum (but maybe not trivial) effect on democratic decision making (the courts being kept away) would be a certain pressure on the frame of mind in which citizens and their elected representatives would approach the sundry questions of public policy always waiting to be decided. In Rawlsian language, the point of naming social citizenship a constitutional right would be to give a certain inflection to political public reason. Across a very broad swathe of public issues, such a naming would amount to a demand that those issues be approached as occasions of judgment—which choice will conducive to the social citizenship of everyone, on fair terms?—rather than as invitations to press and to vote one’s own naked interests and preferences.⁶⁰⁹

Professor William Forbath disagrees with Michelman regarding leaving the determination of social citizenship to the political process, and I agree with Forbath,⁶¹⁰ because the political

⁶⁰⁸ Michelman, Frank I. ‘The constitution, social rights, and liberal political justification’ I.CON, Volume 1, Number 1, 2003, pp. 13-34, at p.33.

⁶⁰⁹ Ibid. at p. 34.

⁶¹⁰ “Once one embraces the view that a republican constitution must vouchsafe the social conditions of democratic law making, one cannot leave the question of social citizenship where Michelman left it in these articles. One cannot leave the work-and economic-interdependence-and –participation-related aspects of social citizenship to the give and take of ordinary politics. Specification of what counts as decent work or recognized but non-waged contribution, and how, at a particular time, the nation ought to go about assuring such opportunities to all, of what counts as a decent livelihood at said time, of what counts as incapacity, and of what quantum of income should separate those, not incapacitated, who avail themselves of “welfare” or a guaranteed income versus those who “work”—all these issues and more may and, practically, must be addressed through political and market processes. But if social citizenship rights are prerequisites to political equality, then they must precede ordinary politics. In their general form as positive and enabling rights, they must become part of the law of lawmaking. Otherwise a broad swathe of the citizenry will be denied-as today they are denied-a constitutionally fair opportunity to act as citizen-participants in the very debates and decision-making upon which their citizenry standing depends.”

process excludes the ordinary citizens and is dominated by professional politicians who command more resources.

Forbath's concern is vividly reflected by the political process under the 1999 Constitution of the Federal Republic of Nigeria, especially the nonjusticiable Chapter II provisions on Fundamental Objectives and Directive Principles of State Policy. I proved in chapter 4 that the Nigerian government has persistently objected to judicial enforcement of the 2004 Universal Basic Education Act passed by its legislators. It regularly claims that education is merely a prerogative of government policy under the nonjusticiable Chapter II provisions of the Constitution of the Federal Republic of Nigeria on Fundamental Objectives and Directive Principles of State Policy. Nigeria's experience buttresses Forbath's disagreement with Michelman on leaving the determination of social citizenship to the political process.

Michelman's "Foreword: On Protecting the Poor Through the Fourteenth Amendment,"⁶¹¹ accurately mirrors the concerns of the ruling political elite in Nigeria's First Republic from 1960 to 1966, when there were programs to abolish poverty and educate citizens free of charge. Unlike the U.S. legal system's concern with providing protection against severe poverty, the politicians in Nigeria in the same period were legislating and implementing programs to make life abundant for the poorest Nigerians through good health and proper nutrition. According to Michelman, the problem to be solved is severe deprivation, and not inequality. He proffers a minimum welfare safety net as opposed to equalization of opportunities. For him, using discrimination claims to tackle severe deprivation are a mistaken and ineffective approach to tackling poverty in society.

Forbath, William E. 'Constitutional Welfare Rights: A History, Critique and Reconstruction,' 69 *Fordham L. Rev.* (2000), pp. 1821- 1891, at p.1888.

⁶¹¹ Michelman, Frank, 'Foreword: On Protecting the Poor through the Fourteenth Amendment,' (*Harvard Law Review*, Vol. 83, 1969,) pp.7-59

The *Harper*⁶¹² decision was about the invalidation of a poll tax condition for voting, and it was just a coincidence that the plaintiffs were poor, ditto the criminal law procedure cases of *Griffin*⁶¹³ and *Douglas*.⁶¹⁴

Nowhere in *Harper* is there any occasion for inference that the poor are, in any more general sense, a judicially favored class or that de facto wealth discriminations are generally disfavored. The same is true of the ‘criminal procedure’ cases-*Griffin v. Illinois*, *Douglas v. California*, and their numerous spawn of decisions insisting that a state which subjects a man to criminal prosecution must make sure that he is not prevented by want of means from defending himself with full vigor, perseverance, and effectiveness. These can easily be explained as belonging to a family which treats as meriting special support the interest in strong opposition to the state’s prosecutorial thrusts. There is again no need to fabricate a no-pecuniary-discrimination doctrine.⁶¹⁵

The [1868] Fourteenth Amendment to the U.S. Constitution stipulates in its first section that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” For Michelman, the provisions do not amount to the recognition of a protection against severe deprivation, but rather a protection against discrimination. He states that: “Of course, the Court’s ‘egalitarian’ interventions are often occasioned by problems which would not exist but for economic inequality. Yet I hope to make clear that in many instances their purposes could be more soundly and satisfyingly understood as vindication of a state’s duty to protect against certain hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment.”⁶¹⁶

Michelman’s concern is not with minority discrimination but rather with severe

⁶¹² *Harper v. Virginia State Board of Elections* 383 U.S. 663 (1966)

⁶¹³ *Griffin v. Illinois* 351 U.S. 12 (1956).

⁶¹⁴ *Douglas v. California* 372 U.S. 353 (1963)

⁶¹⁵ Opit Michelman, Frank, ‘Foreword: On Protecting the Poor through the Fourteenth Amendment,’ at p. 25.

⁶¹⁶ *Ibid.* at p. 9.

poverty.⁶¹⁷ “Perhaps the best description of what ties these paragraphs together is provisional adoption, as inchoate legal doctrine, of a theory of social justice which *prima facie* seems capable of rationalizing an important group of equal protection decisions without positing equality or even handedness as the guiding value (or discrimination as the target evil).”⁶¹⁸ He goes on state that the decisions of the courts would be better grounded in proof of severe deprivation in contradiction to the claim of inequality:

...in shaping the statement of our claim so as to fit it to the locutions of the equal protection clause, we must find an “inequality” to complain about; and the only inequality turns out to be that some persons, less than all, are suffering from inability to satisfy certain “basic” wants which presumably are felt by all alike. But if we define the inequality that way, we can hardly avoid admitting that the injury consists more essentially of deprivation than of discrimination, that the cure accordingly lies more in provision than in equalization, and that the reality of injury and need for cure are to be determined largely without reference to whether the complainant’s predicament is somehow visibly related to past or current governmental activity.⁶¹⁹

Hence, his thesis of a minimum safety net protection from severe deprivation: “The argument for minimum protection as applied to specific needs and occasions must, then, depend on the proposition that justice requires more than a fair opportunity to realize an income which can cover these needs or insure against them—requires, to be sure, absolute assurance that they will be met when as felt, free of any remote contingencies pertaining to effort, thrift, or foresight.”⁶²⁰ In Michelman’s thesis, there is no grand ambition to provide the poor with luxuries of the rich, except in the area of education: “Standing on a quite different ground is the relevance of what others have when the want in question is deemed specially significant—as education, for example, might be—because of its importance for success in competitive activities.”⁶²¹

⁶¹⁷ Ibid. at p. 10.

⁶¹⁸ Ibid. at p. 10.

⁶¹⁹ Ibid. at p. 13.

⁶²⁰ Ibid. at p. 14.

⁶²¹ Ibid. at pp. 18-19.

Michelman makes the claim that American society is only willing to provide the basic minimum to satisfy just wants and not to equalize the poor with the rich.

It is true that the remedy usually adopted in the Griffin-Douglas line of cases—furnishing ‘free’ to those classed as ‘indigent’ something for which the more affluent must continue to pay—may suggest that the grievance must have consisted of some form of ‘discrimination against’ the class of ‘indigents.’ But a little reflection will show that it makes at least as much sense to speak of an obligation on the part of organized society to ensure that everyone’s just wants are fulfilled—which obligation is, in these instances, carried out by free provision to those and only to those who cannot satisfy their just wants out of their own means. Moreover, the common practice of limiting special assistance to those claiming indigency or inability to afford a lawyer, rather than employing a graduated schedule of partial subsidies geared to ability to pay, suggests strongly that fulfillment of just wants exhausts the system’s concern. The ‘equality’ which infects judicial rhetoric is not reflected in the social practice which the courts have so far deemed acceptable; with respect neither to the quality of legal services provided nor to the degree of financial sacrifice required is an equality goal seriously pursued.⁶²²

Michelman cautions against the raising of false hopes in judicial rhetoric of addressing discrimination; as opposed to meeting the basic pecuniary needs of the poor.

If the relevant insight concerning payment requirements must be given a doctrinal form of statement, the appropriate construction would seem to be something like: ‘It is no justification for deprivation of a fundamental right (i.e., involuntary nonfulfillment of a just want) that the deprivation results from a general practice of requiring persons to pay for what they get.’ Such a construction focuses the inquiry on the crucial variable—the nature and quality of the deprivation—and thereby avoids the distractions, false stirring of hopes, and tunneling of vision which results from a rhetorical emphasis on acts of ‘discrimination’ that consists of nothing more than charging a price.⁶²³

Michelman further cautions lawyers aiming at social reform, to formulate their claims regarding severe deprivation by excluding discriminatory claims so as not to alienate judges who are desirous of tackling severe deprivation in a society governed by the market economy:

It must of course be conceded that one might find inaccurate or intolerable the premise, implicit in the forgoing remarks, that significant income disparities look to be a long-term fixture in American society. One might even believe that judicial action can be made an effective

⁶²² Ibid. at p. 26.

⁶²³ Ibid. at p. 32.

instrument of income equalization (though surely it is not easy to imagine how courts could hasten the demise of relative deprivation in general except through treatment of severe deprivations in particular). Those who so believe may be justified-though I suspect they would be tactically ill-advised-in arguing whenever possible that a government's unchallenged refusal to fulfill some want is unconstitutional because, among other vices, it "discriminates against the poor." But other participants in the process of social reform through litigation ought, I believe, to be more discriminating. They might, at any rate, consider the possibility that judges who are especially sensitive to the overbreadth of that formulation will be deterred by its recital from recognizing claims that might have been acceptable if presented without invoking it. In sum, I believe we ought to hear the teachings of Harper⁶²⁴ and the Griffin-Douglass line with an ear resolutely deaf to superfluous rhetoric. We do better by the Court to regard it, not as nine (or seven, or five) Canutes railing against tides of economic inequality, which they have no apparent means of stemming, but as a body commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of what continues to be known as free enterprise."⁶²⁵

Several decades later, Michelman is no longer pushing for a constitutionally justiciable socioeconomic right for protection against severe deprivation, but rather he leans toward the symphony of nonjusticiability.⁶²⁶ Professor Forbath painstakingly traced this metamorphosis in

⁶²⁴ Ibid. at p. 32.

⁶²⁵ Ibid. at p. 33.

⁶²⁶ "Assuming we are serious about the extra-judicial, political efficacy of the naming of something as a constitutional right, then-many will think-we cannot so name social citizenship without intending a heavy drag on democracy, even if we mean also (vainly) to be moving for the constitution to be taken entirely away from the courts. Speaking for myself, I think a critique along those lines of Forbath's proposal would proceed from a terribly wrong understanding of democracy. On what I regard as the better view of what democracy is, the blatant "non-justiciability" of a social-citizenship right-its utter lack of mechanical applicability to any hard or contested question of public policy-is exactly what saves it from charges of contrariety to democracy. (Remember, I am assuming, now, that the courts are out of the picture)."

Michelman⁶²⁷ and the influence of research funding from the U.S. Office of Economic Opportunity on Michelman's 1969 article, "Foreword: On Protecting the Poor Through the Fourteenth Amendment."⁶²⁸ The symphony of nonjusticiability of directive principles has not played out well under the 1999 Constitution of the Federal Republic of Nigeria.

The Nigerian political process, for example, has persistently objected to judicial enforcement of provisions of the 2004 Universal Basic Education Act, and claims that education is merely a prerogative of government policy under the nonjusticiable Chapter II provisions of the Constitution of the Federal Republic of Nigeria on Fundamental Objectives and Directive Principles of State Policy. In section 4 of chapter 4, where I analyzed the impact of the jurisprudence of the ECOWAS Court of Justice on Nigeria, I demonstrated and proved the stubborn tendency of the Nigerian government's persistent refusal to accord respect to Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria.

Mark Tushnet is another American scholar concerned with severe deprivation in American society, and he also supports directive principles of state policy that are nonjusticiable in alleviating economic deprivation, which he vividly demonstrated in his book *Taking the Constitution Away from the Courts*. He also recognized the absence of constitutionally guaranteed socioeconomic rights in the United States, but explained that this has been tempered by ordinary legislation to provide some succor to the needy in society who cannot

Michelman, Frank, I 'Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath,' 69 Fordham L. Rev. (2000), pp. 1893-1899, at p. 1898.

⁶²⁷ "By invoking Michelman present to respond to Michelman past, we have strayed from Michelman on Rawls and welfare rights in 1973. The burden of this foray into the present has been to suggest that Michelman's erstwhile insistence on the justiciability of social and economic rights in non-judicial fora was a product of the politics and doctrine of the day. Welfare rights seemed politically possible and possibly immanent in doctrinal developments; an inspiring movement was pressing for them, and this motivated a search for arguments." Forbath, William E. 'Constitutional Welfare Rights: A History, Critique and Reconstruction,' 69 Fordham L. Rev. (2000), pp. 1821- 1891, at p. 1881.

⁶²⁸ Ibid. at p. 1871.

afford socioeconomic goods. Tushnet cited *Plyler v. Doe* 457 U.S. 202 (1982), a Supreme Court decision to demonstrate that the court steps in to declare as unconstitutional socioeconomic legislation on free public education, which excluded children whose parents lacked immigration papers. He also referred to a federal court decision, *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), that nullified a 1994 California State law passed by voters under Proposition 187, which denied free public education to children whose parents lacked immigration papers.⁶²⁹ In *Plyler* the analysis of the Supreme Court revolved around the fact “that the children denied a free public education were likely to remain in the country for many years, and would be more productive contributors to the nation if they had an education...In *Plyler* the Court found no indication in the record that the burdens the children placed on the Texas economy were significant, and suggested that the outcome might differ if there had been such evidence.”⁶³⁰

Tushnet believes that American legislators have abdicated the constitutional compass to the courts and tailor legislation to avoid such legislation being struck down as unconstitutional by the judiciary.⁶³¹ Tushnet cited Thayer’s seminal 1893 article, which advocated judicial restraint and deference to legislation, except the manifestly unconstitutional ones.⁶³² According to Tushnet, the Supreme Court employs strict scrutiny when interpreting laws that affect the liberty bearing provisions of the American Constitution and adopts low scrutiny in the area of socioeconomic legislation. He cited as an example the case of (*Dandridge v. Williams*, 397 U.S. 471 (1970): “a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some ‘reasonable basis,’ it

⁶²⁹ Tushnet, Mark, *Taking the Constitution Away from the Courts*, (Princeton, New Jersey: Princeton University Press, 1999), p. 6.

⁶³⁰ *Ibid.* at p. 18.

⁶³¹ *Ibid.* at pp. 57-64.

⁶³² *Ibid.* at pp. 57-58

does not offend the...Constitution. The Court's reason for giving low-level scrutiny to social and economic laws is that anything more would convert the Court into a general supervisor of the wisdom of everything a legislature enacts."⁶³³

Tushnet believes that judges are influenced by the dominant political forces in society, thereby assimilating the values of dominant political forces, and he cited the influence of the New Deal political grouping era on judges.⁶³⁴ "All this means that judicial review is likely to simply reinforce whatever a political movement can get outside the courts. Sometimes, however, judicial review might make it harder for political movements to accomplish their objectives."⁶³⁵ He therefore cautions lawyers and political movements against putting all their eggs in the judicial basket as opposed to alternative modes of social mobilization.⁶³⁶

We should not overestimate judicial review's significance, however. The persistence of segregation after Brown, for example, cautions advocates to distinguish between the short term and the long term, and between material accomplishments and ideological ones. ...This sort of caution is particularly important for lawyers, and for a public in the United States with its distinctive constitutional and legal culture. Lawyers are likely to overestimate the contributions we can make to social progress, for obvious and understandable reasons. Cautions about what we can actually accomplish help to deflate our sense that we are essential contributors to social change.⁶³⁷

Tushnet also recognizes the American "passion" with the concept of individualistic fundamental right.

The U.S. constitutional and legal culture matters, too, because in that culture the simple statement by a court that someone has a right-in itself only an ideological victory-can too easily be taken, by the public if not by progressive lawyers and their allies, as a complete victory. It takes work, in our culture, to connect ideological victories to material outcomes, to explain why Brown's condemnation of school segregation is betrayed when African-American children still attend schools with almost no white children. The cautions remind us that such work continues to

⁶³³ Ibid. at p. 60.

⁶³⁴ Ibid. at p. 134.

⁶³⁵ Ibid. at p. 135.

⁶³⁶ Ibid. at pp. 136-137.

⁶³⁷ Ibid. at p. 141.

be necessary.⁶³⁸ ...Rights-claims are individualistic, nonetheless, not because of something inherent in the concept of rights, but rather because of the historical development of the language of rights. The central image of “rights” in our culture is, as Mackinnon’s critique suggests, of a sphere within which each of us can do what he or she pleases. This image, in turn, reinforces the distinction between law and politics. Politics is the domain of pure⁶³⁹ will or preference, not subject to discussion and deliberation except as each individual chooses to be influenced by others. Rights-or law-protect the domain in which political preferences are formed. If, however, a critic believes that making politics truly social is an important task, it might be important as well to fight an ideology, the ideology of rights, that leads people to think of themselves as disconnected from others in important ways.⁶⁴⁰

Tushnet also cautioned about the Supreme Court’s judgment going against the grain of the majority Caucasian populace in America and illustrated the point with the school segregation case in *Brown v. Board of Education*, 349 U.S. 294 (1955):

Brown is important in another way. Whatever its effects were, we know that it did not transform the material conditions in which most African-Americans live. African-American participation in the national political process has not produced public policies that have eliminated discrimination and the disproportionate poverty affecting the African-American community. The reason is that a national majority believes that such policies would be too expensive. The point to note here is that judicial review has not addressed these problems either. Again following the election returns, the Supreme Court has shifted gears. It now uses the rules it developed to assist African-Americans to strike down affirmative action programs. Perhaps this is a more complex case of the Court predicting the future, as the Court seems more opposed to affirmative action than cultural elites and more even than the American people, who reveal in polls more even ambivalence about affirmative action than the Court’s decisions express.⁶⁴¹

As a solution to the above problem, Tushnet looks at the British and Dutch models, where socioeconomic programs have been achieved under ordinary legislation. The judiciary in Britain, for example, employs administrative law proceedings of the ultra-vires doctrine to correct inadequacies in implementation of government programs, unlike the constitutional remedies approach in the United States.⁶⁴² Tushnet recognizes the phobia and deep aversion of

⁶³⁸ Ibid. at p. 141.

⁶³⁹ Ibid. at p. 142.

⁶⁴⁰ Ibid. at p. 143.

⁶⁴¹ Ibid. at p. 151.

⁶⁴² Ibid. at p. 163.

both the U.S. Supreme Court and a majority of constitutional scholars to constitutionalized socioeconomic rights which amount to “...courts running everything—raising taxes and deciding how the money should be spent. Some people think we have all too much of that today, but the problem they see would be worse if we constitutionalized social welfare rights.”⁶⁴³

Tushnet sees a way out in Article 45 of the Irish Constitution, which makes its nonjusticiable “Directive Principles of Social Policy” enforceable only by the legislature. He also seeks a solution in the German model, where public assistance has been recognized as a constitutional right by the Constitutional Court, but the legislature has the prerogative to design and implement such assistance. He cites the incorporation of the above models in Lawrence Sager’s vital but ignored 1978 article, “The Legal Status of Underenforced Constitutional Norms.” In summary, just as international human rights documents dictate, legislators must be guided by the directive principles of a country’s constitution dealing with the welfare of the people.⁶⁴⁴

As that indicates, Sager saw the Constitution in the courts’ shadow. Underenforced constitutional norms are, simply, ones the courts do not enforce. But, Sager argued, they were just as fully “constitutional” as the ones the courts did enforce. What does that mean? International human rights documents typically acknowledge that the degree to which any nation can effectively provide social welfare rights depends on the nation’s economic development. The Irish phrase “Directive Principles of Social Policy” points us in the right direction. Constitutional social welfare rights direct legislators to implement their provisions. As Sager put it, public officials-legislators and executive officials-had a duty to make their “best efforts” to carry out the Constitution’s directives.⁶⁴⁵

Tushnet has a feeling that liberal constitutionalists have not shown concrete sympathy toward the plight of the poor in U.S. society, as they have done with more elitist abortion issues.

⁶⁴³ Ibid. at p. 169.

⁶⁴⁴ Ibid. at pp. 169-170.

⁶⁴⁵ Ibid. at p. 170.

In arriving at this conclusion, he was greatly influenced by Mark Graber's "The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory."⁶⁴⁶ Tushnet's analysis in the previous paragraphs, point toward the adoption of the Irish constitutional model of nonjusticiable directive principles as a way out of addressing poverty in America.

Mark Tushnet's "Weak Courts, Strong Rights" exhibits his concern about delivering the socioeconomic goods in American society and other societies battling with severe deprivation where socioeconomic goods are not constitutionally protected as fundamental rights. He sees a way in having socioeconomic goods provided for through directive principles of state policy akin to what obtains in Nigeria. His thesis must be adjusted to take into consideration deviant behavior, like the political elites who have ignored the fundamental objectives and directive principles of state policy in the 1999 Nigerian Constitution.

Tushnet examines the classical political science model expounded by Robert Dahl in 1957, and built upon by Barry Friedman and Robert Bennett. This political science model maps a longtime dialogue between the executive, judicial, and legislative arms, which eventually leads to the appointment of Supreme Court judges sympathetic to the ruling political elite after the transition or retirement of old judges. "In the end, the dominant coalition comes to live with strong-form review because it finds it pointless to argue the purely theoretical question of strong-versus weak-form review once it has taken control of the Court."⁶⁴⁷ A shorter time frame is offered by social movement scholars. Tushnet analyzed the scholarship of Robert Post and Reva Siegel on the influence that social movements exercise on judgments of the Supreme Court, whose justices as members of society are not hermetically sealed off from how social movements

⁶⁴⁶ Ibid. at p. 186.

⁶⁴⁷ Tushnet, Mark, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (Princeton, New Jersey: Princeton University Press, 2008), p. 34.

change contemporary societal views about the U.S. Constitution. This model does not depend on appointment of sympathetic judges or packing the bench with allies in contradistinction to the political science model above. “Like that model, though, the social movement model takes the story to end when the courts come into line.”⁶⁴⁸ Tushnet also examines the shortest dialogue, “switch in time” model underpinned by metaphorical “moments” offered by Bruce Ackerman. Under this model, a galvanized society enacts legislation through its leaders, which in turn is annulled by the judiciary upon a constitutional petition. At this moment, a more galvanized society seeks to take over the court and the court in the face of strong social mobilization against its judgment, capitulates to popular opinion.⁶⁴⁹

Tushnet identifies U.S. judicial review as a strong form but sees the Supreme Court exercising a weak form of judicial review in the area of socioeconomic welfare legislation when it concedes to the wisdom of the legislature. He buttresses this view with the decision in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).⁶⁵⁰ But nevertheless he goes on to identify the “political questions doctrine,” which insulates certain activities of the legislature from judicial review, for example, the impeachment of judges. “The political questions doctrine does not mean that Congress is totally unconstrained by the Constitution in the areas it identifies. Rather, it means that Congress conclusively determines what the Constitution means in those areas.”⁶⁵¹

Tushnet claims that weak forms of judicial review encourage regular conversation between the judiciary and the legislature on interpreting constitutions.⁶⁵² This model, according to him, has been labeled as experimentalist by Michael Dorf and Charles Sabel.⁶⁵³ “To what

⁶⁴⁸ Ibid. at p. 35.

⁶⁴⁹ Ibid. at p. 35.

⁶⁵⁰ Ibid. at p. 37.

⁶⁵¹ Ibid. at p. 83.

⁶⁵² Ibid. at pp. 43-66.

⁶⁵³ Ibid. at p. 66.

extent do decision makers orient themselves towards a nation's constitutional tradition?"⁶⁵⁴ This is a very important question raised by Tushnet, but I have strong reservations about Tushnet's belief in the altruistic nature of legislators in the United States of America.⁶⁵⁵ "Bruce Peabody's recent survey of the views of members of the U.S. Congress indicates that its members do pay attention to the Constitution more often than academic skeptics think."⁶⁵⁶

Tushnet does not seem to be confident about the emergence of a culture where greater weight would be given to a court's opinion than that of the government under the model of weak judicial review.

Advocates of weak-form review insist on the beneficial effects of embarrassment in shaping a culture of rights. They favor weak-form review rather than mere press criticism because they believe that experience has shown the inadequacy of the latter as a tool to control government....The difficulty lies in creating a culture in which the courts' statements have some weight, but only because people believe that the courts' institutional characteristics increase the likelihood that the constitutional interpretations they offer are more reasonable than the reasonable ones offered by the government. If courts' judgments have more weight than that, one might as well adopt strong-form judicial review....experience with weak-form judicial review is too recent to support confident judgments about the possibility that weak-form systems will indeed create such cultures.⁶⁵⁷

Tushnet redevelops faith in the weak-form of judicial review in the last two chapters of his book, "Weak Courts, Strong Rights".⁶⁵⁸ Tushnet agrees with the thesis of Robert Hale in his 1923 seminal article that the state delegates power in the form of private property.⁶⁵⁹ He tries to explain the U.S. state action doctrine through an expressive methodology that factors in constitutional history or legal culture and ideology, on one hand, and "that state action doctrine is about judicial rather than legislative definition of the effects of the background rules of property,

⁶⁵⁴ Ibid. at p. 85.

⁶⁵⁵ Ibid. at p. 85.

⁶⁵⁶ Ibid. at p. 87.

⁶⁵⁷ Ibid. at p. 150.

⁶⁵⁸ Ibid. Chapters seven and eight.

⁶⁵⁹ Ibid. at p. 169.

contract, and tort,”⁶⁶⁰ on the other hand. Tushnet tries to explain the phobia of an omnipresent state in U.S. culture as the reason for the durability of the mentality of holding the state at bay through the state action doctrine. In his words,

In the U.S. legal culture, the concern, already mentioned, that an expansive state action doctrine has totalitarian overtones plays an important part. The underlying intuition is that there is something more problematic, more threatening to liberty, from government action than from action by private parties. The government might be more threatening because it can inflict more harm than private actors, or because it can inflict a different and more troubling kind of harm. On examination though, neither argument seems particularly strong, suggesting an expressive analysis of the doctrine provides greater insight than alternatives.⁶⁶¹

Tushnet demonstrates the restraint on state power through the employment of state action doctrine by the Supreme Court in the case of *Lochner v. New York* 198 U.S. 45 (1906). Here, the Supreme Court annulled a New York statute that limited operational hours of bakers.⁶⁶² In the earlier *Civil Rights Cases* 109 U.S. (1883), the Supreme Court held that discrimination in the private sphere that did not emanate through state action could not be legislated against by Congress.⁶⁶³ *Miller v. Schoene* 276 U.S. 272 (1928) is used by Tushnet to demonstrate that the background rules of common law did not provide “a neutral baseline of private rights,” which made the Supreme Court jettison the *Lochner* liberty of contract doctrine’s pretension of “protecting individual power against collective power.”⁶⁶⁴

The *Lochner* liberty of contract period was replaced by Franklin Roosevelt’s New Deal commitment to social welfare rights, which Tushnet references Cass Sunstein as calling “The Second Bill of Rights: FDRs Unfinished Revolution and Why We Need It More Than Ever” constitutionally committed to social welfare rights.⁶⁶⁵ The ambivalence of American

⁶⁶⁰ Ibid. at p. 172.

⁶⁶¹ Ibid. at p. 177.

⁶⁶² Ibid. at p. 172.

⁶⁶³ Ibid. at p. 172.

⁶⁶⁴ Ibid. at p. 176.

⁶⁶⁵ Ibid. at p. 181.

society to welfare rights is explained by Tushnet: “We have repudiated *Lochner* in its core applications, and yet it remains with us in the state action doctrine. The reason is that Americans accept the modern regulatory state, which is why we have repudiated *Lochner*, but we are not entirely comfortable with it, which is why we retain the state action doctrine.”⁶⁶⁶ The state action doctrine is underpinned by the concept of federalism, which limits federal legislation and federal judicial power and enables states’ legislatures acting for the majority “to regulate private decisions as they choose.”⁶⁶⁷

U.S. constitutional law is predicated on the deference by the judiciary to the legislature, in matters relating to socioeconomic issues. Because legal reasoning could not resolve policy judgments which socioeconomic issues entailed under the dichotomy between public and private divide. But civil and political rights could easily be addressed by legal reasoning tools employed by the judiciary.⁶⁶⁸ In applying the foregoing analysis to socioeconomic rights, Tushnet adopts Duncan Kennedy’s view that “policy and politics” determine the role of socio-economic rights in wealth creation and distribution in American society.⁶⁶⁹ “The contemporary social welfare state implicitly incorporates the critique of the idea that the economic realm is free from state power by permitting social welfare redistributions. However, the contemporary liberal objection to mandated social welfare rights remains in the shadow of *Lochner* because it holds that questions regarding the distribution of wealth are among the most political and controversial and thus must be left to democratic processes for their resolution.”⁶⁷⁰

Tushnet feels that the assertions by American scholars that the U.S. constitutional model has been adopted widely by other nations is wrong, and he refers to Sager’s *Justice in*

⁶⁶⁶ Ibid. at p. 181.

⁶⁶⁷ Ibid. at p. 183.

⁶⁶⁸ Ibid. at p. 185.

⁶⁶⁹ Ibid. at p. 189.

⁶⁷⁰ Ibid. at p. 190.

Plainclothes as an example of such recent scholarship.⁶⁷¹ Tushnet recommends the Irish model of nonjusticiable “Directive Principles of Social Policy.”⁶⁷² “In this way the Irish model of declaratory but otherwise nonjusticiable rights—analogueous to the British Human Rights Act—may turn out to be the best, because it at least allows for the permanent articulation of the view that social and economic rights should be strong.”⁶⁷³

Clearly then, Tushnet recommends a constitutional model of nonjusticiable directive principles in line with the Irish model. But another reading of the Fourteenth Amendment to the U.S. Constitution dictated positive action of the states to protect liberties of emancipated slaves who had hitherto suffered from the inaction of same states to protect their recently acquired liberties; this implies that positive rights can be read in the U.S. Constitution.⁶⁷⁴

Governments in Nigeria, including military regimes, have always obeyed judicial decisions on justiciable constitutional provisions. The tendency of the Nigerian government not to disrespect Chapter II provisions of the 1999 Constitution of the Federal Republic of Nigeria was addressed in section 4 of chapter 4 on decisions on Nigeria at the ECOWAS Court of Justice. I earnestly believe that socioeconomic rights will only be respected by the Nigerian government when they are made justiciable through an amendment of the 1999 Constitution of the Federal Republic of Nigeria. Justiciable socioeconomic rights would complement and fortify existing mechanisms of accountability in Nigeria and subject government’s socioeconomic policies to judicial scrutiny.

⁶⁷¹ Ibid. at p. 18.

⁶⁷² Ibid. at pp. 238-240.

⁶⁷³ Ibid. at pp. 257-258.

⁶⁷⁴ West, Robin, ‘Rights, Capabilities and the Good Society,’ 69 Fordham L. Rev. (2000), pp. 1901-1932, at p. 1911.

Sager is another American scholar concerned with severe deprivations in U.S. society; he is interested in how to maneuver around the constitutional constraints of a U.S. constitutional order that does not recognize socioeconomic goods as constitutionally protected fundamental rights. But he makes the point that through ordinary legislation the United States strove to ameliorate the plight of the needy in society and that the courts have stepped up to the plate to enforce such rights. Sager acknowledges polycentric considerations of lack of judicial capacity in welfare rights adjudication more properly resolved by other parts of the democratic process, and when welfare rights are legislated, the judiciary now plays a secondary role of policing the just implementation of the legislated welfare rights.⁶⁷⁵

Sager's point of departure from Tushnet's analysis above, is that Tushnet's thin constitution is too thin to guarantee a good society desirous of embedded constitutional norms of nonjusticiable social rights. Political dialogue is also limited in this model.⁶⁷⁶ In addition, Tushnet's thin constitution does not accommodate a rearrangement of the political economy so that a hardworking person "will be able to provide herself and her family with minimum food, shelter, education, and medical care,...There is no space in Professor Tushnet's thin Constitution

⁶⁷⁵ Sager, Lawrence, G. 'The Constitution and the Good Society,' 69 Fordham L. Rev. (2000), pp. 1989-1998, at pp. 1989-1990.

⁶⁷⁶ Professor Tushnet's Constitution seems to wax and wane. Tushnet rather dramatically fattens his thin Constitution by suggesting that welfare rights are indeed within the scope of its concerns. But when his Constitution encounters Proposition 187, we suddenly see it in very thin profile indeed. For Professor Tushnet, the people of California are free to deprive children of illegal aliens from the benefits of education, and free to do so on the grounds that they are not as deserving as more complete members of our political community. All that the thin Constitution hopes for is that the people of California have the welfare of the remaining children in mind as opposed to acting out pure "nativism," out of deep animus to the "other." So Professor Tushnet's thin Constitution is broad only in the subtle and elusive sense that it includes questions of material welfare among its theoretical concerns, but extremely thin because it does not call any particular outcome. What it calls for, at most, are generous restraints on the express terms of political discourse. It is surprisingly comfortable with mean-spirited, but quite possibly hypocritical or self-deceiving, outcomes." Ibid at p.1993.

for any such view.”⁶⁷⁷

In *Justice in Plainclothes*, Sager demonstrates his deeply felt concern about growing poverty in American society, and he tries to proffer solutions and admonishes Americans not to give up on the battle against severe deprivation. He disagrees with the instruction-taking originalist literal agency model of interpretation of the American constitution, which foists the ironclad ancient wisdom of the framing generation upon a modern and different age of constitutional law.⁶⁷⁸ According to Sager, the originalists would prefer that the ancient wisdom of the framing generation dictate present-day constitutional practice.⁶⁷⁹ Sager debunks the instruction-taking approach with his analysis of the Ninth Amendment of the U.S. Constitution. Sager states that “The Ninth Amendment puts the instruction taking view of constitutional practice in gridlock.” The Ninth Amendment states that “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Sager goes further to state that “The Ninth Amendment, in turn, is best understood as responding to the worst fears of those who loved liberty but had doubts about the wisdom of including what ultimately became the Bill of Rights in the Constitution: that no simple list of the liberties of a free people could do justice to justice, and that, by the principle of *expression unius est exclusion alterius*, a bill of rights would do more harm than good.”⁶⁸⁰

Sager pitches his tent with the partnership model of constitutional interpretation.⁶⁸¹ “The partnership model is open to (indeed, depends upon) the belief that collaboration between a popular constitutional decision-maker which paints in broad strokes and a judicial constitutional

⁶⁷⁷ Ibid. at p. 1995.

⁶⁷⁸ Sager, Lawrence G. *Justice in Plainclothes: A Theory of Constitutional Practice*, (New Haven: Yale University Press, 2004), pp. 42-57.

⁶⁷⁹ Ibid. at pp. 58-69.

⁶⁸⁰ Ibid. at p. 67.

⁶⁸¹ Ibid. at p. 70-83.

decision-maker which fills in these strokes with close and reflective details is reasonably well suited to the enterprise of securing the fundamentals of political justice. This is the justice-seeking account of our constitutional practice and I believe it to be the best account of that practice.”⁶⁸² Sager ascribes certain thinness to constitutional law in the realm of political justice. “Constitutional case law is thin in this important sense: The range of those matters that are plausible candidates for judicial engagement and enforcement in the name of the Constitution is considerably smaller than the range of those matters that are plausibly understood to implicate serious questions of political justice. This moral shortfall is one of the most durable and salient features of constitutional life, one that begs for explanation.”⁶⁸³

Even though Sager believes that the Supreme Court has largely been flexible in addressing injustice, he thinks poverty has not been addressed by the Court.⁶⁸⁴

But economic justice for the suffering poor has never secured a firm place on the Court’s constitutional agenda. Even the Warren Court in its most aggressive moments approached the question of economic justice with oblique caution. Throughout, the feeling has not been one of reluctant fidelity but rather of active judgment that recognizes sharp limitations on the reach of constitutional principle or, in the alternative, on the reach of judicially accessible constitutional principle. The sense that seems pervasive in modern constitutional adjudication and most commentary is that judicial enforcement of economic justice would inappropriately congest popular political choice. Something more than mere inertia is needed to explain how a justice-seeking Constitution could treat as a virtue the durable, systematic refusal to respond to the claims of the suffering poor.⁶⁸⁵

Sager locates the answer to the above puzzle in his theory of judicial underenforcement. “The very existence of the political question doctrine concept in our constitutional jurisprudence thus reflects a partial recognition of the idea of judicial underenforcement.”⁶⁸⁶ Sager’s thesis of underenforcement, dictates that the executive and legislative branches are given the prerogative

⁶⁸² Ibid. at p. 68.

⁶⁸³ Ibid. at p. 78.

⁶⁸⁴ Ibid. at pp. 84-86.

⁶⁸⁵ Ibid. at p. 86.

⁶⁸⁶ Ibid. at p. 91.

to formulate policies and programs. The judiciary subsequently intervenes, for instance, under the Fourteenth Amendment's Privileges and Immunities Clause, through cases like *Shapiro v. Thompson* 394 U.S. 618 (1969), *Memorial Hospital v. Maricopa County* 415 U.S. 250 (1974), and *Saenz v. Roe* 526 U.S. 489 (1999). According to Sager,

Like the earlier right to travel cases, *Saenz* makes much sense if understood as the invalidation of an unjust categorical exclusion from the benefits of a state-established safety net—if understood in other words, as an instance of the secondary judicial protection of the constitutional right to minimum welfare. So understood, these cases of judicial enforcement of the right to minimum welfare are secondary in this sense: The judiciary steps in only after the programmatic choices of strategy and responsibility have been made and polices the resulting programs against the possibility of unjust categorical exclusions.⁶⁸⁷ ... Basic welfare payments and public education at the elementary and secondary levels ought to be understood as constitutional entitlements, the primary provision is the constitutional responsibility of non-judicial governmental bodies. Once the broad structural features of programs providing the entitlements are in place, the judiciary can respond constructively in a number of ways. Assuring that appropriate process protects the beneficiaries of these entitlements is a compelling feature of the judiciary's secondary role with regard to such entitlements.⁶⁸⁸

Jones v. Alfred Mayer 392 U.S. 409 (1968), where the Supreme Court found Congress empowered by section 2 of the Thirteenth Amendment to the U.S. Constitution to legislate the protection against racial discriminatory practices of real estate operators, is seen by Sager as an example of institutional partnership and a demonstration of the underenforcement thesis to attain constitutional justice: “*Jones v Alfred Mayer* is a quintessential case of partnership between the Supreme Court and Congress in the enterprise of securing constitutional justice; it is also an important instantiation of the underenforcement thesis. The only wrinkle on the general theme of underenforcement in *Jones* is that here underenforcement is operating not at the level of rights definition but at the level of remedy for an acknowledged constitutional wrong.”⁶⁸⁹

Sager utilizes the dissenting opinion of Justice Breyer and three of his colleagues at the

⁶⁸⁷ Ibid. at p. 99.

⁶⁸⁸ Ibid. at pp. 101-102.

⁶⁸⁹ Ibid. at p. 108.

Supreme Court in *Alabama v. Garrett* 531 U.S. 356, 382 (2001), pertaining to section 5 of the Fourteenth Amendment, to demonstrate his underenforcement thesis:

There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its Section 5 authority to adopt rules or presumptions that reflect a court's institutional limitations. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy...unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have firsthand experience with discrimination and related issues. Moreover unlike judges, Members of Congress are elected. When the Court has applied the majority's burden of proof rule, it has explained that we, i.e., the courts do not 'sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations'.... To apply a rule designed to restrict courts as if it restricted Congress's legislative power is to stand the underlying principle-a principle of judicial restraint-on its head...⁶⁹⁰

What is striking about Sager's in-depth analysis is his emphasis on striving for the practical goal of poverty alleviation through the institution best suited for such an ambitious project, the legislature. That legislative capacity was identified by Sager's extracts from Justice Breyer's dissent, which appears above. This capacity was brought to the fore during the New Deal era. The judiciary already had its hands full in adjudicating upon the liberty-bearing elements of the Constitution, which aim at empowering citizens, through the political process, in having a say in the kind of baseline entitlements necessary for a suitable standard of living.⁶⁹¹

By distinguishing the adjudicated Constitution from the full Constitution, we can make sense of our constitutional practices as a whole: We can explain the durable gap between constitutional case law and political justice, how our justice-seeking constitutional practices can ignore desperate poverty and entrenched racial and gender disadvantage. We can also explain the odd fit between generous congressional authority to enforce the Thirteenth Amendment and the far more narrow spontaneous judicial reading of that amendment, and make attractive sense out of many of the Supreme Court's apparently anomalous engagements with the needs of the poor and the handicapped. What emerges is a picture in which we understand ourselves to be obliged-constitutionally obliged-to address the injustice of poverty and entrenched racial and gender

⁶⁹⁰ Ibid. at p. 118.

⁶⁹¹ Ibid. at p. 126.

disadvantage, but see the primary addresses of this obligation as elected officials rather than judges.⁶⁹²

Congress and the various states' legislatures have been active in U.S. history in setting baseline poverty alleviation programs for education, health care, and social security. The New Deal era was a great watershed in the annals of safety-net measures in the United States.

These immediate times aside, we have at least aspired to secure the right to minimum welfare. There has been a pervasive social and political recognition of the need for a safety net, and efforts to implement a base of public support that satisfies the limited promise of that metaphor. Public or publicly supported education has not flourished in our time, but neither emphatically, has it perished, we would, I strongly hope and believe never retreat from our sustained commitment to a free basic education. Even in the face of our inability to rationalize the distribution of medical care, most if not all urban centers provide a network of public hospitals or some other mechanism by which the most urgent medical needs of the poor are met.⁶⁹³

Sager's judicial underenforcement theory of the U.S. Constitution clearly does not see the advantage to the Constitution having justiciable socioeconomic rights; he would rather have the legislature enact ordinary socioeconomic legislation, to be implemented by the executive. Any discriminatory or unconscionable formulation and implementation of the ensuing programs would then be addressed by the courts utilizing the liberty-bearing provisions of the U.S. Constitution. Sager is candid in admitting the huge challenges of poverty and access to health care prevalent in the United States.

Sager's thesis for the United States, of having the legislature enact ordinary socioeconomic legislation to be implemented by the executive and moderated for fairness by the judiciary, has been extremely difficult to implement in Nigeria. U.S. courts are not hindered by Nigeria's Constitutional provisions, which exclude the Nigerian judiciary from adjudicating upon socioeconomic rights. I establish this fact in the next section, with the education

⁶⁹² Ibid. at pp. 127-128.

⁶⁹³ Ibid. at p. 159.

jurisprudence from Kentucky, New Jersey, and New York. I have established the fact that in Nigeria, ordinary legislation that provides for compulsory basic education has not been implemented by the government, which claims education belongs to the nonjusticiable provisions of the Constitution on fundamental objectives and directive principles of state policy. Therefore, it has refused to comply with decisions of the ECOWAS Court of Justice, which ordered implementation of legislation on compulsory basic education.

I argue, therefore, that constitutionally enforceable socioeconomic rights will greatly complement existing mechanisms of accountability in Nigeria to address the accountability deficit in public governance in Nigeria. The socioeconomic challenges of Nigeria are not the same as those of the United States, which has utilized a Constitution for over two centuries and developed institutions and constitutional practices unlike Nigeria's 1999 Constitution modeled upon the 1979 Constitution of the Federal Republic of Nigeria. Nigerian Supreme Court Justice Kayode Eso advised that the uniqueness of Nigeria's experience should guide "...the problems of interpretation and application of the Nigerian Constitution..."⁶⁹⁴ I will attempt to show, in the next section, the capacity of courts in adjudicating upon the socioeconomic right of education in three states in the United States, and ensuring the soundness of the government's educational policies of fidelity to constitutional provisions in those states' Constitutions.⁶⁹⁵

⁶⁹⁴The Hon. Justice Kayode Eso, 'The Problems of Interpretation and of Application of the Provisions of the Constitution,' in *All Nigeria Judges Conference Papers*, Ilorin Kwara State, 8th -16th March 1982, (London: Sweet & Maxwell, 1983), pp. 127-173, at p.145.

⁶⁹⁵"A later generation of school reform lawsuits turned from equal protection, whether under federal or state law, to state constitution education clauses, thereby expanding the focus from an emphasis on fiscal equity to a broader view of educational sufficiency. In this "new wave" of school reform cases, state courts explicitly attempt to construct a manageable definition of educational adequacy for constitutional purposes by grappling with issues such as the public mission of public schools, the motivating aims of educational clauses, and the range of programs that seem conducive to carrying out these goals."Hershkoff, Helen, 'Positive Rights and State Constitutions: The Limits of Federal Rationality Review,' *Harvard Law Review*, Vol. 112, No. 6 (Apr., 1999), pp. 1131-1196, at pp. 1187-1188

5.2. Education Jurisprudence in Kentucky, New Jersey, and New York States

An understated aspect of U.S. constitutional law is the role of the Constitutions of the fifty states in the guarantee of socioeconomic rights and the active role of their courts in enforcing them.⁶⁹⁶

A more nuanced scholarly approach, which accurately reflects the dual nature of U.S. constitutional law, is now on the ascendancy.⁶⁹⁷ American scholars who have complained about the failure of the national Constitution to protect socioeconomic rights have found such protection in Canada, Europe, and South Africa. “Curiously, these scholars have usually neglected to look within the United States to the various state constitutions that, in fact, establish positive rights.”⁶⁹⁸

In the rest of this section, I will analyze the education clauses in the Constitutions of Kentucky, New Jersey, and New York. The Constitution of Kentucky provides that: “The General Assembly shall, by appropriate legislation, provide for an efficient system of common education throughout the state.”⁶⁹⁹ In *Rose v. Council for Better Education*,⁷⁰⁰ decided on June 8, 1989, the Supreme Court of Kentucky, while interpreting a claim regarding an infringement of the above provision on education, held that the issue of standing requires a substantial interest in

⁶⁹⁶ Neuborne, Burt, ‘Foreword: State Constitutions and the Evolution of Positive Rights,’ *Rutgers Law Journal*, Vol. 20, (1988-1989), pp. 881-901, at pp. 893-901.

⁶⁹⁷ “Successive generations of scholars and jurists have lurched violently from a dismissive view of state constitutions as documents of purely parochial import, worthy of little serious study by anyone outside of a state’s immediate jurisdiction, to an aggressively ambitious approach that understands state constitutions as fundamentally freestanding sources of fully developed, independent legal norms.” Gardner, James A. and Rossi, Jim, ‘Dual Enforcement of Constitutional Norms,’ in Gardner, James A. and Rossi, Jim (eds.), *New Frontiers of State Constitutional Law: Dual Enforcement Norms*, (Oxford University Press, 2011), pp. 1-14, at p. 3.

⁶⁹⁸ Rodriguez, Daniel B. ‘State Constitutionalism and the Scope of Judicial Review,’ in Gardner, James A. and Rossi, Jim (eds.), *New Frontiers of State Constitutional Law: Dual Enforcement Norms*, (Oxford University Press, 2011), pp. 61-80, at p. 66.

⁶⁹⁹ §8

⁷⁰⁰ 790 S.W.2d 186 (1989)

a case and it depends on the facts of each particular case.⁷⁰¹ But the Court exhibited a relaxed and broad view of standing when it ruled that in constitutional matters:

However the absence of, or the failure to create a proper class, in no way changes the decision of the trial court or, for that matter, of this Court, with respect to the issue of the constitutionality of Kentucky system of common schools. If a statute (or in this case, a system established by statutes) is not constitutionally valid, the existence or non-existence of a class of litigants is immaterial. The constitutional issue has been raised by the Council, the individual school districts and by those individual students properly before this Court. The system is no more nor no less susceptible to constitutional challenge because of the lack of a class action.⁷⁰²

This position of the Supreme Court is vital in enabling litigants' access to court, when the state has infringed the socioeconomic right of education guaranteed by the State of Kentucky Constitution.

In dealing with the complaint of infringement of the above provision on education by the state, the Kentucky Supreme Court stated that: "Since the Constitution acknowledges the importance of education to this Commonwealth and since the establishment and maintenance of a system of common schools is a mandated duty of the General Assembly, it is part and parcel of this overall goal that the system have the twin attributes of uniformity and equality."⁷⁰³ In essence, a court constitutionally empowered can rule on the parameters that ensure the soundness of a government educational policy, and this is exactly what the Kentucky Supreme Court distilled in the parameters "of uniformity and equality."

On the issue of separation of powers and judicial ruling on the constitutionality of legislation or the threat of judicial legislation, the Supreme Court held that

It is textbook law that enactments of the General Assembly have a strong presumption of constitutionality.... It is also textbook law that where legislative discretion is present, the judiciary will be reluctant to interfere....The separation of power doctrine of the Kentucky Constitution underpins and buttresses these legal theories...In this context, we review the

⁷⁰¹ Ibid. at 202

⁷⁰² Ibid. at 202

⁷⁰³ Ibid. at 208

question before us. The ultimate issue is whether the system of common schools in the Commonwealth established by the General Assembly, with respect to the mandate of Section 183, is in compliance with the constitution. Specifically we are asked—based solely on the evidence before us—if the present system of common schools is “efficient” in the constitutional sense. It is our sworn duty, to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary. The issue before us...the constitutionality of the system of statutes that created the common schools...is the only issue. To avoid deciding the case because of “legislative discretion,” “legislative function,” etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable....The judiciary has the ultimate power, and duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is solely the function of the judiciary to do so. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court’s view of the constitution is contrary to that of other branches or even that of the public.”⁷⁰⁴

The Supreme Court of Kentucky holding clearly demonstrates that when courts are empowered to adjudicate on socioeconomic rights of education, they can ensure that government’s policies conform to constitutional provisions.

The Court held that the school system in Kentucky was inefficient, and that the legislature must device means of adequately funding the system while making it accessible to children from both poor and rich families, while at the same monitoring legislative remedies continuously.⁷⁰⁵

Having declared the system of common schools to be constitutionally deficient, we have directed the General Assembly to recreate and redesign a new system that will comply with the standards we have set out. Such system will guarantee to all children the opportunity for an adequate education, through a state system. To allow local citizens and taxpayers to make a supplementary effort in no way reduces or negates the minimum quality of education required in the statewide system. We do not instruct the General Assembly to raise taxes. It is their decision how best to achieve efficiency. We only decide the nature of the constitutional mandate. We only determine the intent of the framers. Carrying out that intent is the duty of the General Assembly.⁷⁰⁶

⁷⁰⁴ Ibid. at 209

⁷⁰⁵ Ibid. at 211

⁷⁰⁶ Ibid. at 212

The Supreme Court then affirmed the seven requirements of an efficient school system formulated by the trial court and stated that public schools must be free.⁷⁰⁷

A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right. We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

1. sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
2. sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
3. sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
4. sufficient self-knowledge and knowledge of his or her mental and physical wellness;
5. sufficient grounding in the arts to enable each student to appreciate his or her cultural heritage;
6. sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
7. sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.⁷⁰⁸

The order of the Court was suspended from June 9, 1989 to 1990, to enable the General Assembly pass a remedial statute. According to the Court: "Because of the enormity of the task before the General Assembly to recreate a new statutory system of common schools in the Commonwealth, and because we realize that the educational process must continue, we withhold the finality of this decision until after the adjournment of the General Assembly, sine die, at its regular session in 1990."⁷⁰⁹ The Kentucky General Assembly subsequently passed the Kentucky Education Reform Act of 1990, which increased taxation revenues by over \$1 billion to increase

⁷⁰⁷ Ibid at 212

⁷⁰⁸ Ibid. at 212

⁷⁰⁹ Ibid. at 216

funding for education.⁷¹⁰

The New Jersey State Constitution, enacted in 1947, states that “The Legislature shall provide for the maintenance and support of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”⁷¹¹ In the Supreme Court of New Jersey case of *Abbott v. Burke*,⁷¹² decided on June 5, 1990, the constitutionality of the New Jersey Public Education Act of 1975, with regard to the above article on education for children, was the issue under determination. The Court held that:

From this record we find that certain poorer urban districts do not provide a thorough and efficient education to their students. The Constitution is being violated. These students in poorer urban districts have not been able to participate fully as citizens and workers in our society. They have not been able to achieve any level of equality in that society with their peers from the affluent suburban districts. We find the constitutional failure clear, severe, extensive, and of long duration. We cannot find on this record, however, that there is any constitutional violation in the other districts.⁷¹³

This decision clearly demonstrates that at the state level in the United States, courts are empowered and equally have the capacity to adjudicate on the socioeconomic right of education.

In *Abbott*, that is exactly what the Supreme Court did when it aligned the educational policies of New Jersey to be in tune with the state’s constitutional provisions. The Court then ordered that

The Act must be amended, or new legislation passed, so as to assure that poorer urban districts’ educational funding is substantially equal to that of property-rich districts. “Assure” means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year. The level of funding must also be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages. We leave it to the Legislature, the Board, and the Commissioner to determine which districts are “poorer urban districts.”⁷¹⁴

⁷¹⁰ Albisa, Cathy and Schultz, Jessica, ‘The United States: A Ragged Patchwork,’ in Langford, Malcolm (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (Cambridge: Cambridge University Press, 2008), pp. 230-249, at p.242.

⁷¹¹ Article VIII §1

⁷¹² 119 N.J. 287 (1990)

⁷¹³ *Ibid.* at 385

⁷¹⁴ *Ibid.* at 385

Clearly then, courts can play a vital role in ensuring fidelity of socioeconomic policies of government with justiciable socioeconomic rights provided in a constitution.

The Constitution of the State of New York states that “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”⁷¹⁵ The highest appellate court in the State of New York, the Court of Appeals of New York, on June 23, 1982, in a case that challenged the funding policy of education in New York State, interpreted the Article as having:

...mandated only that the Legislature provide for the maintenance and support of a system of free schools in order that an education might be available to all the State’s children. There is of course, a system of free schools in the State of New York. The Legislature has made prescriptions (or in some instances provided means by which prescriptions may be made) with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters. If what is made available by this system (which is what is to be maintained and supported) may properly be said to constitute an education, the constitutional mandate is satisfied.⁷¹⁶

Clearly, this is evidence of how a constitutionally empowered court can ensure that educational policies of a government conform to a constitutionally provided right to education.

The Court had earlier observed that in the legislative history of the article on the provision of free education “What appears to have been contemplated when the education article was adopted at the 1894 Constitutional Convention was a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State.”⁷¹⁷ The Court also stated that: “The circumstance that public education is unquestionably high on the list of priorities of governmental concern and responsibility, involving the expenditures of enormous sums of State and local revenue, enlisting

⁷¹⁵ Article XI §1

⁷¹⁶ Board of Education, Levittown Union Free School District et al v. Ewald B. Nyquist, as Commissioner of Education, et al. 57 N.Y.2d 27 at 48

⁷¹⁷ Ibid. at 47

the most active attention of our citizenry and of our Legislature, and manifested by express articulation in our State Constitution, does not automatically entitle it to classification as a ‘fundamental constitutional right’ triggering a higher standard of judicial review for purposes of equal protection analysis.”⁷¹⁸

The courts also can give a stamp of approval to government policy on education policies that uphold and conform to a constitutional mandate of free education. This, in essence, was what the Court of Appeals of New York did when it ruled that:

Interpreting the term education, as we do, to connote a sound basic education, we have no difficulty in determining that the constitutional requirement is being met in this State, in which it is said without contradiction that the average per pupil expenditure exceeds that in all other States but two. There can be no dispute that New York has long been regarded as a leader in free public education. Because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher priority for education...⁷¹⁹

The Court held that the fiscal policy in the funding of education by the State of New York was adequate and it would only have ruled against the policy if it was obviously grossly inadequate.⁷²⁰ It held that “the present statutory provisions for allocation of State aid to local school districts for the maintenance and support of elementary and secondary public education are not violative of either Federal or the State Constitution.”⁷²¹

The Court of Appeals of New York, on June 15, 1995, formulated a template for the definition of basic education in the case of *Campaign for Fiscal Equity, Inc. v. State of New York*.⁷²²

⁷¹⁸ Ibid. at 43

⁷¹⁹ Ibid. at 48

⁷²⁰ Ibid. at 49

⁷²¹ Ibid. at 50

⁷²² 86 N.Y. 2d 307 (1995)

“That Article requires the State to offer all children the opportunity of a sound basic education. Such an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. If the physical facilities and pedagogical services and resources made available under the present are adequate to provide children with the opportunity to obtain these essential skills, the State will have satisfied its constitutional obligation as we stated in *Levittown*⁷²³ The State must assure that some essentials are provided. Children are entitled to minimally adequate physical facilities and class rooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.⁷²⁴

This case is a clear demonstration of the capacity of the courts to shape the formulation of effective policies on education by governments that will operate in total fidelity with a constitutionally guaranteed right to education.

In the *Campaign for Fiscal Equity, Inc. v. State of New York*,⁷²⁵ decided on June 26, 2003, the Court of Appeals of New York reversed the appellate court decision and upheld the trial court’s decision, which earlier held that the City of New York did not provide sound basic education and infringed the education article of the State of New York’s Constitution.

The State argues that poor student performance is caused by socioeconomic conditions independent of the quality of the schools and better remedied with investment in other resources. The Appellate Division agreed, reasoning that because of “demographic factors, such as poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken, or homes where parents offer little help with homework and motivation...more spending on education is not necessarily the answer, and...the cure lies in eliminating the socio-economic conditions facing certain students (295 A.D.2d at 16). This is partly an argument about why students fail, which we have rejected in the discussion of outputs. But it is also a distinctively constitutional argument in the sense that choosing between competing beneficial uses of funds is a legislative task. This is in fact, the argument that Judge Simons made in his solitary dissent in CFE (86 N.Y.2d at 342-343). Had we accepted the argument, we would have saved everyone considerable effort and expense by dismissing the case on the spot. We did not do so. Decisions about spending priorities are indeed the Legislature’s province, but we have a duty to determine whether the State is providing students with the opportunity for a sound basic education. While it

⁷²³ Ibid. at 316

⁷²⁴ Ibid. at 317

⁷²⁵ 100 N.Y.2d 893(2003)

may be that a dollar spent⁷²⁶ on improving “dysfunctional homes” would go further than one spent on a decent education, we have no constitutional mandate to weigh these alternatives. And, again, we cannot accept the premise that children come to New York City schools ineducable, unfit to learn.⁷²⁷

The Court also rejected the state’s argument that its budgetary expenditure on New York City compared favorably with other large cities like Los Angeles, and hence was adequate. It ruled that budgetary volume by itself, does not guarantee that a sound basic education would be received by students. The Court held that the education expenditure must consider local costs, the requirements of students, and “quality of inputs and outputs.”⁷²⁸ In other words, it is not only the amount of resources spent that matters, but clearly both the amount and the efficiency with which the resources are spent to achieve the constitutional mandate. The Court further held that: “the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” This also proves the capacity of courts to evaluate the quality and effectiveness of socioeconomic policies of government, such as education, provided they are empowered to adjudicate upon such matters.

The Court of Appeals of New York also demonstrated the capacity of courts to formulate remedial orders in the area of socioeconomic policies of government on education. In this case it did this when it analytically revised the trial court’s remedial orders imposed on New York City.

Given all of the jurisprudential constraints discussed above, we begin our review of the trial court’s directives by rejecting the provision that the remedy be statewide, and that variations in local costs be taken into account. Courts deal with actual cases and controversies, not abstract global issues, and fashion their directives based on the proof before them. Here the case presented to us, and consequently the remedy, is limited to the adequacy of education financing for the New York City public schools, though the State may of course address statewide issues if it chooses. Second, we recognize that mechanisms in place, including No Child Left Behind and the SURR process, may already to some extent function as a system of accountability. They are not foolproof, and neither is tied to the definition of a sound basic education. Nevertheless, the

⁷²⁶ Ibid. at 920.

⁷²⁷ Ibid. at p.921.

⁷²⁸ Ibid. at 912.

State should be able to build on existing criteria to identify the schools in greatest need and set measurable goals for their improvement. Third, we are not prepared to say as a constitutional matter that a new system must ensure the City “sustained and stable funding.” The language of this directive may appear unobjectionable, but in the context of the trial court’s decision it implies a need for fundamental change in the relationship between New York City schools and their local tax base. The school districts in New York City, Buffalo, Yonkers, Syracuse and Rochester—unlike every other district in the State—are “fiscally dependent”: they lack the authority to levy property taxes to support education.⁷²⁹

The Court of Appeals of New York clearly demonstrated a mastery of polycentric considerations, as shown in its above analysis, and it proves that courts can adjudicate upon socioeconomic rights and formulate a just holding. This it further evinced when it observed that:

At the same time, the State has suggested that reforms tending to concentrate responsibility with the Mayor of New York City may prove beneficial, and we do not know that a “sustained and stable funding” requirement addressing fiscal dependency would necessarily fit together with such reforms. Accordingly, while the trial court’s directive is understandable we do not make it mandatory. Fourth, as the foregoing implies, the trial court properly indicated that reforms may address governance as well as the school funding system. Various factors alleged by the State as causes of deficiencies in the schools...and rejected by us on the ground that the State has ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools...may be addressed legislatively or administratively as part of the remedy. We do not think such measures will obviate the need for changes to the funding system, but they may affect the scope of such changes.⁷³⁰

The Court of Appeals of New York also refused to dabble in the inner workings of the executive and legislative branches when it stated that “Finally, we know of no practical way to determine whether members of the political branches have complied with an order that the funding process become as transparent as possible, and we therefore decline to incorporate such a directive into our order. No one, however, disputes the trial court’s description of the existing education funding scheme as needlessly complex, malleable and not designed to align funding with need”⁷³¹ Nevertheless, the Court of Appeals of New York highlighted the constitutional

⁷²⁹ Ibid. at 928

⁷³⁰ Ibid. at 929

⁷³¹ Ibid. at 929

duty imposed on the executive and legislative branches to fulfill provisions of the Constitution of New York State on education.

Thus the political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students. While we do not join the trial court in ordering that the process be made as transparent as possible, we do agree that the funding level necessary to provide City students with the opportunity for a sound basic education is an ascertainable starting point. Once the necessary funding level is determined, the question will be whether the inputs and outputs improve to a constitutionally acceptable level. Other questions about the process...such as how open it is and how the burden is distributed between the State and City are matters for the Legislature desiring to enact good laws.⁷³²

In crafting a remedy the Court of Appeals of New York was concerned about the accountability of the executive and legislative reform to achieve the constitutional mandate of access to a sound education. It also suspended its order from taking effect on June 26, 2003 and postponed the effective date of the order to July 30, 2004, to enable the legislative and executive branches to craft an effective policy to attain sound education in New York City.

In view of the alternatives that the parties have presented, we modify the trial court's threshold guideline that the State ascertain "the actual costs of providing a sound basic education in districts around the State." The State need only ascertain the actual cost of providing a sound basic education in New York City. Reforms to the current system of financing school funding and managing schools should address the shortcomings of the current system by ensuring, as part of that process, that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education. Finally, the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education. The process of determining the actual cost of providing a sound basic education in New York City and enacting appropriate reforms naturally cannot be completed overnight, and we therefore recognize that defendants should have until July 30, 2004 to implement the necessary measures.⁷³³

The Court of Appeals of New York also emphasized that it was not making policy but interpreting and enforcing the rights of litigants whose constitutional right to a sound education in New York City had been violated.

⁷³² Ibid. at 930

⁷³³ Ibid. at 930

Courts are, of course, well suited to adjudicate civil and criminal cases and extrapolate legislative intent. They are, however, also well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government ...not in order to make policy but in order to ensure the protection of constitutional rights. that is what we have been called upon to do by litigants seeking to enforce the State Constitution's Education Article....Indeed, a sound basic education back in 1894, when the Education Article was added, may well have consisted of an eighth or ninth grade education, which we unanimously reject. The definition of a sound basic education must serve the future as well as the case now before us.⁷³⁴

The above cases clearly offer lessons for the adjudication of socioeconomic rights with regard to the right to a sound education, when provided by a constitution. They prove that courts have the capacity to adjudicate upon socioeconomic policies of governments in the area of education and make such policies align with constitutional mandates.

5.3. India's Chapter IV Directive Principles of State Policy

India gained independence in 1947, after two centuries of British colonial rule. In 1949, a government official identified India's major domestic problem as that of socioeconomic development, and its foreign policy as one of championing decolonization and racial equality.⁷³⁵

India looked to the Irish Constitution and borrowed its directive principles of state policy with regard to nonjusticiable socioeconomic rights, and made civil and political rights justiciable.⁷³⁶

Socioeconomic rights are contained under Chapter IV Directive Principles of State Policy of the India Constitution of 1950.⁷³⁷ Article 37 states that provisions of Chapter IV "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in

⁷³⁴ Ibid. at 931.

⁷³⁵ By an Indian Official, 'India as a World Power', Foreign Affairs, Vol. 27, No. 4 (Jul., 1949), pp.540-550.

⁷³⁶ de Villiers, Bertus, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience', 8 S. Afr. J. on Hum. Rts. (1992), pp.29-49 at p.2; Sharma, Gokulesh, Human Rights and Social Justice: Fundamental Rights vis-à-vis Directive Principles, (New Delhi:Deep and Deep Publications, 1997), p.48

⁷³⁷ The Constitution of India, full text available at the website of the Ministry of Law and Justice (Legislative Department), India: <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm> (accessed on February 22, 2012).

the governance of the country and it shall be the duty of the state to apply these principles in making laws.”⁷³⁸

India operates a written constitution, a federal form of government, and a common law tradition inherited from England. It has great challenges with poverty, corruption, and huge income disparities. India is representative of a general trend in developing countries of striving toward poverty reduction, economic development, and social justice via “a political process that holds leadership accountable.”⁷³⁹ The Indian courts have sought to utilize civil and political rights to incorporate socioeconomic rights. For example, the right to life constitutional provision has been extended to incorporate socioeconomic rights of nutrition and health care. In the first decade of the twenty-first century, India has become the health mecca for middle-class Nigerians desirous of affordable surgeries, due to the appalling state of the Nigerian public health sector.⁷⁴⁰

Under the current leadership of the Congress Party, the Indian government has devoted billions of dollars or over two percent of its gross domestic product to assist poor citizens who

⁷³⁸ Directive Principles of State Policy, full text available at the website of the Ministry of Law and Justice (Legislative Department), India: [http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%20Pg.Rom8Fsss\(7\).pdf](http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%20Pg.Rom8Fsss(7).pdf) (accessed on February 22, 2012).

⁷³⁹ Schachter, Oscar, *International Law in Theory and Practice*, (Dordrecht: Martinus Nijhoff Publishers, 1991).at p. 351.

⁷⁴⁰ “It was in search of this better medical care at affordable cost that a 50-year-old Nigerian, Patience Uviase, left Nigeria for India in April last year. Specifically, she had gone to that country for treatment of cervical spondylosis. Her first port of treatment was the privately run Hiranandani Hospital in Navi Mumbai, where she ended up paralysed after three surgeries. Uvaise, who choked with emotion, put it better, ‘A year ago, when I arrived in India, I could walk comfortably. Now, I will have to return home paralysed’. It is so sad and touching. The thought of returning home worse than she left, and she put it, due to negligence on the part of the doctors at the private hospital made her to file a case at Bombay High Court which referred her case to JJ Hospital for investigation and to see whether her case was reversible. The hospital sealed all hopes of this happening, saying she is quadriplegic, having lost sensation below the hip and in the limbs. Now the hospital has said that it was not negligent and Uvaise has refused to leave the hospital, following her discharge. We leave the rest to the court to sort out.” ‘With hate from India,’ Editorial, *The Nation*, Lagos, March 16, 2012, <http://www.thenationonlineng.net/2011/index.php/editorial/39933-with-hate-from-india.html> (accessed on March 18, 2012)

make up to forty percent of India's total population.⁷⁴¹ But in a recent report the World Bank claimed that corruption is hampering the Indian poverty alleviation project.⁷⁴² Child labor has been a recurring problem accentuated by poverty in India.⁷⁴³ India's Supreme Court has sought to alleviate the plight of the poor in society through the Indian Constitution.⁷⁴⁴ India has also expanded access to justice for the poor through a concept of the peoples' court, "Lok Adalat."⁷⁴⁵

Courts have long been recognized as the last hope of the common person, and they have served as a bulwark against excesses of the state. They have also been instrumental in enforcing the supremacy of the constitution in India. Courts, therefore, play an influential role in shaping policy decisions of the legislative and executive arms of government. Such policies impact negatively or positively on members of society.

In 1993, the Supreme Court of India declared in the challenge to states' regulation of private school fees, in the case of *Unni Krishnan J.P. v. State of Andhra Pradesh*,⁷⁴⁶ that

The citizens of this country have a fundamental right to education. The said right flows from Article 21 (Right to life). This right is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41. In other words every child/citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limits of economic capacity and development of the State.⁷⁴⁷

⁷⁴¹ McGivering, Jill, 'Indian aid programme 'beset by corruption' - World Bank', BBC News, 18 May, 2011, <http://www.bbc.co.uk/news/world-south-asia-13447867> (accessed on May 18, 2011).

⁷⁴² Id.

⁷⁴³ Weiner, Myron 'Child Labor in Developing Countries: The Indian Case-Articles 28a, 32 and 36 of the UN Convention on the Rights of the Child,' International Journal of Children's Rights, Vol. 2 (1994), pp. 121-128.

⁷⁴⁴ Sripathi, Vijayashri 'Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective, Tulane Journal of International and Comparative Law, Vol. 16 (2007), pp. 49-116.

⁷⁴⁵ Galanter, Marc and Krishnan, Jayanth K. 'Bread for the Poor: Access to Justice and the Rights of the Needy in India,' Hastings Law Journal Vol. 55 (2004), pp. 789-834.

⁷⁴⁶ (1993) SCC (1) 645; 1993 SCR (1) 594, majority opinion delivered by Justice B.P. Jeevan Reddy, full text available at the Indian Supreme Court Website: <http://judis.nic.in/supremecourt/imgs.aspx> (accessed on May 9, 2012).

⁷⁴⁷ Ibid. at p. 693. Note the concurring opinion of Justice Mohan especially at pp. 694, 714-715, and 719.

In 2002, India amended Article 21 of its Constitution by adding paragraph A.⁷⁴⁸ This amendment made education a justiciable constitutionally protected fundamental right for children of six to fourteen years of age.⁷⁴⁹ This reflects the general apathy of the executive arm of government toward judicial declarations, which has led to the issuance of mandatory court orders requiring supervision and timelines by the Indian court machinery.⁷⁵⁰

The early years of the Indian Supreme Court were a period of conservative jurisprudence.⁷⁵¹ The catalyst for judicial activism was the emergency rule of 1975 to 1977, when civil and political rights were violated on a massive scale in India.⁷⁵² This led to the emergence of an activist Supreme Court, introducing the concept of Public Interest Litigation “to enable easier access to justice to the vast majority of underprivileged and deprived sections of society and as a tool for achieving social justice.”⁷⁵³ It shed its conservatism in its *Kesavananda Bharati v. State of Kerala* decision, in which it held that fundamental rights and directive principles of state policy complement one another.⁷⁵⁴ “Public interest litigation, sometimes known as class action law suits or representative actions, can reduce legal costs by the application of a single remedy to all relevant cases. But this can have the effect of changing

⁷⁴⁸ Sripathi, Vijayashri and Thiruvengadam, Arun K. ‘India-Constitutional Amendment Making the Right to Education a Fundamental Right,’ Vol. 2 International Journal of Constitutional Law (2004), pp. 148-158

⁷⁴⁹ Muralidhar, S. ‘Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary’ being a lecture delivered at the: First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi, 1-3 November 2002, at p.2, full text available at: <http://www.ielrc.org/content/w0202.pdf> (accessed on February 2, 2012).

⁷⁵⁰ Id.

⁷⁵¹ Kothari, J, ‘Social Rights and the Indian Constitution’, 2004 (2) Law, Social Justice & Global Development Journal (LGD). http://www.go.warwick.ac.uk/elj/lgd/2004_2/kothari (accessed on May 9, 2012)

⁷⁵² Muralidhar, S. ‘Judicial Enforcement of Economic and Social Rights: The Indian Scenario’, in Coomans, Fons (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Antwerpen: Intersentia, 2006), pp. 237-267, at p.239.

⁷⁵³ Ibid. at p. 240.

⁷⁵⁴ (1973) 4 SCC 225.

priorities and therefore public policy, a development likely to be opposed by governments.”⁷⁵⁵

In 1978, in *Maneka Gandhi v. Union of India*, the Supreme Court imbued the right to life provision of Article 21 with an added substantive requirement of justness, fairness, and reasonableness, and its future decisions linked it with environmental, nutrition, emergency health care, legal aid, and labor rights.⁷⁵⁶

How far has this revolution gone? India is served by a ratio of 1 judge to 100 thousand citizens, and still harbors 170 million extremely poor people, referred to officially as “scheduled castes.”⁷⁵⁷ Sudarshan cautions against placing the greater burden of social transformation on the judiciary, but rather, members of civil society, legislative and executive institutions of democracy must collectively bear the burden of eradicating poverty, while courts can alleviate democratic shortfalls.⁷⁵⁸

The lower courts, or subordinate judiciary as they are called in India, have a large proportion of cases that have been pending for a decade or more. It is not surprising... that much of the literature that paints a positive view of India’s judiciary is focused on the Supreme Court, located in the country’s capital, New Delhi, and the High Courts, located in the state capitals. The people who have access to these courts are necessarily elites, although some of the members of this elite group do act on behalf of the poor and disadvantaged people, and seek to secure their rights and entitlements.⁷⁵⁹

5.4. Socioeconomic Rights in Argentina and Colombia

It is pertinent at this stage to recognize that Argentina, which experienced military rule, and

⁷⁵⁵ Smith, B.C. *Good Governance and Development*, (New York, Palgrave Macmillan, 2007), 87.

⁷⁵⁶ Kothari, Jayna, ‘Social Rights Litigation in India: Developments of the last Decade’, in Barak-Erez, Daphne and Gross, Aeyal, M. (eds.), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing: Oxford and Portland, Oregon, 2007), pp.171-192.

⁷⁵⁷ Sudarshan, R. ‘Courts and Social Transformation in India’, in Gargarella, Roberto; Domingo, Pilar and Roux, Theunis (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate, 2006)153-168, at pp. 153-154. The scheduled castes prefer to call themselves Dalits (downtrodden).

⁷⁵⁸ Ibid. at pp. 163-165.

⁷⁵⁹ Ibid. at p.154.

Columbia, which underwent a civil war, both promulgated transformative constitutions with enforceable socioeconomic rights. Despite the fact that Argentina, Colombia, and South Africa provided the Nigerian military junta with examples of transformative constitutions containing justiciable socioeconomic rights, Nigeria decreed into existence the 1999 Constitution that only provided for justiciable civil and political rights, with socioeconomic rights as fundamental objectives and directive principles of state policy. This was a continuation of the military's opposition to socioeconomic rights, which it demonstrated two decades earlier when, it decreed the 1979 Constitution into existence on similar terms. On the other hand, South Africa's 1996 Constitution made socioeconomic rights justiciable, and its people have benefited from the jurisprudence of its Constitutional Court on socioeconomic rights. "South Africa's courts have taken an account of the fact that the justiciability of socio-economic rights is never an 'either-or' question, but always only a matter of degree."⁷⁶⁰ I analyze South African socioeconomic jurisprudence in the next chapter.

Argentina recognized socioeconomic rights under its 1949 Constitution, which was abrogated in 1955 when President Peron was deposed in the coup d'état of 1955; but the 1853 Constitution was resurrected, and in 1957 it was infused with socioeconomic rights relating to the rights of workers, supported with social insurance and modeled on "industrial democracy."⁷⁶¹ The Supreme Court of Argentina has established a record of enforcing socioeconomic rights, which has impacted positively on the accountability of government's socioeconomic policies.

⁷⁶⁰ Brand, Danie, 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale', in Coomans, Fons, (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Antwerpen-Oxford: Intersentia, 2006), pp. 207-236 at p. 207.

⁷⁶¹ Etchichury, Horacio Javier, 'Argentina: Social Rights, Thorny Country Judicial Review of Economic Policies Sponsored by the IFI's,' *American University International Law Review*, Vol. 22, (2006-2007), pp. 101-125, at pp. 102-103.

In 2000, the Supreme Court confirmed in *Asociacion Benghalensis* a lower court's decision that ordered the national government to grant timely and appropriate medical treatment, including the allocation of required drugs, to all patients affected by HIV/AIDS. The court enforced the state duty as described in a national law and as framed in the right to health care, now included in the Constitution. This put a limit on the political discretion of the executive.⁷⁶²

The watershed moment for Argentina was in 1994, when the two major political parties in Argentina amended the 1853 Constitution, which allowed President Menem an extra term in office, based on the condition that the Convention for the Elimination of All Forms of Discrimination Against Women, the Universal Declaration of Human Rights, and the American Convention on Human Rights were granted constitutional hierarchy and added to the existing Bill of Rights in the 1853 Constitution.⁷⁶³

Argentina operates a monist constitution that makes international treaties it is a party to be automatically operative in domestic courts, and Section 75(22) of the Argentine Constitution grants international treaties a higher status than domestic enactments.⁷⁶⁴ Since the 1940s, Court decisions in Argentina have been enforcing labor rights.⁷⁶⁵ The Argentine courts have also enforced social security rights for over forty years.⁷⁶⁶ Health rights came under the jurisdiction of the Argentine courts in the 1990s, and its "Supreme Court has held that the right to health creates positive—and not only negative—obligations for the state."⁷⁶⁷ The creation of the post of the ombudsperson twenty years ago in Argentina at the federal and provincial levels has

⁷⁶² Ibid. at p. 111.

⁷⁶³ Courtis, Christian, 'Socio-Economic Rights Before the Courts in Argentina', in Coomans, Fons, (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Antwerpen-Oxford: Intersentia, 2006), pp. 309-353, at p. 312.

⁷⁶⁴ Ibid. at p. 314.

⁷⁶⁵ Ibid. at pp. 317-320.

⁷⁶⁶ Ibid. at pp. 320-323.

⁷⁶⁷ Ibid. at p. 324.

facilitated the enforcement of socioeconomic rights, and they have “*locus standi* to initiate legal actions in cases of alleged collective violations of fundamental rights.”⁷⁶⁸

Another example is Colombia, whose 1886 Constitution had a frugal bill of rights without justiciable socioeconomic rights, but change came with the 1991 Constitution formulated by the Constituent Assembly of 1991. Over forty 40 percent of the Constituent Assembly’s members did not belong to the parties that had dominated Columbia for over a century, namely the Conservative and Liberal parties.⁷⁶⁹ Members of the Constituent Assembly who had never been in power were political parties of former guerrilla fighters, a leftist party, parties representing students, children, and Christians who were not Catholics, and indigenous parties. They mobilized a consensual approach in the deliberations of the Assembly to formulate a constitution to expand democracy in order “to confront a generalised state of political corruption and violence.”⁷⁷⁰ As a result,

In that framework, it is not surprising that the ideological orientations of the 1991 Constitution were radically different from the former Constitution, and included the incorporation of a rich charter of rights accompanied by new and effective judicial mechanisms for their protection, the broadening of participation mechanisms, and the imposition of equality duties and social justice upon the state. The 1991 Constitution’s objective was to introduce a new model of society and to transform Colombia’s reality. It is, using Teitel’s word, a ‘forward looking’ rather than ‘backward looking’ Constitution.⁷⁷¹

The 1991 Colombian Constitution contains civil and political rights, socioeconomic rights, and third-generation or collective rights, and it makes international treaties including the ILO

⁷⁶⁸ Ibid. at p. 313.

⁷⁶⁹ Yepes, Rodrigo Uprimny, ‘Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court’, in Coomans, Fons, (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Antwerpen-Oxford: Intersentia, 2006), pp. 355-388 at pp. 356-357.

⁷⁷⁰ Ibid. at p. 357.

⁷⁷¹ Ibid. at p. 358. (Teitel, Ruti ‘Transitional jurisprudence: The role of law in political transformation,’ *Yale Law Journal* , Vol. 106, No. 7, (1997) pp.2009-2080, at p. 2015).

Conventions legally binding; all these rights cannot be suspended during a state of emergency. A special organ, the Constitutional Court was also created to interpret and apply the provisions of the 1991 Constitution. The 1991 Colombian Constitution “also designed a special constitutional procedure for constitutional claims that makes access to constitutional justice much easier and not so costly. This certainly favours some kind of judicial activism regarding human rights, which had less legal grounding in the former constitution.”⁷⁷² The lessons from Argentina and Colombia are that socioeconomic rights improve the accountability of governments. A brief analysis of some African countries that provide socioeconomic rights follows.

5.5. Some African Countries That Provide for Socioeconomic Rights

Kenya’s 2010 Constitution provides for justiciable socioeconomic rights under its Chapter 4, titled Bill of Rights.⁷⁷³ Chapter 4 declares that: “The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.”⁷⁷⁴ It further provides for socioeconomic rights of health, education, housing, and social security.⁷⁷⁵ In a section setting out the applicability of the bill of rights, socioeconomic rights are qualified by the availability of resources and it is the duty of the state to establish the lack of resources.⁷⁷⁶

Benin’s 1990 Constitution guarantees socioeconomic rights.⁷⁷⁷ It provides that “The human person is sacred and inviolable. The state has the absolute obligation to respect it and protect it. It shall guarantee him a full blossoming out. To that end, it shall assure to its citizens

⁷⁷² Ibid. at p. 358.

⁷⁷³ Full text available at: <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> ; http://www.chr.up.ac.za/images/files/documents/ahrdd/kenya/kenya_constitution_new_2010.pdf (accessed on February 15, 2013).

⁷⁷⁴ Ibid. Article 19(1)

⁷⁷⁵ Ibid. Article 43.

⁷⁷⁶ Ibid. Article 20(5).

⁷⁷⁷ Constitution of the Republic of Benin adopted at a referendum of December 2, 1990, English version available at: http://www.chr.up.ac.za/images/files/documents/ahrdd/benin/benin_constitution_english.pdf (accessed on February 14, 2013).

equal access to health, education, culture, information, vocational training, and employment.”⁷⁷⁸

The 1975 Constitution of Sao Tome and Principe, in its September 10, 1990 amendment, provides for socioeconomic rights under its third part, named Title 3.⁷⁷⁹ It provides for the right to health care, coupled with “the duty to defend it.”⁷⁸⁰ The Constitution also provides that primary education is free and compulsory, while “the state gradually promotes the possibility of equal access to the other levels of education.”⁷⁸¹

The 1991 Constitution of Burkina Faso, amended in 1997 and 2000, still recognizes socioeconomic rights in its Chapter IV.⁷⁸² It recognizes and promotes the right to health.⁷⁸³ “Every citizen has the right to education. Public education is secular. Private education is recognized. The law establishes the condition of its exercise.”⁷⁸⁴ The 1991 Constitution of Gabon, amended in 1997, provides for socioeconomic rights.⁷⁸⁵ It provides that “The state, subject to its resources shall guarantee to all, notably to the child, the mother, the handicapped, to aged workers and to the elderly, the protection of health, social security, a preserved natural environment, rest and leisure.”⁷⁸⁶ It also provides for the right to education. “The support to be given to children and their education constitute, for parents, a natural right and duty which they

⁷⁷⁸ Ibid. Article 8.

⁷⁷⁹ English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/saotomeandprincipe/saotomeandprincipe_constitution_extracts.pdf (accessed on February 14, 2013).

⁷⁸⁰ Ibid. Article 49.

⁷⁸¹ Ibid. Article 54.

⁷⁸² English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/burkinafaso/burkinafaso_constitution_english_extracts.pdf (accessed on February 14, 2013).

⁷⁸³ Ibid. Article 26.

⁷⁸⁴ Ibid. Article 27.

⁷⁸⁵ English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/gabon/gabon_constitution_extracts.pdf (accessed on February 14, 2013).

⁷⁸⁶ Ibid. article 1(8).

shall exercise under the surveillance and with the aid of the state and public entities.”⁷⁸⁷

Togo’s 1992 Constitution, which is currently in force, provides for socioeconomic rights.⁷⁸⁸ It recognizes and promotes the right of its citizens to health care.⁷⁸⁹ In the area of education, the Togolese “state shall recognize the right of all children to education and shall create conditions favorable to this end. Education is mandatory for children of both sexes until the age of 15 years. The state shall act progressively to assure that public education be free of charge.”⁷⁹⁰ The Cape Verde’s 1992 Constitution contained socioeconomic rights under its third section, named Title III.⁷⁹¹ It envisages the gradual realization of the right of everyone to social security.⁷⁹² The Constitution also provides for the progressive realization of everyone’s right to health care.⁷⁹³ Primary education is also free and compulsory under the Constitution, while a scheme of scholarships would gradually be provided to cater for the needs of indigent citizens to access other levels of education.⁷⁹⁴ The Constitution was amended in 1995, 1999, and 2010.⁷⁹⁵ But socioeconomic rights were still retained by the various amendments.⁷⁹⁶

Mali’s January 12, 1992 Constitution, amended in 1999, provides for socioeconomic

⁷⁸⁷ Ibid article 1(16).

⁷⁸⁸ English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/togo/togo_constitution_extracts.pdf (accessed on February 14, 2013).

⁷⁸⁹ Ibid. Article 34.

⁷⁹⁰ Ibid. Article 35.

⁷⁹¹ The Constitution of the Republic of Cape Verde (1992), full text available at:

<http://confinder.richmond.edu/admin/docs/CapeVerde.pdf> (accessed on February 14, 2013).

⁷⁹² Ibid. Article 67.

⁷⁹³ Ibid. Article 68.

⁷⁹⁴ Ibid. article 73.

⁷⁹⁵ Constitution of the Republic of Cape Verde 2010 Version:

<http://www.wipo.int/wipolex/en/details.jsp?id=6160> (accessed on February 14, 2013).

⁷⁹⁶ English translation available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=206290 (accessed on February 14, 2013).

rights.⁷⁹⁷ “Education, instruction, training, employment, housing, leisure, health and social protection constitute some of the protected rights.”⁷⁹⁸ The Constitution also provides that: “Public education is mandatory, free and non-religious.”⁷⁹⁹ Madagascar’s 1992 Constitution, which was amended in 1995 and 1998, retained socioeconomic rights in its amendments.⁸⁰⁰ “The state recognizes to each individual the right to the protection of his or her health, starting from conception.”⁸⁰¹ Primary education is compulsory and public education is “free and accessible to all.”⁸⁰²

Seychelles’s 1993 Constitution, amended in 1996, retained socioeconomic rights.⁸⁰³ It guarantees the right to health care.⁸⁰⁴ The Seychelles Constitution also guarantees the provision of “compulsory education, which shall be free in state schools, for such minimum period, which shall not be less than ten years, as may be prescribed by law.”⁸⁰⁵ Niger’s 1999 Constitution contains socioeconomic rights, just as does the December 1992 Constitution.⁸⁰⁶ It provides that “Each person shall have the right to life, health, security, physical well-being, education, and

⁷⁹⁷ English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/mali/mali_constitution.pdf (accessed on February 14, 2013).

⁷⁹⁸ Ibid. Article 17.

⁷⁹⁹ Ibid. Article 18.

⁸⁰⁰ English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/madagascar/madagascar_constitution_extracts.pdf (accessed on February 14, 2013).

⁸⁰¹ Ibid. Article 19.

⁸⁰² Ibid. Article 24.

⁸⁰³ English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/seychelles/seychelles_constitution_extracts.pdf (accessed on February 14, 2013).

⁸⁰⁴ Ibid. Article 29.

⁸⁰⁵ Ibid. Article 33.

⁸⁰⁶ Constitution of the Fifth Republic of Niger, adopted on July 18, 1999, promulgated on August 9, 1999, English version available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/niger/niger_constitution_extracts.pdf (accessed on February 14, 2013).

instruction according to conditions established by law.”⁸⁰⁷

Namibia’s 1990 Constitution contains some justiciable socioeconomic rights under its Chapter III provisions on fundamental human rights and freedoms and another set of nonjusticiable socioeconomic rights under its Chapter XI provisions on Principles of State Policy.⁸⁰⁸ Chapter III provides for the right to education, while it stipulates free and compulsory primary education.⁸⁰⁹ Chapter XI provides for a cluster of socioeconomic rights grouped under the “promotion of the welfare of the people.”⁸¹⁰ But it states that “The principles of state policy contained in this chapter shall not of themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.”⁸¹¹

Ghana’s 1992 Constitution divides socioeconomic rights under justiciable fundamental human rights and nonjusticiable directive principles of state policy.⁸¹² It guarantees the right to free and compulsory basic education under its Chapter 5 provisions on fundamental human rights and freedoms.⁸¹³ Progressive realization of access to free secondary and tertiary education is also listed in Chapter 5.⁸¹⁴ Chapter 6 provisions on directive principles of state policy also provides for free and compulsory basic education, as well as progressive realization of access to

⁸⁰⁷ Ibid. Article 11.

⁸⁰⁸ Full text available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/nambia/namibia_constitution.pdf (accessed on February 14, 2013)

⁸⁰⁹ Ibid. Article 20.

⁸¹⁰ Ibid. Article 95.

⁸¹¹ Ibid. Article 101.

⁸¹² Full text available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/ghana/ghana_constitution.pdf (accessed on February 14, 2013).

⁸¹³ Ibid. Article 25(1) (a)

⁸¹⁴ Ibid. Article 25(1) (b) (c)

secondary and tertiary education.⁸¹⁵ The Directive Principles of State Policy are supposed to guide the executive, legislative, and judicial branches of government in the performance of their duties as well policy formulation.⁸¹⁶ Chapter 6 mandates the president “to report to Parliament at least once a year all the steps taken to ensure the realization of the policy objectives contained in this Chapter and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.”⁸¹⁷

The Malawian 1994 Constitution also divides socioeconomic rights under Chapter III provisions on Fundamental Principles, which are directory in nature, and justiciable socioeconomic right to education under Chapter IV provisions on Human Rights.⁸¹⁸ Mauritius does not recognize socioeconomic rights in its 1968 Constitution, which is still in force.⁸¹⁹ But Mauritius provides free education at all levels to its citizens, courtesy of the Education Act of 1996.⁸²⁰ This was originally provided for by the Education Act of December 28, 1957.⁸²¹

Conclusion

Nigerian leadership has not respected the legislative approaches to the realization of education and health care. This is unlike the tradition at the federal and states levels in America, where despite a strong aversion to constitutional provision of socioeconomic rights, ordinary legislative

⁸¹⁵ Ibid. Article 38.

⁸¹⁶ Ibid. article 34(1).

⁸¹⁷ Ibid. article 34(2).

⁸¹⁸ Full text available at:

http://www.chr.up.ac.za/images/files/documents/ahrdd/malawi/malawi_constitution.pdf (accessed on February 14, 2013).

⁸¹⁹ Full text available at: <http://www.gov.mu/portal/goc/webattorney/file/revisedlaws/C/PART%20I%20-%20THE%20CONSTITUTION1.pdf> (accessed on February 14, 2013).

⁸²⁰ The Development of Education: National Report of Mauritius by the ministry of Education and Scientific Research September 9, 2004, <http://www.ibe.unesco.org/International/ICE47/English/Natreps/reports/mauritius.pdf> (accessed on February 14, 2013).

⁸²¹ Article 35 provides that: “All Government schools and all schools in receipt of a regular grant in aid from Government funds shall be open to pupils of any race or religion.” Full text available at: <http://www.gov.mu/portal/goc/educationsite/file/Education%20Act%201957.pdf> (accessed on February 14, 2013).

enactments have been made to entrench concrete primary and high school education, despite persistent poverty. The education jurisprudence of the States of Kentucky, New Jersey, and New York demonstrate the capacity of the courts to adjudicate over socioeconomic rights and shape government policies to conform to constitutional provisions.

India faces challenges of huge levels of poverty and astronomical inequalities in wealth with a few percentage of its population commanding most of the economic resources. But the Supreme Court in India has striven to concretize in real terms the wordings of the “Directive Principles of State Policy,” exhorting the Indian state to realize socioeconomic rights. Its first step was to simplify access to courts by poor litigants through the public interest litigation concept. The Court then expanded the ambit of justiciable Fundamental Rights of civil and political rights, especially the right to life to entail provisions of adequate nutrition and health care. Education, as a socioeconomic good in 1993, was also brought under the rubric of the right to life component of the civil and political rights’ enforcement umbrella by the Indian Supreme Court, which remarkably, led to a constitutional amendment in 2002 by the addition of paragraph A to Article 21 of the Indian Constitution on the right to life provision. Article 21(A) made education a justiciable fundamental right for children of six to fourteen years of age.

Nigeria has so much to learn from the Argentine, Colombian, and Indian constitutional experiences, where there are ongoing conscious efforts by the judiciary, executive, and legislature to improve accountability in public governance. African countries closer to Nigeria, particularly its neighbors, Benin and Niger, have also incorporated justiciable socioeconomic rights into their constitutions in order to attain accountability in public governance in regard to socioeconomic policies. Through constitutionally enforceable socioeconomic rights, Nigeria can improve accountability in public governance that formulates socioeconomic policies that

engender economic development. All available mechanisms of accountability, including constitutionally enforceable socioeconomic rights, must be employed to continuously ameliorate Nigeria's accountability deficit in public governance.

CHAPTER SIX

SOUTH AFRICAN CONSTITUTIONAL COURT'S REASONABLENESS JURISPRUDENCE

6.0. Introduction

In this introduction, I will present a brief background to the 1996 South African Constitution, and then proceed to critically evaluate the most prominent socioeconomic rights decisions of the South African Constitutional Court. South Africa was, and still is, a deeply divided society, having experienced colonialism by Europeans and subsequent racial-economic discrimination by European settlers who grabbed the land and economic resources of the indigenous black population. The unbanning of the major black liberation movement, the African National Congress (ANC), by President de Klerk in February 1990, and the release of ANC's leader, Nelson Mandela, as well as other political detainees, set in motion a national debate over the ideal constitution to redress past centuries of injustice suffered by black South Africans, Asians, and those of mixed heritage.⁸²² A constitutional bridge was needed from a culture of authority under apartheid to a culture that would guarantee accountable governance.⁸²³ Most participants agreed on the necessity of civil and political rights, but there were mixed feelings over the status of socioeconomic rights.

The ANC intelligentsia's Draft Bill of Rights favored justiciable socioeconomic rights, while some ANC sympathizers favored the Indian version of socioeconomic rights as nonjusticiable directive principles of state policy. On the other side, were right wingers, and pillars of apartheid who latched onto the Reagan and Thatcher neoliberal view that only civil and

⁸²² de Vos Pierre, 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution,' *South African Journal on Human Rights*, Vol. 13, (1997), pp. 67-101; Klug, Heinz, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, (Cambridge: Cambridge University Press, 2000); Klug, Heinz, *The Constitution of South Africa: Contextual Analysis*, (Oxford: Hart Publishing, 2010).

⁸²³ Mureinik, Etienne, 'A Bridge to Where? Introducing the Interim Bill of Rights', 10 *S. Afr. J. on Hum. Rts.* (1994), pp.31-48.

political rights should be in the constitution, while socioeconomic rights belong to manifestoes of political parties and executive policies of government.⁸²⁴ In opposition to the neoliberals, in 1992, Haysom stated that “Our laws have for decades prescribed compulsory education for whites, granted a right to pension for persons of old age and prohibited environmental degradation. Our courts have had no difficulty in enforcing these laws merely because they dealt with socio-economic matters or involved a positive duty on the state to provide resources.”⁸²⁵

Professor Etienne Mureinik was wary about the positive duties emanating from justiciable socioeconomic rights, and was only willing to concede negative duties of restraint and rendering of account by the executive to the judiciary. The judiciary should only be able to strike down unjustifiable programs, but the executive retains its independence to formulate policies, for instance, to provide health-care services.⁸²⁶ For him civil and political rights still needed to take firm root in South Africa: “If we qualify them before they exist, they may well be stillborn.”⁸²⁷ Professor Dennis Davies urged caution in making socioeconomic rights justiciable owing to polycentric considerations that render them ideal for the executive and legislative arms of government to tackle.⁸²⁸ He went on to recommend the Indian example of socioeconomic rights as nonjusticiable directive principles provisions in the Constitution.⁸²⁹ This fits in with the view of Cass Sunstein, one of the American scholars frequently quoted in South African law journals

⁸²⁴ “It argue[d] that the judges are unaccountable and inherently conservative, that the courts are not a democratic institution and should not be vested with any power over parliament. This majoritarian position asserts more than a simple parliamentary sovereignty, but that judges should especially not have the authority to prioritise government expenditure, for example, by compelling government to build a clinic from funds designated for housing. The majority is subject to the rule, the final word of unaccountable ‘wise men’. Haysom, Nicholas, ‘Constitutionalism, Majoritarian Democracy and Socio-Economic Rights’, 8 S. Afr. J. on Hum. Rts. (1992), pp.451-463 at pp. 455-456.

⁸²⁵ Ibid. at p.458.

⁸²⁶ Mureinik, Etienne, ‘Beyond A Charter of Luxuries: Economic Rights in the Constitution’, 8 S. Afr. J. on Hum. Rts. (1992), pp.464-474.

⁸²⁷ Ibid. at p. 469.

⁸²⁸ Davies, D. M. ‘The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles’, 8 S. Afr. J. on Hum. Rts. (1992), pp. 475-490

⁸²⁹ Ibid. at p. 486-488.

during the transition from apartheid to majority rule. In 1993, while analyzing ideal contents of Eastern Europe constitutions after the fall of communism, Sunstein advised that they should contain justiciable civil and political rights. “If the constitution tried to specify everything to which a decent society commits itself, it threatens to become a mere piece of paper, worth nothing in the real world.”⁸³⁰ But socioeconomic rights should not be justiciable, and a constitution should only “set out general aspirations for public officials and for the citizenry at large.”⁸³¹ Sunstein, in his seminal piece in 1991, asserted that “Judicial decisions are of limited efficacy in bringing about social change.”⁸³² According to him, the 1954 *Brown v. Board of Education* decision of the Supreme Court of the United States only became effective in 1964, when the executive and legislative branches of government intervened.⁸³³

Davies also recognizes that the adjudication process is not insulated from politics.⁸³⁴ The same point was made in an analysis of appointments to the judiciary during apartheid, when affirmative action was employed to displace English-speaking lawyers and judges with Afrikaans speakers.⁸³⁵ For this dissertation, the relevant provisions of the Constitution of the Republic of South Africa, 1996⁸³⁶ are its Preamble, sections 7(2) (respect, protect, promote, and fulfill duties of the state), 8 (vertical and horizontal application), 24 (environment), 25 (property), 26 (housing), 27 (health care, food, water, and social security), 28 (children’s rights), 29(education), 35(2)(e) (treatment of detainees), 38 (enforcement of rights), and 39

⁸³⁰ Sunstein, Cass, ‘Against Positive Rights: Why social and economic rights don’t belong in the new constitutions of post-Communist Europe’, 2 E. Eur. Const. Rev. pp.35-38 at p. 36.

⁸³¹ Ibid. at p. 38.

⁸³² Sunstein, Cass, ‘Three Civil Rights Fallacies’, California Law Review, Vol.79, No.3 (May, 1991), pp.751-774 at p. 765.

⁸³³ Id.

⁸³⁴ Davis, Dennis, ‘Democracy and integrity: Making Sense of the Constitution’, 14 S. Afr. J. on Hum. Rts. (1998), pp.127-145, at p.143.

⁸³⁵ Chaskalson, Arthur, ‘Reshaping the structures of justice for a democratic South Africa’, in Norton, Michelle, (ed.), Reshaping the Structures of Justice for a Democratic South Africa: Papers of a Conference organized by the National Association of Democratic Lawyers, October 2003, Pretoria, (Vlaeberg: National Association of Democratic Lawyers, 1994), pp.13-24, at pp.22-23.

⁸³⁶ Act 108 of 1996.

(Interpretation clause).⁸³⁷ The South African Constitution is a transformational document aiming to correct a long period of injustice.

Differently formulated, the question is whether transformative constitutionalism is a viable project for South African judges and lawyers (and by extension, judges and lawyers working within other legal regimes). By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (...in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.⁸³⁸

The track record of the South African Constitutional Court in its jurisprudence on socioeconomic rights will now be examined. This chapter will analyze four of the first sets of cases considered by the Court, and some more recent cases.

6.1. *Soobramoney v. Minister of Health, Kwazulu Natal*

In *Soobramoney v. Minister of Health, Kwazulu Natal*,⁸³⁹ the plaintiff needed kidney dialysis, but his heart ailment was used to eliminate him from the pool of those who were being considered for kidney dialysis. This was based on the limited numbers of dialysis machines; those most likely to benefit from kidney transplants and treatment were ranked before others with additional ailments that tended to reduce the chances of survival. The Court ruled that due to lack of available resources, the government was not compelled to provide health care for Soobramoney. Right to health care, according to the Court, depended on availability of adequate resources. "In *Soobramoney*, the standard was one of simple rationality."⁸⁴⁰ The decision exhibited great deference to the executive branch, and did not venture to evaluate the policy adopted by the

⁸³⁷ Brand, Dannie, 'Introduction to Socio-Economic Rights in the South African Constitution', in Brand, Dannie and Heyns, Christof (eds.) (Pretoria: Pretoria University Law Press, 2005), pp.1-56.

⁸³⁸ Klare, Karl E. 'Legal Culture and Transformative Constitutionalism', 14 S. Afr. J. on Hum. Rts.(1998), pp. 146-188, at p. 150

⁸³⁹ 1997 (12) BCLR 1696 (CC) 8.

⁸⁴⁰ Brand, Dannie, 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale', in Coomans, Fons, (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Antwerpen: Intersentia, 2006), pp.207-236, at p.227.

health authorities in not expanding availability of dialysis for the likes of Soobramoney. This was a utilitarian decision requiring the executive to sacrifice an individual for the general good. The Court should have directed the immediate treatment of Soobramoney and ordered the executive to drastically expand dialysis treatment to cover the likes of Soobramoney. The government would have been forced to redirect resources on arms acquisition or money saved from reduced mismanagement of funds to the health sector.⁸⁴¹ Interestingly, in the next case below, the Constitutional Court, in a paradigmatic shift, shed its utilitarian approach and ruled as unreasonable a housing policy that addressed the needs of the general populace, but excluded the most vulnerable in society—the poor and homeless.

6.2. *Government of the Republic of South Africa v. Grootboom*

The present case went a step further than *Soobramoney*, and the Constitutional Court shed its utilitarian toga. The case dealt with the right of access to housing guaranteed under the Constitution. In a groundbreaking decision, the Constitutional Court introduced the concept of reasonableness into socioeconomic rights jurisprudence.⁸⁴² This was the case filed by Irene Grootboom, 510 children, and 390 adults.⁸⁴³ These were homeless people who had for years been on the government waiting list for housing. They had moved into private land and built shelters that were bulldozed and burned upon an eviction order procured by the landlord. The Court reiterated the fact that sections 39, 231, to 235 of the Constitution obliges it to consider international law as an interpretative guide, particularly when certain international law principles are binding upon South Africa.⁸⁴⁴ It proceeded to analyze the minimum core concept formulated in General Comment 3, paragraph 10 of 1990, earlier issued by the ICESCR Committee, based

⁸⁴¹ Lehmann, Karin, 'In Defense of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core,' *American University International Law Review*, Vol. 22, (2006-2007), pp. 163-197 at pp. 193-197

⁸⁴² Dugard, Jackie and Roux, Theunis, 'The Record of the South African Constitutional Court in Providing an Institutional Court for the Poor: 1995-2004', in Gargarella, Roberto; Domingo, Pilar and Roux, Theunis (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate, 2006), pp.107-125, at pp.114-116.

⁸⁴³ 2000 (11) BCLR 1169 (CC).

⁸⁴⁴ *Ibid.* paragraph 26.

on more than ten years of considering states' reports submitted to it in its norm-clarification role of the contents of the ICESCR.⁸⁴⁵

Judge Yacoob concluded that "Minimum core obligation is determined by generally having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law"⁸⁴⁶ Justice Yacoob then proceeded to give a catalog of reasons why the Constitutional Court did not have the informational capacity of the ICESCR Committee to apply the minimum core concept to evaluate the right of access to housing in South Africa. According to the Constitutional Court:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realization of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The Committee developed the concept of minimum core over many years of examining reports by reporting States. This Court does not have comparable information.⁸⁴⁷

Justice Yacoob then expressed his reservations about the minimum core concept premised on information deficiency and shied away from determining the minimum content of a right of access to adequate housing. He opted to apply a reasonableness test of the South African government's housing policy in relation to "the right to have access to adequate housing."

The determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. This so because the needs in the contexts of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of the minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of peoples. As will appear from the discussion below, the real question in terms of our Constitution

⁸⁴⁵ Ibid. paragraph 31.

⁸⁴⁶ Ibid. paragraph 31.

⁸⁴⁷ Ibid. paragraph 32.

is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.⁸⁴⁸

The Court formulated a multilayer test in ascertaining the reasonableness of the South African government's housing policy in fulfilling the right to housing guaranteed under the Constitution:

The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁸⁴⁹

6.3. *Minister of Health and Others v. Treatment Action Campaign and Others*

The third case for consideration dealt with the interpretation of access to health care under section 27 of the Constitution of the Republic of South Africa, 1996, the *Minister of Health and Others v. Treatment Action Campaign and Others* (No. 2).⁸⁵⁰ The facts were that government restricted the provision of nevirapine, a drug for the prevention of mother-to-child transmission of the HIV virus, to select research health centers, despite the fact that there were adequate supplies to cover all health facilities. Section 27 of the 1996 South African Constitution provides that

⁸⁴⁸ Ibid paragraph 33.

⁸⁴⁹ Ibid. paragraph 44.

⁸⁵⁰ (2002) AHLR 189 (SACC 2002)

27. Health care, food, water and social security

(1) Everyone has the right to have access to-

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

(3) No one may be refused emergency medical treatment.

The Court addressed the minimum core proposal put forward by first and second amici to serve as a test for government's health policy in fulfilling the right to access to health-care services. Paragraph 10 of General Comment 3 of the ICESCR Committee, which treated minimum obligations of a state party to the ICESCR, was then evaluated by the Court.⁸⁵¹ Textual differences between the provisions of the Convention and the South African Constitution were also evaluated.⁸⁵² Judge Yacoob's analysis of the minimum core in paragraph 33 of *Grootboom*, which I discussed above, was relied upon by the Court, in the proposition that the minimum core might be relevant in relation to the test of reasonableness. Especially with regard to measures required of the state under section 26(2), but not as an independent right, to a minimum core of the right of access to housing under section 26(1).⁸⁵³ The Court then outlined a purposive

⁸⁵¹ "...According to the Committee a state party in which any significant number of individuals is deprived of essential foodstuffs, of primary health care, of basic shelter and housing; or of the most basic forms of education is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each state party to take the necessary steps 'to the maximum of its available resources'. In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." Ibid. paragraph 26.

⁸⁵² Ibid. paragraph 27.

⁸⁵³ Ibid. paragraph 34.

interpretation of sections 26 and 27, and cited Grootboom's quotation from Soobramoney's case⁸⁵⁴ to contextualize the obligations of the state.

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. As this Court said in Grootboom: '[i]t is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.'⁸⁵⁵

Just as it decided in Grootboom, the Constitutional Court claimed that it was institutionally deficient to collate the data required for ascertaining the minimum core of a right of access to health care and efficient utilization of public revenues.

It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many demands on the public purse. As was said in Soobramoney: The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.⁸⁵⁶

The Court then laid out its reasonableness formula as follows:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such

⁸⁵⁴ "A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. In Grootboom the relevant context in which socio-economic rights need to be interpreted was said to be that

[m]illions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted..." Ibid. paragraph 35.

⁸⁵⁵ Ibid. paragraph 36.

⁸⁵⁶ Ibid. paragraph 37.

determinations of reasonableness may in fact have budgetary implications, but not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.⁸⁵⁷

The Court, thus, effectively deferred to the legislative and executive branches of government, and closed the slight glimmer of hope offered by Judge Yacoob in *Grootboom* of applying the minimum core concept to fortify and set a baseline for the Court's reasonableness test formula in making socioeconomic policies of government accountable. It also refused to entertain the possibility of interpreting the contents of the right of access to health care when it ruled that

We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to 'respect, protect, promote and fulfill' such rights. The rights conferred by sections 26(1) and 27(1) are to have 'access' to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).⁸⁵⁸

In its evaluation of the South African government health policy, using its reasonableness test formula, the Constitutional Court held that

Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of Nevirapine at the time of the birth of the child. A potentially life-saving drug was on offer and where testing and counseling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government insofar as it confines the use of Nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution.⁸⁵⁹

The Court then laid out the implications of its findings: "Implicit in this finding is that a policy of waiting for a protracted period before taking a decision on the use of nevirapine beyond the research and training sites is also not reasonable within the meaning of section 27(2) of the

⁸⁵⁷ Ibid. paragraph 38.

⁸⁵⁸ Ibid. paragraph 39.

⁸⁵⁹ Ibid. paragraph 80.

Constitution.”⁸⁶⁰ The government was ordered to remove the restrictions on the availability of nevirapine and subjected its administration on each mother to medical superintendent.⁸⁶¹ But the Court refrained from assuming a supervisory jurisdiction.⁸⁶²

It is striking to note, as highlighted above, that, the Court refused to interpret what, essentially, the right to health means in Article 27(1); rather, it couples Article 27(1) with the duty of the state dependent on availability of resources in Article 27(2) to give effect to the right. “This detracts significantly from the capacity of courts to serve as significant institutions where deliberation concerning the meaning and implications of constitutional rights and values occurs.”⁸⁶³ Nevertheless, whenever the South African government faces a claim against it of failure to implement socioeconomic rights, the standard of reasonableness doctrine mandates the South African government to prove that its policies and programs are geared toward attaining its socioeconomic constitutional obligations.⁸⁶⁴ This was greatly expounded in the *Government of the Republic of South Africa v. Grootboom* and *Minister of Health and others v. Treatment Action Campaign and others* examined in section 6.2.

⁸⁶⁰ Ibid. paragraph 81.

⁸⁶¹ Ibid. paragraph 135.

⁸⁶² “The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution. In Pretoria City Council this Court recognised that courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.” Ibid. paragraph 129.

⁸⁶³ Liebenberg, Sandra, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, (Claremont: JUTA, 2010), at p. 176.

⁸⁶⁴ “But at the same time the standard of reasonableness enables courts to hold the state accountable in a manner consistent with the doctrine of the separation of powers. If a case is presented alleging that the state has failed to comply with its constitutional obligations in relation to socio-economic rights, the state is required to respond to the claim and to show that it has adopted and implemented measures to give effect to its constitutional obligations. Those measures are then subjected to close evaluation by the courts to determine whether they comply with the constitutional standard of reasonableness. And if the measures do not meet the standard, the court is obliged to say so.” Ngcobo, Sandile, *South Africa’s Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers*’ Stellenbosch Law Review, Vol. 22, No. 1, (2011), pp. 37-49 at p. 46.

6.4. In *Khosa and Others v. Minister of Social Development and Others*

In *Khosa and Others v. Minister of Social Development and Others*, *Mahlaule and Others v. Minister of Social Development*,⁸⁶⁵ the concept of reasonableness was through a purposive formula, employed by the Constitutional Court, to give a broader meaning to the word “everyone” contained in section 27(1) of the Constitution of South Africa with regard to social security benefits to encompass not only citizens but also permanent residents.

According to Justice Mokgoro:

The socio-economic rights in ss 26 and 27 of the Constitution are conferred on ‘everyone’ by ss(1) in each of those sections. In contrast the State’s obligations in respect of access to land apply only to citizens. Whether the right in s27 is confined to citizens only or extends to a broader class of persons depends on the interpretation of the word ‘everyone’ in that section. The applicants relied on s25 of the Constitution, as well as various other rights in the Bill of Rights to argue that ‘everyone’ in s27 included non-citizens and therefore also (for the purposes of this case) permanent residents.⁸⁶⁶...This Court has adopted a purposive approach to the interpretation of rights. Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of ‘all people in our country’ and in the absence of any indication that the s27(1) is to be restricted to citizens as in other provisions in the Bill of Rights the word ‘everyone’ in this section cannot be construed as referring only to ‘citizens.’⁸⁶⁷

The Court then restated the meaning of its reasonableness doctrine as follows:

A Court considering the reasonableness of legislative or other measures taken by the State will not enquire into whether other more desirable or favourable measures could have been adopted or whether public resources could have been better spent. A wide range of possible measures could be adopted by the State to meet its obligations and many of these may meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement would be met.⁸⁶⁸

The Court also expounded on the import of context whenever the doctrine of reasonableness is to be employed:

In dealing with the issue of reasonableness, context is all important. We are concerned here with the right to social security and the exclusion from the scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose

⁸⁶⁵ 2004 6 SA 505 (CC).

⁸⁶⁶ Ibid. paragraph 46.

⁸⁶⁷ Ibid. paragraph 47.

⁸⁶⁸ Ibid. paragraph 48.

served by the social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose. It is also necessary to have regard to the impact that this has on other intersecting rights. In the present case, where the right to social assistance is conferred by the Constitution on ‘everyone’ and permanent residents are denied access to this right, the equality rights entrenched in s9 are directly implicated.⁸⁶⁹

The Court held that the denial of permanent residents social security benefits was not a reasonable legislative enactment, and the legislature was ordered to add to the word “citizens” the clause “or permanent residents.”⁸⁷⁰

Justice Mokogoro reasoned that:

In my view, the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the State relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance, does not constitute a reasonable legislative measure as contemplated by s27(2).⁸⁷¹

6.5. Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v.

City of Johannesburg and Others

In another case, the Constitutional Court considered an appeal against the decision of the Supreme Court of Appeal, which ordered an eviction. The case involved the right to housing in relation to the pending eviction by authorities of the City of Johannesburg of 400 occupants of unsafe buildings within the inner city who had no alternative accommodation. This was the case of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others*.⁸⁷² The constitutional validity, of section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977, which empowered such eviction, was also considered by the Court in tandem with section 26(3) of the Constitution. Justice Yacoob, who delivered the lead judgment, observed that the City of Johannesburg had not

⁸⁶⁹ Ibid. paragraph 49.

⁸⁷⁰ “Reading in the words ‘or permanent resident’ after ‘South African citizen’ in s3(c) and ‘or permanent residents’ after ‘South African citizens’ in s4(b)(ii) offers the most appropriate remedy as it retains the right of access to social security for South African citizens while making it instantly available to permanent residents.” Ibid. at paragraph 89.

⁸⁷¹ Ibid. paragraph 82.

⁸⁷² 2008 (3) SA 208 (CC)

engaged in a meaningful dialogue with the 400 occupants faced with eviction.⁸⁷³ He ruled that

Section 26(3), like all provisions of the Bill of Rights, deserves a generous construction. The section prohibits eviction of people from their home absent a court order that must be made after taking into account all the relevant circumstances. It means in effect that no person may be compelled to leave their home unless there exists an appropriate court order. The provisions of s26(3) would be virtually nugatory and would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order. It follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of s26(3) of the Constitution. Section 12(6) provides for this criminal compulsion and is not consistent with the Constitution. Continued occupation of the property should not be a criminal offence absent a court order for eviction.⁸⁷⁴

Section 12(6) of the National Building Regulations and Buildings Standards Act of 1977 was then declared as inconsistent with the Constitution, and “must be read as if the following proviso has been added at the end of it-‘This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned.’”⁸⁷⁵

6.6. Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others

Another case dealt with the relocation of 20,000 residents belonging to 4,386 households in Joe Slovo community, ten kilometers from Cape Town. Based on a Western Cape High Court order to construct improved houses to replace the informal structures at Joe Slovo, the case was *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others*.⁸⁷⁶ The Constitutional Court formulated two issues for determination. Had a case been made for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act), based on whether it had been proved that the residents were unlawful occupiers under the PIE Act? Further, was the conduct of the respondents reasonable, under the interpretation of

⁸⁷³ Ibid. paragraph 53.

⁸⁷⁴ Ibid. paragraph 49.

⁸⁷⁵ Ibid. paragraph 54 (5).

⁸⁷⁶ 2010 (3) SA 454 (CC).

section 26 of the Constitution? The Court ruled in favor of relocation that must be fair to the residents and in line with the spirit of the Constitution.⁸⁷⁷ Justice Ngcobo reasoned that:

What must be emphasized is that the government has a wider range of needs to meet. As we held in *Grootboom*, ‘housing must be made more accessible not only to a larger number of people but to a wider range of people.’ There are those who can afford to buy houses and there are those who cannot. Income determines what form of housing people can afford. In developing a policy to provide access to adequate housing, the government must endeavour to address all these needs. And the primary obligation to achieve the progressive realization of the right of access to adequate housing rests on government. It must determine how and when this should be done. This, however is subject to the requirement of progressive realization of the right-it must progressively facilitate accessibility. How and when the obligation must be fulfilled depends on the availability of resources, in particular, the availability of land.⁸⁷⁸

Justice Ngcobo then analyzed the concept of reasonableness developed by the Court:

In considering reasonableness, the enquiry is not ‘whether other more desirable or favourable measures could have been better spent.’ Rather, the enquiry should be confined to the question whether the measures that have been adapted are reasonable bearing in mind ‘that a wide range of possible measures could be adopted by the State its meet its obligations,’ Thus in determining whether the government has complied with its obligation to provide access to adequate housing, courts must acknowledge that the government must determine and set priorities but must ensure that, in setting those priorities, it has regard to its constitutional obligations. In short the obligation of government must not be construed in a manner that ties its hands and makes it impossible to comply with its constitutional obligations.⁸⁷⁹

6.7. *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties*

The case of *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties* is also worth considering, as it dealt with access to shelter for relocated persons, based on whether the City of Johannesburg could rightly claim responsibility for those displaced by its relocation policies and exclude those relocated by private developers.⁸⁸⁰ This case concerned eighty-six inhabitants of Saratoga Avenue, Bera, Johannesburg, who squatted within business premises owned by Blue Moonlight Properties. Justice Van der Westhuizen held that

⁸⁷⁷ Ibid. paragraph 261.

⁸⁷⁸ Ibid. paragraph 250.

⁸⁷⁹ Ibid. paragraph 252.

⁸⁸⁰ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

By drawing a rigid line between persons relocated by the City and those evicted by private landowners, the city excludes from the assessment, whether emergency accommodation should be made available, the individual situations of the persons at risk and the reason for the eviction...the policy does not meaningfully and reasonably allow for the needs of those affected to be taken into account.⁸⁸¹

The Court subsequently held that the policy of exclusion was unreasonable.

As a result, I find that whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy makes is not. To the extent that eviction may result in homelessness, it is of little relevance whether removal from one's home is at the instance of the City or a private property owner. The policy follows from the City's incorrect understanding of its obligations under Ch12 and its claim that it lacks resources. The City's housing policy is unconstitutional to the extent that it excludes the occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable.⁸⁸²

6.8. *City of Johannesburg and Others v. Mazibuko and Others*

The case of indigent citizens of Phiri township in Soweto, Johannesburg, who could not afford water rates is another case worth considering. In *City of Johannesburg and Others v. Mazibuko and Others*,⁸⁸³ the Supreme Court of Appeal examined section 4 of the Water Services Act, section 27(1) of the Constitution, and the 2002 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on accessibility of water services provision to the most vulnerable in society.⁸⁸⁴ The Court then evaluated the City's water policy,⁸⁸⁵ after which it analyzed the City's budgetary limitations.⁸⁸⁶ Justice Streicher held that

However, the free water policy of the City was adopted on the basis that it was in terms of the Water Services Act obliged to provide the residents within its area of jurisdiction access to 6 kilolitres water per household per month or 25 litres per person per day, that this obligation did not entail that the provision had to be free to those who could not afford to pay and that the obligation superceded the constitutional duty that it may have had before the Act was enacted.

⁸⁸¹ Ibid. paragraph 92.

⁸⁸² Ibid. paragraph 95.

⁸⁸³ 2009 (3) SA 592.

⁸⁸⁴ Ibid. paragraphs 26-29.

⁸⁸⁵ Ibid. paragraphs 33-35.

⁸⁸⁶ Ibid. paragraph 37.

For the reasons stated the policy was materially influenced by an error of law and falls to be set aside on that basis.⁸⁸⁷

The Court held that the water policy had to be reformulated to conform to the Constitution against the backdrop of available resources.⁸⁸⁸ The Court further held that

In terms of s4 of the Water Services Act, water services must be provided in terms of conditions set by the water services provider and these conditions must provide for the circumstances under which water services may be limited or discontinued and for procedures for limiting or discontinuing water services. Furthermore, procedures for the limitation or discontinuation of water services must be fair and equitable, provide for reasonable notice of intention to limit or discontinue the services and for an opportunity to make representations. They may not result in a person being denied access to basic water services for non-payment, where that person proves to the satisfaction of the relevant water services authority that he or she is unable to pay for basic services.”⁸⁸⁹

6.9. *Mazibuko and Others v. City of Johannesburg and Others*

Both sides appealed to the Constitutional Court against the preceding decision of the Supreme Court of Appeal regarding *City of Johannesburg and Others v. Mazibuko and Others*. The Constitutional Court reversed the judgment in the case of *Mazibuko and Others v. City of Johannesburg and Others*.⁸⁹⁰ The applicants appealed on the basis that fifty liters of water was required by a person daily as opposed to the forty-two liters decided by the Supreme Court of Appeal, and that an order should have issued against the city of Johannesburg to provide indigent residents of Phiri in Soweto with free water.⁸⁹¹ The Court held that

The Constitution envisages that legislative and other measure will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the State to respond to the basic social and economic needs of the people by adopting reasonable

⁸⁸⁷ Ibid. paragraph 38.

⁸⁸⁸ For these reasons the matter should be referred back to the City to formulate a revised water policy in the light of the finding that it was constitutionally obliged to grant each Phiri resident who cannot afford to pay for water access to 42 litres of water per day free insofar as it can reasonably be done having regard to its available resources and other relevant considerations.” Ibid. paragraph 43.

⁸⁸⁹ Ibid. paragraph 54.

⁸⁹⁰ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

⁸⁹¹ Ibid. paragraph 31.

legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and the content is subject to the constitutional standard of reasonableness.⁸⁹²

Justice O'Regan proceeded to distill from the Court's previous decisions in *Grootboom* and *Treatment Action* cases; her enforcement obligations mandated by the Constitution in respect of socioeconomic rights through the reasonable test formulated in the two cases.

Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in *Treatment Action Campaign* (No 2), the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.⁸⁹³

The Court disagreed with the position of the Supreme Court of Appeal for overlooking its reasonableness test jurisprudence in *Grootboom* and *Treatment Action Campaign* (No. 2), but, rather, quantified the content of the right water under section 27(1)(b), which provides for the right to "sufficient food and water."⁸⁹⁴ The Court in applying its test of reasonableness to the city's water project found that

The City has provided a detailed account of the project and its genesis. It has also made plain that its Free Basic Water Policy has been under constant review since it was adapted. In particular the City has sought to ensure that those with the lowest incomes are provided, not only an additional free water allowance, but also with relief in relation to the charges levied for other services provided for by the City, such as electricity, refuse removal and sanitation services. The City accepts that it is under an obligation to take measures progressively to achieve the right of access to sufficient water and its conduct so far indicates that it will take further steps to meet this obligation.⁸⁹⁵

⁸⁹² Ibid. paragraph 66.

⁸⁹³ Ibid. paragraph 67.

⁸⁹⁴ Judge O'Regan ruled that: "These considerations were overlooked by the Supreme Court of Appeal, which without first considering the content of the obligation imposed upon the State by S 27(1)(b) and 27(2) found it appropriate to quantify the content of the right, despite the jurisprudence of *Grootboom* and *Treatment Action Campaign* (No 2). In my view they erred in this approach and the applicants' arguments that the court should set 50 litres per person per day as the content of the S27 (1)(b) right must fail." Ibid. paragraph 68.

⁸⁹⁵ Ibid. paragraph 168.

Justice O'Regan then ruled that the prepaid water meters introduced into Phiri and the Free Basic Water Policy under Operation Gcin'amanzi did not violate section 27(1)(b) of the South African Constitution, and she set aside the orders of both the trial and appellate courts.⁸⁹⁶

The above cases demonstrate the added advantage of subjecting socioeconomic policies of government to litigation to benefit from judicial scrutiny and determine whether such policies keep fidelity with constitutional provisions. The opportunity to adjudicate over socioeconomic policies of government complements and reinforces existing mechanisms of accountability within a country. But in the following paragraphs I will highlight the fact that South Africa's Constitutional Court from the *Grootboom* case to the *Mazibuko* case missed the golden opportunity to fortify and enhance its reasonableness test with the minimum core baseline formulated by the ICESCR Committee.⁸⁹⁷

6.10. Reasonableness and the Minimum Core

The South African Constitutional Court exhibited undue deference to the South African executive and legislative branches when it refused to employ the golden opportunity in *Grootboom*⁸⁹⁸ to outline the minimum core contents of a right of access to housing. Judge Yacoob declared: "In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right."⁸⁹⁹ This is unlike the position of American courts in Kentucky, New Jersey, and New York, analyzed in the previous chapter, which outlined the minimum contents of free qualitative education for children based on constitutional provisions to guide

⁸⁹⁶ Ibid. paragraph 169.

⁸⁹⁷ I analyzed the minimum core in chapter four of this dissertation.

⁸⁹⁸ 2000 (11) BCLR 1169 (CC).

⁸⁹⁹ Ibid paragraph 33.

policies to be crafted by the executive and legislative branches within specific time limits. Moreover, unlike, South Africa's Constitutional Courts, the American courts exercised supervisory jurisdiction to ensure compliance with their orders. Argentina and Colombia socioeconomic jurisprudence, also discussed in the previous chapter, have both adopted the ICESCR Committee's minimum core obligation to govern the right to health care justiciable under their constitutions.⁹⁰⁰

The South African Constitutional Court has generally refrained from supervisory jurisdiction and trusted the "goodwill" of the executive and legislative branches to comply with the reasonableness doctrine verdicts of the Court.⁹⁰¹ Judge Yacoob's major reason in *Grootboom* for rejecting the minimum core approach was that the Court lacked the capacity of ICESCR Committee, to gather the necessary information to determine the minimum contents of access to housing. In addition, the Court found it difficult to aggregate the diverse needs of the right of access to housing.⁹⁰² The South African Constitutional Court thus exhibited undue deference to the executive and legislative branches.⁹⁰³

Reasonableness has also been explained as a minimalist interpretation of constitutional rights, in pursuant of separation of powers so that the courts will not become policy makers, but, rather, they will evaluate the reasonableness of legislative and executive policies to fulfill

⁹⁰⁰ Young, Katherine, *Constituting Economic and Social Rights*, (Oxford: Oxford University Press, 2012), p. 80.

⁹⁰¹ Wesson, Murray, 'Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court, *South African Journal on Human Rights*, Vol. 20, (2004), pp. 284-308.

⁹⁰² Bilchitz, David, *Poverty and Fundamental Human Rights: The Justification and Enforcement of Socio-Economic Rights*, (Oxford: Oxford University Press, 2007), pp. 197-200.

⁹⁰³ Bilchitz, David, 'Giving Socio-economic Rights Teeth: The Minimum Core and its Importance, *South African Law Journal*, Vol. 119,(2002), pp. 484-501.

constitutional mandates.⁹⁰⁴ “Nevertheless, the danger that reasonableness review can degenerate into an excessively deferential or formal standard of review cannot be discounted.”⁹⁰⁵ Deference was apparent in the South African cases I analyzed above in this chapter.⁹⁰⁶ It also has been suggested that the reasonableness concept can be complemented by litigation against misspending of public funds in South Africa.⁹⁰⁷

In the *Treatment Action* case (No. 2), the court immediately rejected the minimum core approach of the ICESCR Committee.⁹⁰⁸ It refused to define the contents of a minimum core of right of access to health care, and conflated the right (section 27[1]) with the measures (section 27[2] under a test of reasonableness, in her appraisal of government policies dealing with the provision of the constitutionally guaranteed right of access to health care. In this particular case, there was no need to exhibit deference to the executive and legislative branches, because government restrictions placed on the provision of nevirapine, a drug for the prevention of

⁹⁰⁴ Steinberg, Carol, ‘Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-economic Rights Jurisprudence,’ *South African Law Journal*, Vol. 123, (2006), pp. 264-284.

⁹⁰⁵ Liebenberg, Sandra and Goldblatt, Beth, ‘The Interrelationship between Equality and Socio-economic Rights under South Africa’s Transformative Constitution,’ *South African Journal on Human Rights*, Vol. 23, (2007), pp.335-361, at p. 355; Ackerman, Bruce, ‘The New Separation of Powers,’ *Harvard Law Review*, Vol. 113, No. 3, (Jan.,2000), pp. 633-729, at pp. 724-725.

⁹⁰⁶ “In summary, the social and economic rights contained in the Constitution were open to multiple interpretations, at least one of which could have directed the societal journey towards the kind of social democracy envisaged in key provisions of the text. But the Court froze from engaging with the transformative potential posed by the express inclusion of second-and indeed third-generation rights because of its deferential attitude to the other two arms of the state. Traditional legal techniques, sourced in administrative law, came to the aid of the Court in its election of the deference model. Reading these key judgments it now striking how reasonableness has become the norm for this area of the law...” Davis, Dennis, ‘Transformation: The Constitutional Promise and Reality,’ *South African Journal on Human Rights*, Vol. 26, (2010), pp. 85-101, at p. 97.

⁹⁰⁷ Lehmann, Karin, ‘In Defense of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core,’ *American University International Law Review*, Vol. 22, (2006-2007), pp. 163-197 at pp. 193-197.

⁹⁰⁸ Bilchitz, David, ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Jurisprudence,’ *South African Journal on Human Rights*, Vol. 19 (2003), pp. 1-26.

mother-to-child transmission of the HIV virus, to select research health centers was unreasonable since adequate supplies existed to cover health facilities nationwide.

South Africa's Constitutional Court's jurisdiction covers South Africa, unlike ICESCR Committee's global jurisdiction. It must be noted that the ICESCR Committee operates a mediatory and aspirational arena unlike the adversarial national arena of South Africa's Constitutional Court, whose decisions are constitutionally binding and budget implicating. This might be a more transparent ground on which to explain the deference exhibited by the Constitutional Court of South Africa to the legislative and executive branches, versus the argument that it does not possess the capacity to gather data to determine the minimum core of a socioeconomic right.⁹⁰⁹

A better argument could also have been made by the Constitutional Court that the South African Constitution mandates a test of reasonableness.⁹¹⁰ The drafters of the Constitution were aware of the existence of the minimum core concept before opting for the reasonableness concept. As I explain below, South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights, despite the fact that it influenced the socioeconomic rights

⁹⁰⁹ "Hence, if the Constitutional Court, for reasons of constitutional deference, did not want to adopt a minimum core approach, it should have pointed to the different social and political functions which socio-economic rights play at the international level and in the South African context. It could have argued that, in the international arena, they serve to establish a higher ideal to which state parties subscribe and desire to commit themselves for future achievement. The South African Constitution, on the other hand, establishes a standard to which the South African government must be held immediately accountable, or be found in breach of its constitutional obligations. It is therefore appropriate, the Court could find, that the South African Constitution should establish a standard that the government can, in good faith, achieve, and that more aspirational goals such as the minimum core obligation are not necessarily appropriate as a constitutional standard in the context of South Africa. The interpretation and enforcement of socio-economic rights in South Africa must be informed by its historical, political and social context. While international norms are relevant to informing the approach adopted, they should not be determinative. South Africa needs to develop its own approach to the adjudication of these rights-an approach grounded in its context. While it is not suggested that such an argument is a necessary interpretation of sections 26 and 27 of the Constitution, this approach would be preferable to that adopted for its transparency," Mclean, Kirsty, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, (Pretoria: Pretoria University Law Press, 2009), p.186

⁹¹⁰ Sections 26(2); 27(2); 29(1)(b).

provisions of its 1996 Constitution. The Court could also argue that its contextual purposive approach of the reasonableness test to realize socioeconomic rights promotes South Africa's transformative constitutionalism project better than a minimum core concept.⁹¹¹

Besides, there is also the danger of the judiciary agreeing with an executive that sets a minimum core concept as the maximum standard. A test of reasonableness incorporates the philosophy behind the minimum core content and goes beyond it. "However, reasonableness review must incorporate substantive factors such as the interpretation of the relevant socio-economic right, and a detailed, contextual assessment of the impact of the denial of the right on the complainant group."⁹¹² It considers all the various components of socioeconomic rights, in tandem with the Constitutional mandate of reasonableness.⁹¹³ Litigants must also introduce

⁹¹¹ "Rather than making use of the notion of minimum core content of obligations, every right should be interpreted in its context within the Constitution. Every right should be interpreted to give effect to its purpose by *advancing one of the core values* of the Constitution rather than to *establish some core or minimum content* of a right. This would be in line with the main approach adopted by the Constitutional Court on numerous occasions. This approach is referred to as "contextual" and "value-based" (or "teleological") and has indeed been reiterated in the Constitutional Court's judgment in the Grootboom case" Viljoen, Frans, 'Children's Rights: A Response from a South African Perspective,' in Brand, Danie and Russell Sage (eds.) *Exploring the Core Content of Socio-economic rights: South Africa and International Perspectives* (Pretoria: Protea Book House, 2002), pp. 201-206, p. 205, he cited paragraph 25 of the Grootboom judgment which I analyzed above. A catalytic role is ascribed to court in the transformative constitutional project by Young, Katharine, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review,' *International Journal of Constitutional Law*, Vol. 8, No.3 (July, 2010), pp. 385-420.

⁹¹² Liebenberg, Sandra, 'Socio-economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate,' in Woolman, Stu and Bishop, Michael (eds.) *Constitutional Conversations*, (Pretoria: Pretoria University Press, 2008), pp. 303-329, at pp. 327-328. Full text available at: http://www.pulp.up.ac.za/pdf/2008_07/2008_07.pdf (accessed on April 20, 2013).

⁹¹³ Brand, Danie, 'The Minimum Core Content of the Right to Food in Context: A Response to Rolf K nnemann,' in Brand, Danie and Russell Sage (eds.) *Exploring the Core Content of Socio-economic rights: South Africa and International Perspectives* (Pretoria: Protea Book House, 2002), pp. 99-108. A sympathetic view of the minimum core concept is offered by de Vos Pierre, 'The Essential Components of the Human Right to Adequate Housing-A South African Perspective,' in Brand, Danie and Russell Sage (eds.) *Exploring the Core Content of Socio-economic rights: South Africa and International Perspectives* (Pretoria: Protea Book House, 2002), pp. 23-33.

misappropriation of public funds into their pleadings to check government's defense of lack of funds.⁹¹⁴ It bears reiterating that

Attempting to improve the implementation of economic and social rights using a minimum core approach is a noble aim but one which is not without its dangers. The minimum core of a state's obligations must never be used as a reason for inertia. The only justification for adopting a minimum core approach is that it should be viewed as a springboard for further action.⁹¹⁵

The origin of the minimum core concept discussed in chapter 4 has been attributed to German basic law, wherein certain rights cannot be limited. This is akin to clauses in numerous national constitutions, which, at a minimum threshold, permit of no derogation from certain fundamental rights, for example, the right to life or freedom from torture and inhuman treatment even in periods of emergencies.⁹¹⁶

The likelihood of the South African Constitutional Court reconsidering its rejection of the minimum core obligation to serve as a baseline for the reasonable test formula appears to be very slim in the near future.⁹¹⁷ In addition South Africa has refused to ratify the International Covenant on Economic, Social and Cultural Rights, despite the fact that its provisions influenced the entrenchment of justiciable socioeconomic rights in the 1996 South African Constitution.⁹¹⁸ "Failure to ratify the Covenant means that there will be little pressure on South Africa to conform with the jurisprudence of the CESCR with the result that South African law on social and economic rights will follow its own separate path. This is already illustrated by South

⁹¹⁴ Lehmann, Karin, 'In Defense of the Constitutional Court: Litigating Socio-economic Rights and the Myth of the Minimum Core,' *American University International Law Review*, Vol. 22, (2006-2007), pp. 163-197 at pp. 193-197

⁹¹⁵ van Bueren, Geraldine 'Alleviating Poverty Through the Constitutional Court,' *South African Journal on Human Rights*, Vol. 15, (1999), pp.52-74, at p. 59; van Bueren, Geraldine, 'Of Floors and Ceilings: Minimum Core Obligations and Children,' in Brand, Danie and Russell Sage (eds.) *Exploring the Core Content of Socio-economic rights: South Africa and International Perspectives* (Pretoria: Protea Book House, 2002), pp. 183-200.

⁹¹⁶ Young, Katherine G. 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content,' *Yale Journal of International Law*, Vol. 33 (2008), pp. 113-175, at p.124.

⁹¹⁷ Dugard, John, *International Law: A South African Perspective* (fourth ed.), Cape town: Juta, 2011), p. 331.

⁹¹⁸ *Ibid.* at p. 332.

Africa's deviance from the standard of the 'minimum core obligation.'⁹¹⁹

South Africa's ratification of the CESCRR is no guarantee that its courts will apply the CESCRR Committee's jurisprudence. It is striking to note that South Africa ratified the African Charter on Human and Peoples' Rights in 1996, but its courts have seldom relied upon it. Professor Frans Viljoen has been disappointed by this fact, and believes it "is a reminder that the professional training of both judges and senior counsel dates from a period when the African human rights regional human rights system was absent from legal studies."⁹²⁰ South Africa in 1995 ratified the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child. In 1998 it ratified the Convention Against Torture, Convention Against Racial Discrimination, the Genocide Convention and the International Covenant on Civil and Political Rights.⁹²¹ Despite all the above ratifications, "South Africa's implementation and compliance practices or results are not transparent."⁹²²

Conclusion

The South African Constitutional Court, in its early years, while interpreting the transformative and unique African Constitution, wherein socioeconomic rights are justiciable, made some groundbreaking decisions in relation to health care, housing, and social security. It formulated a reasonableness test doctrine in evaluating the seriousness/effectiveness of the various programs that the South African government had designed to implement socioeconomic rights. But the Court has also struggled to justify its rejection of the minimum core concept of the Committee on Economic, Social and Cultural Rights. The Court would rather hide behind a purported inability

⁹¹⁹ Ibid. at p. 332.

⁹²⁰ Viljoen, Frans, *International Human Rights Law in Africa*, (second ed.) (Oxford: Oxford University Press, 2012), p. 539.

⁹²¹ Strydom, Hennie, 'The Place and role of international law in the new constitutional order of South Africa,' in Schff, Gerhard van der (ed.) *Constitutionalism in the Netherlands and South Africa*, (Nijmegen: Wolf Legal Publishers (WLP), 2008), pp. 175-192 at p. 181.

⁹²² Ibid. at p. 182.

of access to information to interpret the core contents of the socioeconomic rights. Socioeconomic rights were embedded in the South African Constitution to facilitate accountability of government's socioeconomic policies in order to fulfill the transformative goals of the 1996 South African Constitution.

Nevertheless, no one can deny the fact that the reasonableness doctrine of the Constitutional Court of South Africa has led to improved accountability of the South African government in the crafting of inclusive and responsive socioeconomic policies on health care, housing, and social security. The reasonableness test, developed by South Africa's Constitutional Court in the adjudication of socioeconomic rights to health care, housing, and social security under the 1996 South African Constitution, represents a paradigm for Nigeria's quest for improved accountability in public governance. Indeed it is a paradigm that could be added to existing mechanisms of accountability in countries like Nigeria that are grappling with huge deficiencies in public governance accountability. As the experience of South Africa shows, justiciable socioeconomic rights can only be a part of the tapestry of accountability mechanisms and not a cure-all stand-alone device. This sobering reality must always be understood by accountability theorists, practitioners, and advocates.

CHAPTER SEVEN: CONCLUSION

7.0. Introduction

I argue in this chapter that constitutionally justiciable socioeconomic rights can complement and enhance the existing mechanisms of accountability in Nigeria. Constitutionally justiciable socioeconomic rights can ameliorate the accountability deficit of the Nigerian state through the subjection of government's socioeconomic policies to judicial scrutiny. Section 7.1 evaluates constitutional legitimacy and the capability of courts to adjudicate over socioeconomic rights. Section 7.2 shows that existing mechanisms of accountability can be complemented and enhanced by constitutionally enforceable socioeconomic rights that subject government's socioeconomic policies to judicial scrutiny. Section 7.3 reiterates the fact that the only instance of the Nigerian government effecting a positive change in its socioeconomic policies emanated from the SERAC decision of the African Commission on Human and Peoples' Rights. But subsequent decisions of the ECOWAS Court of Justice, which ordered implementation of Nigerian legislation on basic education and legislation incorporating socioeconomic rights under the African Charter on Human and Human Rights, have not been complied with, because government lawyers believe that the Nigerian Constitution as the supreme law of the land renders socioeconomic rights nonjusticiable.

Chapter 1 established the presence of several mechanisms of accountability in Nigeria's legal regime and their limitations. Chapter 2 proved the accountability deficit of public governance in Nigeria through the analysis of health and education data as well as judicial

decisions on official and corporate corruption. Chapter 3 showed the limitations of socioeconomic rights as nonjusticiable and directive principles of state policy in Nigeria on the power of judicial review. The Nigerian Supreme Court's analysis of socioeconomic rights as constitutional directive principles of state policy in Nigeria conclusively shows that the court needs to be empowered to subject government policies on socioeconomic rights to objective scrutiny. In chapter 5 I showed the capacity of the courts in the American States of Kentucky, New Jersey, and New York to adjudicate upon the constitutionality of educational policies in keeping fidelity with constitutional provisions and in their crafting of remedies to achieve the objectives and intent of the constitutional provisions. Chapter 5 also showed that the varied experiences of the transformative constitutions of Argentina and Colombia that contain justiciable socioeconomic rights have made their governments adopt programs and policies that are accountable to their citizens. In addition, chapter 5 showed that India, where socioeconomic rights are nonjusticiable directive principles of state policy, has amended its Constitution to make education for children up to the age of fourteen free and compulsory. The chapter proved that some African countries in the past two decades have incorporated socioeconomic rights in their constitutions to improve accountability in public governance.

This concluding chapter analyzes the possibility of making socioeconomic rights justiciable in Nigeria. It further argues and reiterates the position of chapter 4, that the SERAC case on socioeconomic rights, decided by the African Commission on Human and Peoples' Rights Against Nigeria, is the only time that the Nigerian government has been made accountable in socioeconomic policy matters. Subsequently, the Nigerian government has refused to conform to the decisions of the Economic Community of West African States Court of Justice regarding noncompliance with the 2004 Universal Basic Education Act and breaches of socioeconomic rights provisions of the African Charter on Human and Peoples' Rights. I argue that this fact makes it imperative for there to be a constitutional amendment to make socioeconomic rights justiciable under the 1999 Constitution of the Federal Republic of Nigeria,

in order to make Nigeria conform to its treaty obligations under international human rights law, to improve its accountability in socioeconomic policy formulation and implementation. In addition, there would be the added benefit of domestic judicial scrutiny of government's socioeconomic policies.

This chapter also reiterates the fact that decisions of the South African Constitutional Court on socioeconomic rights analyzed in chapter 6 proves that governments can be made accountable for their socioeconomic policy decisions, when the constitution provides for socioeconomic rights as enforceable rights. This chapter recommends an amendment of the nonjusticiable socioeconomic rights provisions of Chapter II of the 1999 Nigerian Constitution, to be made justiciable to empower the judiciary's input into the accountability matrix of public governance in Nigeria to complement and fortify existing mechanisms of accountability in Nigeria.

7.1. Constitutional Legitimacy and Capability of Courts to Adjudicate over Socioeconomic Rights

In chapter 4, I evaluated the work of the Committee on Economic, Social and Cultural Rights, which between 1989 and 2009, issued twenty-one general comments clarifying the norms of various articles of the International Convention on Economic, Social and Cultural Rights.⁹²³ General Comment 9, issued on December 3, 1998, reiterates a key component of this dissertation—the belief in the constitutional legitimacy and capability of courts to adjudicate over socioeconomic rights in the context of domestic application of the CESCR.⁹²⁴ At the domestic level, member countries have a duty to give effect to the provisions of the CESCR.⁹²⁵ It is equally important that the domestic legal system must enable citizens' access to effective

⁹²³ <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed on April 22, 2012).

⁹²⁴ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/148/36/PDF/G9814836.pdf?OpenElement> (accessed on April 22, 2012)

⁹²⁵ Ibid. paragraphs 1-3.

remedies in regard to violations of the CESC.R.⁹²⁶

The debate over the relative ease of the judicial remedies in civil and political rights, as opposed to the constraints of applying resource allocation implications of adjudicating socioeconomic rights, was addressed by General Comment 9, and it directly implicates the constitutional legitimacy and capability of courts to adjudicate over socioeconomic rights. The Committee on Economic, Social and Cultural Rights clarified the debate by stating that:

It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁹²⁷

This clarification reinforces the argument of my dissertation, that courts are well equipped to adjudicate over the constitutionality and soundness of government's socioeconomic policies. The same competencies required in adjudication over civil and political rights that implicate budgetary expenditures also apply to adjudication over socioeconomic rights.

In the *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v. Nigeria*,⁹²⁸ the case relating to socioeconomic rights violations by Nigeria evaluated in chapter 4, the African Commission on Human and Peoples' Rights stated categorically, without mincing words, that

The uniqueness of the African situation and special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in

⁹²⁶ Ibid. paragraphs 4-8.

⁹²⁷ Ibid. paragraph 10.

⁹²⁸ (2001) AHLR 60 (ACHPR 2001).

Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.⁹²⁹

In chapter 4, I also showed that the Economic Community of West African States equally exhibited its competence to adjudicate over socioeconomic rights provisions of the African Charter on Human and Peoples' Rights in cases involving Nigeria's violations of its provisions.

In 1976, Professor Chayes observed that American courts, were increasingly adjudicating over the constitutionality and soundness of government's socioeconomic policies:

In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. Whether this be legislative abdication or not, the result is to leave a wide measure of discretion to the judicial delegate...The fundamental ground of traditional reservations about constitutional adjudication is that the courts may be called upon to act counter to the popular will as expressed in legislation.⁹³⁰

These concerns were effectively addressed by the courts of Kentucky, New Jersey, and New York that I analyzed in section 5.2, and the courts concluded that they were constitutionally empowered by their states' Constitutions to adjudicate upon the constitutionality of public educational policies.

Professor Chayes also tackled the question of judicial deference to majoritarian considerations in the sense of an unelected body of judicial officers moderating upon and adjudicating upon the fidelity of administrative policies to the constitution:

Public law litigation is at once more and less intrusive: more because it may command affirmative action of political officers; less because it is ordinarily limited to adjusting the *manner* in which state and federal policy on education, prisons and mental institutions, and the like is carried forward. Its target is generally administrative rather than legislative action, action that is thus derivative rather than a direct expression of the legislative mandate. Moreover, one may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers. Unlike the numerical

⁹²⁹ Ibid. at paragraph 68

⁹³⁰ Chayes, Abram, 'The Role of the Judge in Public Law Litigation,' Harvard Law Review, Vol. 89, No. 7 (May, 1976), pp. 1281-1316, at p.1314.

minorities that the courts protected under the banner of economic due process, these have no alternative access to the levers of power in the system.⁹³¹

Professor Chayes recognized that the concept of separation of powers did not envisage that government could be broken into three watertight branches.⁹³² He identified the institutional advantage of the judiciary as:

...an effective mechanism for registering and responding to grievances generated by the operation of public programs in a regulatory state. Unlike an administrative bureaucracy or a legislature, the judiciary must respond to the complaints of the aggrieved. It is also rather well situated to perform the task of balancing the importance of competing policy interests in a specific situation. The legislature, perhaps could balance, but it cannot address specific situations. The bureaucracy deals with specific situations, but only from a position of commitment to particular policy interests.⁹³³

Remedies or relief under public litigation utilizes existing mechanisms of adjudication, but it extends beyond litigants before the courts to shape public policies that impact the society in the future. “Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.”⁹³⁴ In section 5.2 of the previous chapter, I showed that remedies were effectively administered by the courts in Kentucky, New Jersey, and New York States to correct deficiencies in the educational programs of the states.

The South African Constitutional Court in *Minister of Health and Others v. Treatment Action Campaign and Others*, emphasized that its constitutional role in the adjudication of socioeconomic rights might result in the evaluation of government’s policy.⁹³⁵ It further stated that the Constitution made it mandatory for the Court to declare as unconstitutional a policy

⁹³¹ Ibid. at p. 1315.

⁹³² Ibid. at p. 1307.

⁹³³ Ibid. at p. 1308.

⁹³⁴ Ibid. at p. 1302.

⁹³⁵ (2002) AHLR 189 (SACC 2002)

inconsistent with its provisions, and where socioeconomic rights have been violated, the Court must provide a remedy.⁹³⁶ The Court also asserted that it was empowered to issue mandatory orders, which it had exercised in previous cases against government agencies, one of which required a comprehensive plan allowing public access from a government agency to facilitate prisoners' participation in voting.⁹³⁷ The Court disagreed that its sole power in the case was limited to declaratory orders, but, rather, that it was duty bound to grant effective relief, which depending on the manner of right violated could involve both mandatory orders and supervision under its jurisdiction.⁹³⁸ The Court then interpreted judicial powers in a constitutional democracy operating separation of powers.

South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may-and if need be must-use their wide powers to make orders that affect policy as well as legislation.

The Court then issued orders aligning government health policies with constitutional objectives, but granted the government the latitude to reformulate its health policy to be consistent with the Constitution.⁹³⁹

The 1960, 1963, 1979, and 1999 Nigerian Constitutions all empowered the judiciary to strike down any legislation or address any action that violated their provisions. The Nigerian

⁹³⁶ "A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution, it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also 'make any order that is just and equitable'. Ibid. paragraph 101.

⁹³⁷ Ibid. paragraph 105.

⁹³⁸ Ibid. paragraph 106.

⁹³⁹ Ibid. paragraph 135(4).

judiciary has accordingly struck down numerous legislative acts that violated the Constitution.⁹⁴⁰

The judiciary has also vigorously protected the fundamental human rights provisions in the Constitution.⁹⁴¹ The Nigerian judiciary is widely perceived as a strong defender of the Constitution and as a willing protector of the ordinary citizen.⁹⁴² The same principles formulated by the Nigerian judiciary in striking down unconstitutional legislation or in securing fundamental human rights, will be applicable to judicial adjudication over socioeconomic rights presently listed as nonjusticiable Chapter II provisions of Fundamental Objectives and Directive Principles of State Policy.⁹⁴³ The Nigerian judiciary possesses the necessary competencies to evaluate socioeconomic policies of government and align them with constitutionally enforceable or legislated socioeconomic rights.

⁹⁴⁰“Section 26(3) says that ‘A prosecution for an offence shall be concluded and judgment delivered within ninety (90) working days of its commencement save that the jurisdiction of the court to continue to hear and determine the case shall not be affected where good grounds exists (sic) for a delay.’ The argument here is that this is a usurpation of judicial power (or an attempt to control how the judiciary shall go about its functions) and is accordingly void. This argument has merit because this is a direct interference with the judiciary by the National Assembly as to when the court should conclude matters accordingly. It is unconstitutional: see *Unongo v. Aku* (1983) 2 SCLNR 332 where this court held in regard to similar provision (1) that they constituted an unjustifiable interference with the judicial functions of the courts and was breach of the entrenched doctrine of separation of powers in the Constitution; (2) that the period necessary to complete hearing in a case having regard to the nature of that case, the preparations and research necessary before judgment is given is a matter within judicial control with which the legislature cannot and ought not to interfere; (3) that the impugned provisions were contrary to the stipulated discretion given to the courts in section 258 of 1979 Constitution (now section 294 of the 1999 Constitution).” *Uwaifo, J.S.C. in Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 9 NWLR (Pt. 772) 222 S.C. at 419-420

⁹⁴¹ *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228 S.C.; *Shugaba Darman v. Federal Minister of Internal Affairs* (1981) 2NCLR 459; *Bishop Olubunmi Okojie v. Attorney-General of Lagos State* (1981) 1 NCLR 218; *Attorney-General Imo State v. Ukaegbu* (1981) 2 NCLR 568.

⁹⁴² Ikhariale, M.A. ‘The Independence of the Judiciary under the Third Republican Constitution of Nigeria,’ *Journal of African Law*, Vol. 34, No.2 (Autumn, 1990), pp.145-158, at pp. 150-151.

⁹⁴³ “It was contended that 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 Chapter II of the Constitution which excludes from the courts any issue or question as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy. This argument in my view is limited to the extent that courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws for their enforcement as has been done in respect of section 15(5) of the Constitution by the enactment of the ICPC Act.” *Ogwuegbu, J.S.C. in Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 9 NWLR (Pt. 772) 222 S.C. at 343.

7.2. Making Socioeconomic Rights Justiciable in Nigeria

Comparative constitutional law has proved that courts' political influence increase when access to courts is simplified.⁹⁴⁴ The Columbian 1991 Constitution reminds us that the judiciary can only be an accountability benchmark guarantor of any particular society's struggle for fairness and justice in the allocation of state resources in a constitutional democracy. In Nigeria, the judiciary can be empowered through justiciable socioeconomic rights to make government officials accountable for just and equitable utilization of substantial oil revenues and huge taxes in developing the Nigerian economy and poverty eradication. "Constitutional justice can become an important instrument for democratic progress, only if we think of it as part of broader social struggles. The accomplishment of the emancipation promises made by the 1991 (Colombian) Constitution is too serious a matter to leave it only to judges: citizens' participation is indispensable for the realization of democracy."⁹⁴⁵ This reinforces the argument of this dissertation, that a holistic approach of complementing existing mechanisms of accountability in Nigeria with justiciable socioeconomic rights in order to subject government's socioeconomic policies to judicial scrutiny, assisted by relaxation of access to courts by civil society, will continuously lead to improvements in the formulation of responsive and inclusive government socioeconomic policies. This will ultimately improve the quality of health care and education of the populace while at the same time reducing poverty.

Education and health are essential foundations for rapid economic development.⁹⁴⁶ The ruling elite in societies determine the trajectory of social arrangements. Quasi-economic liberals who dominate the sociopolitical terrain in Nigeria have been greatly influenced by Western

⁹⁴⁴ Yepes, Rodrigo Uprimny, 'Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court', in Coomans, Fons, (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Antwerpen-Oxford: Intersentia, 2006), pp. 355-388 at p. 360.

⁹⁴⁵ Ibid. at pp. 387-388.

⁹⁴⁶ Ibid. at p. 275.

liberalism, but Nigerian laissez-faire oligarchs dominant since 1966 have no understanding that economic liberalism does not equate with callous laissez-faire. Karl Polanyi went to great lengths in his seminal work, *The Great Transformation*, to explain the difference.⁹⁴⁷ Simply put, coercive law of the state was employed to establish the conditions for a market-based economy through labor law and antitrust legislation.⁹⁴⁸ These were used to establish “the preconditions of a self-regulating market”⁹⁴⁹ and defang the excesses of a laissez-faire economy ridden with cartels and monopolists.

The United Nations Millennium Development Goals for 2015 are to eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and last to develop a global partnership for

⁹⁴⁷ Polanyi, Karl, *The Great Transformation*, (Boston: Beacon Press Paperback Edition, 1957).

⁹⁴⁸ Ibid. at p. 148, “It is highly significant that in either case consistent liberals from Lloyd George and Theodore Roosevelt to Thurman Arnold and Walter Lippmann subordinated laissez-faire to the demand for a free competitive market; they pressed for regulations and restrictions, for penal laws and compulsion, arguing as any “collectivist” would that the freedom of contract was being “abused” by trade unions, or corporations, whichever it was. Theoretically, laissez-faire or freedom of contract implied the freedom of workers to withhold their labor either individually or jointly, if they so decided; it implied also the freedom of businessmen to concert on selling prices irrespective of the wishes of the consumers. But in practice such freedom conflicted with the institution of a self-regulating market, and in such a conflict the self-regulating market was invariably accorded precedence. In other words, if the needs of a self-regulating market proved incompatible with the demands of laissez-faire, the economic liberal turned against laissez-faire and preferred-as any antiliberal would have done- the so-called collectivist methods of regulation and restriction. Trade union law as well as antitrust legislation sprang from this attitude.”

⁹⁴⁹ Ibid. at p. 149. “Strictly, economic liberalism is the organizing principle of a society in which industry is based on the institution of a self-regulating market. True, once such a system is approximately achieved, less intervention of one type is needed. However, this is far from saying that market system and intervention are mutually exclusive terms. For as long as that system is not established, economic liberals must and will unhesitatingly call for the intervention of the state in order to establish it. The economic liberal can, therefore, without any inconsistency call upon the state to use the force of law; he can even appeal to the violent forces of civil war to set up the preconditions of a self-regulating market. In America the South appealed to the arguments of laissez-faire to justify slavery; the North appealed to the intervention of arms to establish a free labor market. The accusation of interventionism on the part of liberal writers is thus an empty slogan, implying the denunciation of one and the same set of actions according to whether they happen to approve of them or not. The only principle economic liberals can maintain without inconsistency is that of the self-regulating market, whether it involves them in interventions or not.”

development.⁹⁵⁰ The eight goals are all in sync with Chapter II provisions on fundamental objectives and directive principles of state policy of the 1999 Constitution of the Federal Republic of Nigeria, and will be boosted if Chapter II provisions, which contain socioeconomic rights are amended to be constitutionally enforceable.⁹⁵¹ UNICEF in its 2010 annual report recognized the importance of qualitative education and health care for children as the basis for a prosperous society.⁹⁵² The United Nations Educational, Scientific and Cultural Organization (UNESCO) detailed the importance of early childhood care and education, as over ten and a half million children under the age of five die yearly from preventable diseases.⁹⁵³ UNESCO has demonstrated that early childhood education is sine qua non for a sustainable society.⁹⁵⁴ Secondary education or high school is equally vital for adolescents and teenagers to attain their full potentials in life.⁹⁵⁵ The curriculum or contents of secondary education is now recognized as

⁹⁵⁰ United Nations Millennium Development Goals, full text available at: <http://www.beta.undp.org/undp/en/home/mdgoverview.html> (accessed on June 21, 2011); United Nations Development Programme, *Unlocking Progress : MDG acceleration on the road to 2015*, (New York: UNDP, September 2010), full text available at: http://www.beta.undp.org/content/dam/aplaws/publication/en/publications/MDG/unlocking-progress-maf-lessons-from-pilot-countries/UnlockingProgress_MAF%20Lessons%20from%20Pilot_Countries_September%202010.pdf (accessed on June 21, 2011).

⁹⁵¹ Finally, the transformation of Nigeria's economy cannot take place without adequate attention to this transformation's implications for human development. Nigeria has some of the worst human-development indicators in the world and is not on track to meet most of the health and education Millennium Development Goals. This means that its failing education and health sectors should be reformed to better serve households and businesses." Okonjo-Iweala, Ngozi, *Reforming the Unreformable: Lessons from Nigeria*, (Cambridge, Massachusetts: MIT Press, 2012), p. 142.

⁹⁵² UNICEF 2010 Annual Report (New York: UNICEF, June 2011) full text available at: http://www.unicef.org/publications/files/UNICEF_Annual_Report_2010_EN_052711.pdf (accessed on June 21, 2011).

⁹⁵³ UNESCO, *Early Childhood Care and Education* (ECCE), <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/early-childhood/> (accessed on June 21, 2011).

⁹⁵⁴ Kaga, Yoshie and Samuelsson, Ingrid Pramling (eds.), *The Contribution of Early Childhood Education to a Sustainable Society*, (Paris: UNESCO, 2008), full text available at: <http://unesdoc.unesco.org/images/0015/001593/159355e.pdf>

⁹⁵⁵ UNESCO, *Secondary Education*, <http://www.unesco.org/new/en/education/themes/strengthening-education-systems/secondary-education/> (accessed on June 21, 2011).

vital in equipping the young ones with skills that will make them effective and successful members of a knowledge-based society in a globalized world.⁹⁵⁶

7.3. Socioeconomic Rights Applied to Ameliorate Nigeria's Accountability Deficit

The potentials of the international tribunals of the African Commission on Human and Peoples Rights and the Court of Justice of the Economic Community of West African States serving as alternative avenues of enforcement of socioeconomic rights in Nigeria have not been realized fully, as I demonstrated in chapter 4. The jurisprudence of the South African Constitutional Court, in the *Soobramoney v. Minister of Health, Kwazulu Natal*⁹⁵⁷; *Government of the Republic of South Africa v. Grootboom*⁹⁵⁸; and *Minister of Health and Others v. Treatment Action Campaign and Others*,⁹⁵⁹ treated in chapter 6, points the way forward for employing socioeconomic rights domestically to subject Nigerian government policies to accountability requirements. These South African cases subjected government policies to a high accountability threshold to maximize the proper utilization of resources in the housing and health sectors. This is imperative, having established in Chapter II, the limitations of existing mechanisms of accountability in securing accountability of government's socioeconomic policies in Nigeria. South Africa, unlike Nigeria, has a constitutional mandate to tackle poverty.⁹⁶⁰ South African courts, unlike Nigerian courts, are empowered to address poverty through justiciable constitutionally provided socioeconomic rights. South Africa's highest court, the Constitutional Court, has utilized this power to formulate the standard of reasonableness, concept to evaluate

⁹⁵⁶ Gauthier, Roger-François, *The Content of Secondary Education Around the World: Present Position and Strategic Choices*, (Paris: UNESCO, 2006), full text available at:

<http://unesdoc.unesco.org/images/0014/001475/147570e.pdf> (accessed on June 21, 2011).

⁹⁵⁷ 1997 (12) BCLR 1696 (CC) 8.

⁹⁵⁸ 2000 (11) BCLR 1169 (CC).

⁹⁵⁹ (2002) AHLR 189 (SACC 2002)

⁹⁶⁰ Wilson, Stuart and Duggard, Jackie, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' *Stellenbosch Law Review*, Vol. 22, No. 3, (2011), pp. 664-682.

the reasonableness of government policies in the fulfillment of socioeconomic rights, especially with regard to the most vulnerable in society, the poor.⁹⁶¹ This has enabled the courts to make the South African state accountable for its socioeconomic policies.⁹⁶² Nigeria has great lessons to learn from the South African constitutional example.

Nigeria is a paradox to be resolved with millions of its citizens wallowing in poverty while a few privileged officials in charge of state resources squander billions of dollars in revenues. Existing mechanisms of accountability in the 1999 Constitution of the Federal Republic of Nigeria must be complemented by enforceable socioeconomic rights to subject socioeconomic policies of government to judicial scrutiny. Socioeconomic rights are vital in securing the quality of life. Basic requirements like adequate nutrition, qualitative health care, basic education, and potable water are the minimum requirements a developing country must provide for its citizens, particularly a country like Nigeria whose oil revenues have fostered the greatest levels of inequality in the world. The policies of the ruling elite in Nigeria have treacherously betrayed the socioeconomic welfare policies of the first set of Nigerian leaders who, from 1960 to 1966, educated the young; provided health care, a potable water supply, and manufacturing jobs; invested massively in agriculture; and fostered a nurturing environment during the formative years of the present prodigal ruling elites in Nigeria. Hence, it is not surprising, as attested to by the Siemens and Halliburton cases, analyzed in chapter 2, that such a class of political elites will be readily influenced by bribes from multinational firms to secure sweet deals in the petroleum extractive industry, the major source of public revenues in Nigeria.

⁹⁶¹ Quinot, Geo and Liebenberg, Sandra, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' *Stellenbosch Law Review*, Vol. 22, No. 3, (2011), pp. 639-664.

⁹⁶² Ngcobo, Sandile, South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' *Stellenbosch Law Review*, Vol. 22, No. 1, (2011), pp. 37-49 at p. 46.

All available mechanisms of accountability, including constitutionally enforceable socioeconomic rights must be on deck to ameliorate Nigeria's accountability deficit in public governance.

Dissertation Findings

1. Judicial decisions on the constitutional right to education provisions in the Constitutions of Kentucky, New Jersey, and New York States effected positive changes in socioeconomic policies on education formulated by the executive and legislative branches of government. Judicial scrutiny in these states has enabled their governments to be accountable to the public for the formulation of effective policies, which made available sound and free public education for children.
2. The groundbreaking 1993 decision of the Supreme Court of India, in the challenge to states' regulation of private school fees case of *Unni Krishnan J.P. v. State of Andhra Pradesh* analyzed in section 5.3; which extended the fundamental right to life under Article 21 of the Indian Constitution to encompass a right to basic education for children up to the age of fourteen, led to the 2002 constitutional amendment, which transformed Article 45 on the provision of primary education of the Directive Principles of State Policy into a justiciable fundamental right to primary education. This has resulted in the formulation of effective policies on primary education, thereby making free public primary education available to Indian children.
3. The reasonableness doctrine of the Constitutional Court of South Africa, developed in the adjudication of socioeconomic rights to health care, housing, and social security under the 1996 South African Constitution, has led to improved accountability of the South

African government to the people in the formulation of effective policies to implement the constitutional provisions on the right to health care, housing, and social security.

4. Judicial scrutiny of government's compliance with constitutional provisions assures accountability of government to the governed in line with constitutional mandates.
5. A liberal and expanded interpretation of access to courts or standing is crucial in enabling affected members or classes of the public to test compliance of public policies with constitutional provisions in the law courts, thereby ensuring accountability of government's policies to the governed.
6. It is very instructive that India, in 2002, opted for a constitutional amendment to transform the nonjusticiable provision on primary education of the Directive Principles of State Policy into a justiciable fundamental human rights provision under its Constitution.
7. A content analysis of the health and education sectors in Nigeria shows that socioeconomic policies of government in both sectors have not been effective and accountable to the public/governed.
8. The same principles formulated by the Nigerian judiciary in striking down unconstitutional legislation or in securing fundamental human rights, will be applicable to judicial adjudication over socioeconomic rights. The Nigerian judiciary possesses the necessary competencies to evaluate socioeconomic policies of government and align them with constitutionally enforceable or legislated socioeconomic rights.

Recommendations

1. Nigeria can complement existing mechanisms of accountability, such as the rule of law, by making socioeconomic rights justiciable and thereby subject the government's socioeconomic policies to judicial scrutiny and test its compliance with constitutional

provisions, ultimately improving the accountability of the government to the governed in the formulation of transparent, responsive, and inclusive socioeconomic policies.

2. The nonjusticiable Fundamental Objectives and Directive Principles of State Policy of the 1999 Constitution of the Federal Republic of Nigeria relating to the socioeconomic rights of education and health care must be transformed into justiciable fundamental human rights. Such amendment will stop the refusal of the Nigerian government to abide with decisions of the ECOWAS Court of Justice, because according to Nigeria, education is a nonjusticiable Fundamental Objective and Directive Principle of State Policy.
3. Access to the courts in the area of standing must be relaxed and broadened in Nigeria, as practiced by the Supreme Court of India, provisions in the South African Constitution, rules of court of the Constitutional Court of South Africa, and the courts in Kentucky, New Jersey, and New York States in the United States of America.

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