

## Justiciability of fundamental objectives and directive principles of state policy: Under the 1999 Nigerian constitution

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### Abstract

The Constitution of the Federal Republic of Nigeria 1999 as amended in chapter 2 provides for Fundamental Objectives and Directive Principles of State Policy, which substantially contains socio-economic rights. The Constitution in section 6(6)(c) declared chapter 2 as non-justiciable. This article examined the general argument for and against the justiciability of socio-economic rights embedded in the said chapter 2, and also examined the reasons that influenced the makers of the Constitution to adopt the non-justiciability approach to the Directive Principles. The article argues that the non-justiciability of chapter 2 is not total considering item 60(a) of Schedule II part 1 of the Constitution, and the African Charter on Human and Peoples Rights which has been domesticated by Nigeria. The paper concluded that the Directive Principles are like welfare legislations, therefore the Nigerian Judiciary should adopt a liberal and dynamic approach like the Indian Judiciary in the interpretation of its provisions in order to achieve the beneficial purposes for which they are inserted.

**Keywords:** justiciability of fundamental, principles of state, under 1999, Nigerian constitution

### 1. Introduction

The 1999 constitution of the Federal Republic of Nigeria (otherwise 1999 constitution) in chapter II contains fundamental objectives and Directive Principles of state policy<sup>[1]</sup> which substantially entrench certain rights and benefits conventionally referred to under human rights regime as Economic, Social and Cultural rights.

The Directive Principles of State Policy are a set of constitutional provisions which requires a state to carry out certain obligations in fulfillment of its mandate for the citizenry. Some of these obligations can be understood as conferring rights on individuals in the same way as guaranteeing human rights of individuals implies obligations of states<sup>[2]</sup>.

As stated earlier these fundamental objectives and Directive Principles of State Policy as contained in the 1999 constitution contain economic, social and cultural rights, framed in terms of state duties instead of individual entitlements together with other principles and objectives that are not directly related to economic, social and cultural rights. It is an indirect way of giving constitutional protection to economic social and cultural rights (ESCRs) at domestic level.

The constitution expressly declared the directive principles of state policy contained in it as non-justiciable or unenforceable<sup>[3]</sup>. Nigeria no doubt must have been influenced by the argument or notion under international law. At international law, arguments against justiciability of economic, social and cultural rights underlie the division of human rights into two-civil and political rights on the one hand, and economic social and cultural rights on the other<sup>[4]</sup>.

This also gave rise to two separate international covenants-namely the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social

and Cultural Rights.

Initially the two categories of rights comprised equal elements of the Universal Declaration of Human Right, but this categorization and argument came at the time of the cold-war because of political and ideological differences between the Eastern bloc led by Soviet Union then and the western bloc led by United States of America<sup>[5]</sup>.

The two covenants as mentioned above, set out their respective rights in different terms (which exhibited the importance of one over the other) “whereas in the International Covenant on Civil and Political Rights, the rights are subjects of immediate obligation, in the International Covenant on Economic, Social and Cultural Rights, they are to be achieved by the more tangible notion of “progressive realization<sup>[6]</sup>.”

“The two categories of rights were also given divergent levels of support for monitoring state compliance: whereas the ICCPR was allocated the treaty-based Human Rights Committee Comprised of an independent body of experts, no mechanism was set up for the ICESCR until the formation of the committee on Economic, Social and Cultural Rights in 1986, which is obliged to operate under the direction of the politically constituted United Nations Economic and Social Council<sup>[7]</sup>.”

In addition, regional courts such as the Inter-American Court of Human Rights and the European Court of Human Rights have been set up to adjudicate disputes over civil and political rights, whereas the committee on Economic, Social and Cultural Rights (ESCR) remains the only mechanism available for socio-economic rights claims and is able to deal with a minute fraction of cases meeting in any event with little political cooperation<sup>[8]</sup>. It is the African charter on Human and People Rights that did not categorise the rights and the

African Commission on Human Right and African courts human rights are mandated to handle all complaints arising from the charter whether civil, political or economic, social and cultural rights <sup>[9]</sup>.

The position of socio-economic rights within national jurisdictions has tended to reflect these attitudes of negativity or ambivalence about enforcement on the international level, which persist despite the United Nations' effort to realign approaches to the two covenants <sup>[10]</sup>.

The above historical exposition, no doubt influenced most countries who have adopted socio-economic rights in their constitutions as Directive Principles including Nigeria, to balkanize provisions relating to human rights in their constitutions into two groups – one dealing with civil and political rights otherwise called fundamental rights expressly declared as justiciable; and the other dealing with economic, social and cultural rights otherwise referred to as Directive Principles of State Policy expressly declared as non-justiciable.

This categorization of human rights has come to stay with scholars giving reasons why socio-economic rights should not be justiciable. However there are some scholars who believe today that socio-economic rights should be made enforceable. These groups have converted a few countries like South Africa. It is worthy to note that the mood of the world today is changing in favour of justiciability of socio-economic rights.

## 2. General Arguments for Non-Justiciability

The following reasons have been put forward generally why socio-economic rights should not be enforceable or justiciable.

1. Positive and negative rights construct: One of the major reason against the enforceability of Directive Principles or Economic and Socio-Cultural rights is the argument of negative and positive rights. Socio-economic rights are said to be positive rights requiring the state to expend resources to provide the remedy, whereas civil and political rights are negative rights which simply require the state to refrain from unjust interference with individual liberty <sup>[11]</sup>. In other words, negative rights involve freedom from governmental (or private) coercion that would prevent an individual from doing what she is otherwise minded to do; positive rights requires the government to take action in order to provide an individual what she cannot get for itself. This implies that only negative rights are rights at all, since in a free society the only form of protection the individual should be entitled to is protection against coercion <sup>[12]</sup>. The state is not expected to expend any resources, therefore, no financial commitment on the part of the state in the enforcement of the negative rights and freedoms. The civil and political duties imposed on the state are just duties of restraint preventing the state from interfering with individual freedom rather than casting positive duties on the state to act, therefore, more appropriate for the judicial resolution than positive duties <sup>[13]</sup>.

It is believed that the protections of citizens against want or needs are in the realm of policy which is the responsibility of the executive. According to Ellen Wiles, the positive rights criticism tends to align with a conservative ideological view, suspicious of perceived

steps towards increased state intervention that would interfere with the operation of the free market by authorizing redistribution of wealth. The preference for negative rights alone derives from the principles of natural law, in particular the Kantian view of negative liberty based on autonomy. From this perspective, the poverty that the individual may experience as a result of the operations of a free market is not to be construed as a limitation of individual liberty, as the outcomes of market are the unintended consequences of decisions of individuals to buy and sell <sup>[14]</sup>.”

2. From the negative and positive rights and duties theory emerged also the reason that socio-economic rights being positive rights involves policy choices, which directly implicate economic prioritization and budgetary allocations <sup>[15]</sup>. In other words it involves choice and decision as to which programme, or need or want to implement and which to take first in terms of priority, which is of utmost importance and which one should come last, considering the availability of financial and material resources because means of satisfying all human wants are scarce and cannot be enough at any particular time. The wants are not only numerous they are also competing amongst themselves. These rights (positive) involve some kind of economic and financial balancing that lies within the competence of the government, they are not to be made available to individuals as enforceable claims in the manner of negative rights <sup>[16]</sup>.
3. Another major argument against the socio-economic rights in the justiciability conundrum are the twin issues of clarity and certainty. It is argued that the Economic, Social and Cultural rights “are by nature, open-ended and indeterminate, and that there is lack of conceptual clarity about them.” For example which treatments, should be included in the right to an adequate minimum standard of health care? “How are judges to decide when such rights have been violated?” <sup>[17]</sup>. They are imprecise, vague, unenforceable in domestic law and unsuitable for supranational adjudication <sup>[18]</sup>. In the words of Ilias Trispoitis “Social rights suffer from a painful lack of precision, therefore, they are not capable of being judicially enforced.” <sup>[19]</sup>.
4. Complexity of Adjudication and social impact. There is also the argument made against the practicability of legal enforcement, to the effect “that cases involving socio-economic rights are too complex for judges to analyse adequately, as the social and economic issues they raise tend to be embedded in a complex web of causes and effects. Consequently, there is the danger that a judicial decision that effected a change in public policy or in the distribution of resource expenditure could upset the balance in ways that a court might not expect, as its decision on one area of social policy could have an impact on another” <sup>[20]</sup>.”
5. Remedies and implementation. Another contention is that socio-economic rights should not be justiciable, as providing remedies will be problematic, because it involves social changes that are not capable of immediate implementation, and therefore, in practical terms, cannot be treated as enforceable law <sup>[21]</sup>. According to Ellen

Wiles, “It is substantially due to this concern that socio-economic rights were framed as achievable via progressive realization in ICESCR.”

6. Access to justice: it is also contended that socio-economic rights should not be justiciable because the poor will not benefit from its justiciability as it is the case with civil and political rights, because the poor cannot afford bringing cases to court. Cases will only be brought to court by the most articulate, assertive, and wealthy individual the most disadvantaged, poor, and marginalized do not have the knowledge, ability, or resources to be able to voice their claims, and cases are decided without taking their potentially competing needs into account <sup>[22]</sup>.
7. Separation power: It has also been argued that adjudicating on economic, social and cultural rights is not a proper or legitimate role of the courts as it will make them to delve into policy decisions which are the functions of other organs of government thereby violating the doctrine of separation of powers. Judges are not elected directly like the Executive and Legislature by the people, judicial enforcement of socio-economic rights means reviewing decisions which the executive or legislative arm would have taken which may involve procurement, allocation and expenditure of state resources. Elevating economic, social and cultural rights to the status of legal enforceability would therefore threaten traditional notions of democracy and separation of powers. It is argued that economic and socio-cultural rights constitute the core political policy which is the realm of elected representatives rather than an unelected judiciary <sup>[23]</sup>. Further it is also contended as an addendum or alternative why socio-economic rights should not be adjudicated, that rights claims are decided on a case by case basis. The political result of their enforceability will be piecemeal and short term approach to social policy and by necessary implication slows down social policy <sup>[24]</sup>.

### 3. General Arguments for Justiciability

1. These arguments and reasons for non-justiciability of economic and social right as strong and convincing as they may be, it is gratifying to state that most if not all of these reasons have been substantially rebutted and there are a lot of valid reasons advanced by scholars and institutions why socio-economic rights should be made judicially enforceable.

On the negative and positive rights and duties argument which cast duty on the state to act or take action, it is important to state that the enforcement of political and civil rights also requires resource expenditure and requires the state to take action towards realizing them. Thus the states duty is not only just to respect it by non-interference it must also fulfill these rights. For example it is argued, the right to property, is meaningless without an institutional system that will involve the police force and other law enforcement agents to prevent trespassing, and a legal structure to punish it if it happens <sup>[25]</sup> or the right to fair trial requires the maintenance of expensive and conducive court system <sup>[26]</sup>, or the right to liberty, in cases of detention the state has to inform the detainee of the

reason for his arrest promptly and in the language he or she understands and also ensure that the detainee has access to proceeding challenging the detention <sup>[27]</sup>. Thus every right whether civil and political, or economic and social can give rise to positive and negative obligations. It is therefore better to focus on the nature of the obligation created by a particular right.

2. Judicial review of socio-economic rights may not necessarily require the determination of a particular level of expenditure or the exact method of spending the resources. A judgment can simply consist of merely pointing out where violation has occurred and then instruct, that it should be remedied in which ever way the authority deems most appropriate, or simply that an appropriate inquiry should be instigated <sup>[28]</sup>, thus a court can issue an injunctive order requiring the state to abstain from destroying or contaminating food sources of its citizens this does not involve resources expenditure <sup>[29]</sup>.
3. Again, even where expenditure is involved, for remedial actions, judges are very sensitive to their constitutional duties within the state and will not unreasonably authorize large sums of money to be spent unless it is absolutely necessary, knowing that resources are not limitless <sup>[30]</sup>. Judges are not robots, they are not insensitive or unreasonable in the performance of their duties. They play their roles rationally and with the understanding that they constitute one of the organs of government and therefore major stakeholders in governance, they cannot therefore make orders for expenditure with reckless abandon or apathy, they are there to solve problems and not to create conflict between the state and its citizens. Thus in the South Africa case of *Soobramoney v. Minister of Health, Kwazulu-Natal* <sup>[31]</sup> which involved the application of section 27(3) of the South African Constitution which provides that “no one may be refused emergency medical treatment.” In that case the applicant claimed the provision of kidney dialysis treatment from a provincial hospital based on section 27(3) and section 11 which has to do with right to life under the same constitution. The court in dismissing his claim under those two sections of the constitution stated that the court would be slow to interfere with rational decisions taken in good faith by the political organs and authorities whose responsibility it is to deal with such matters. The court was of the view that treatment of chronic diseases was not covered by section 27(3) of the constitution. The role to be played in the adjudication of socio-economic rights by judges should be “seen in the context of and in interaction with the role of those institutions with an implicit, but vital function in the process of implementing socio-economic rights, such as the legislature, elected by popular franchise.” <sup>[32]</sup> Judges must not be treated with suspicion in the governance of the state.
4. The argument that, elevating socio-economic right to the status of legal enforceability will erode the principle of separation of powers, have also been debunked, Ellen Wiles describe this argument as purely based on distrust for the judges and contended that even in civil and political rights judges are also involved in policy making. He cited the American case of *Brown v. Board of*

education which was responsible for condemning the policy of segregation of blacks in the American educational system and described same as radical and progressive<sup>[33]</sup>. The said writer justified this attitude of the judges when he declared “it is now widely accepted that judicial review of such policies is a valuable mechanism for intervention where policies are threatening human rights standard<sup>[34]</sup>.”

It is a notorious fact that there is no water-tight separation powers, more so the principle of checks and balances have been used to dilute the principle and reduce the excesses of each organ of government. It has therefore been argued that, without breaching the doctrine of separation of powers, “courts can place the state in the position of having to explain why it cannot afford to expend resources on a particular public priority. In such a case, the state is expected to justify its actions and come up with plausible explanations for budgetary allocations instead of simply being allowed to plead poverty<sup>[35]</sup>.”

5. Making socio-economic right enforceable will promote democracy and engender the enforcement of civil and political rights. Socio-economic rights, are rights to the provision of resources necessary in order to live a minimally decent life within the society if there are any rights that should be protected and enforced then they should be the socio-economic rights, and of course poverty does not necessarily arise here because, it is an issue of the state supporting to provide, may be food, or housing or health as the case may be. They are basic human well-being concerned in terms of how a person can “function” through activities (like eating or reading or seeing), states of existence or being e.g. being well-nourished, being free from malaria, not being ashamed by poverty of one’s clothing or shoe.” According Ellen Wiles “to have autonomy and to be able to exercise choice human beings need to be able to function in these basic ways and socio-economic rights can be considered as components of a commitment to individual freedom as a means of enabling civil and political rights to exist<sup>[36]</sup>.” He argued further, that without being literate there is not much use for a right to freedom of speech, and without housing there is not much use for a right to privacy, they are important means to achieve a just form of democracy. He concluded therefore that it will be illogical to make only civil and political rights legally enforceable<sup>[37]</sup>.
6. **Poverty:** The argument as stated here is that the poor cannot access justice therefore socio-economic rights should not be made legally enforceable. This argument as plausible as it is, it has been suggested that poverty can be taken care of in access to justice through the promotion of Public Interest Litigation as being done in countries like India. The court can in this context, be less legalistic as to issues like locus standi, and procedural flexibility.
7. The argument as to vagueness and indeterminacy has also been dismissed as untenable because this same argument was also made against enforceability of civil and political rights before their development through practice and scholarship<sup>[37]</sup>. According to Gautam Bhatia this objection of vagueness fails for reasons of under-inclusiveness and over-inclusiveness as public interest

limitations on negative rights, found in most constitutions all over the world are as open-ended as positive rights<sup>[38]</sup>. Some economic, social and cultural rights are very clear and precise and more precise than political and civil rights. The historical, ideological and philosophical exclusions of social rights from adjudicative experience have resulted in a failure to accumulate experience that would render the imprecision of social rights less and less true as time goes on<sup>[39]</sup>.” However, the economic and social and cultural committee have issued comments which illustrate how clear and precise economic rights could be<sup>[40]</sup>. Case laws are being developed in some domestic jurisdiction like South Africa, India to demonstrate the coherence in the application of socio-economic rights to domestic jurisdictions.

8. The argument that economic and social rights are not capable of immediate implementation appears also be an over statement, because there are a lot of socio-economic rights that are capable of instant realization<sup>[41]</sup>. The committee on Economic, Social and Cultural Rights in their General Comment No. 3 dealing with nature of state parties obligation has argued that the right to fair and equal remuneration for equal work between men and women under article 7(a)(1), non-discrimination under article 3, right to form trade Union and trade union of one choice and right to trade union activities under article 8, right to protection and assistance of children and young persons from exploitation, and their right not to be employed in works harmful to their health and moral development under article 10(3), right to primary education, right of parents or guardian to choose schools for their children, right to establish and manage educational institutions under article 13(2)(a), (3) & (4) are all capable of immediate application by judicial and other organs in many national legal systems.
9. The argument of institutional incompetence or complexity of adjudication have been dismissed on the ground that, firstly, there are some aspects of socio-economic rights that cannot be said to present complex problems for the court e.g. arbitrary eviction; secondly judges are trained to be able to analyze and evaluate different types of legal cases involving extensive volumes of complex evidence, therefore, it will be unfair to accuse judges of incompetence in socio-economic rights<sup>[42]</sup>.

The foregoing demolishes the argument put forward for non-justiciability of socio-economic. It is argued that the non-justiciability argument based on the bifurcation of human rights into civil and political rights on the one hand and economic and social rights on the other appears to be not only political but artificial and unnecessary, more so when it has been declared that human rights are interdependent, indivisible and interrelated and that the realization of socio-economic rights will be necessary for the actualization of civil and political rights. I agree no less with Sandra Freedom when she stated as follows:

“With the recognition of the Unity of Civil rights with socio-economic rights comes the acknowledgement that all rights, regardless of their nature, can give rise to positive as well as negative obligations on the state. Even a quintessential civil right such as the right to a fair trial requires the state to

provide an adequate court system. It is, therefore, more helpful to focus on the nature of the obligations generated by different rights than on an attempt to categorize the rights themselves. As recent analysis has shown, both civil rights and socio-economic rights give rise to a cluster of obligations: the primary duty whereby the state should not interfere with individual activity; the secondary duty whereby the state should protect individuals against other individuals; and the tertiary duty to facilitate or provide for individual. Known as the duties to respect, protect and fulfill...<sup>[44]</sup>

#### 4. Under the 1999 Constitution of Nigeria

The Fundamental Objectives and Directive Principles of State Policy under the 1999 constitution is expressly declared to be non-justiciable, albeit not in the body of chapter II which provided for the Directive Principles of State Policy, but elsewhere in the constitution. Section 6 sub-section 6 paragraph C provides as follows:

“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.”

This section as recited above ordinarily provides a normative basis for the non-justiciability of Directive Principles under chapter II of the 1999 constitution. This is notwithstanding the provisions of section 13 which provides that, “it shall be the duty and responsibility of all organs of government, and of all authorities and persons exercising legislative, executive or judicial powers to confirm to, observe and apply the provisions of this chapter of this constitution.” As we have noted earlier, the Directive Principles of State Policy embodies Economic, Social and Cultural rights otherwise known as socio-economic/socio-cultural rights together with other principles and objectives which are not necessarily socio-economic rights.

The makers of the 1999 constitution in making the provisions of chapter II non-justiciable must have been influenced by the general reasons already advanced earlier in this article which reasons are hereby adopted, besides there are other internal and domestic reasons which influenced the adoption of non-justiciability concept of Directive Principles of State Policy in the 1979 constitution, before it now came to be retained by the 1999 constitution. The reason(s) remain valid now as they were in 1979. The reasons appear to have been summarized in the following statements:

“First, they take the position that wealth must be created before it can be distributed;

Secondly, “they contend that it would be dangerous from a political standpoint, to arouse expectations that cannot be fulfilled, thus leading to a revolution of rising frustrations”;

Thirdly, while maintaining the position that ‘socialist economies’ tend to be less efficient than free-enterprise economies, they assert that, it is difficult to pursue the two goals of rapid development and extreme forms of income equality at the same time;

Fourth, they believe that to make these provisions justiciable

would only lead to constant confrontation between the executive and/or the legislature on the one hand and the judiciary on the other;

Fifth, that the provisions by their nature relate to policy goals or directions rather than to the existence or extent of legal rights vested in any individual or group normally subject to the jurisdiction of the court, it is a field in which professional lawyers who preside over courts of law are not necessarily the most competent judges;

Sixthly, the provisions are new and no one can be too confident of the most appropriate method of ensuring their observance<sup>[45]</sup>.”

The adoption of the non-justiciability approach has been severely criticized by some writers. Adeoye himself described it as really disappointing” to regard the directive principles as mere ideal, an utopia, the arrival of which the citizens have to pray and hope for?<sup>[46]</sup> According to Duru, one factor that has undermined the usefulness of the chapter (i.e. chapter II) and prevented the people from reaping the fruits of good governance which the chapter is meant to guarantee is the retrogressive non-justiciability clause in section 6(6)(c) of the constitution...<sup>[47]</sup>

Okeke described the non-justiciability as a “draw-back to the appropriation of the dreams” set out in chapter II, by the citizens<sup>[48]</sup>. Dakas opined that the provisions of section 6(6)(c) makes a “caricature” of the obligations imposed by section 13 of the constitution for the organs of government to observe the provisions of chapter II<sup>[49]</sup>. Alemika herself declared that the non-justiciability of the Directive Principles of State Policy has serious socio-economic consequences which includes human insecurity, corruption deprivation, impunity and lack of accountability etc<sup>[50]</sup>.

Notwithstanding all these comments, the position of the law still remains that the Directive Principles of State Policy is not justiciable, in other words there are no personal rights created in favour of citizens which they can enforce against the state in a court of law. There is no access to legal adjudication by the individual or groups as the case may be.

The non-justiciability does not mean that the chapter is a mere utopia or ideal which the citizens will only hope and pray for its realization. The constitution places some duty on the state to observe those objectives and principles. As stated by S Ibe chapter II was devised to fulfill the promises made in the preamble to the constitution. “The preamble and chapter II reflect the high ideals of liberal democratic polity and thus serves as guidelines to action or major policy goals?<sup>[51]</sup> It represent the constitutional guarantee of socio-economic rights in Nigeria no matter the non-justiciability conundrum. No rational government is expected to ignore them.

#### 5 Judicial Attitude

The discussion on the attitude or response of the courts to the justiciability of the Directive Principles of State Policy will be subject to two premises or assumptions:

1. The constitution which is the grundnorm provides expressly that the provisions of chapter II are not justiciable,
2. The provisions are new and therefore the courts are still in the process of learning to appreciate the purport of its adoption into the constitution.

Therefore, the Nigerian courts can be excused on the level of their approach to the application of the justiciability of chapter II. Against the background of the above propositions, the attitude of the Nigerian judiciary in the justiciability of Directive Principles of State Policy have been that of unprecedented caution and subtle passivity<sup>[52]</sup>. The first case that has to do with the application or interpretation of chapter II under the 1979 constitution which of course is similar to chapter II of the 1999 constitution was the case of Arch Bishop Anthony Olunmi Okogie v. Attorney General of Lagos State<sup>[53]</sup>. The plaintiff challenged circular of the Lagos State Government which purported to abolish private schools in the state on the ground that they were implementing some provision of chapter II. Certain questions were referred to the court of Appeal for consideration which border on sections 16, the economic objectives, 18 the educational objectives, 36 which has do with right to freedom of expression. The court of Appeal in its judgment declared inter alia that although section 13 makes it a duty and responsibility of all organs of government including the judiciary to conform to and apply the provisions of chapter II, Section 6(6)(c) of the same constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with fundamental objectives and directive principles of state policy. The court maintained that it is clear that section 13 has not made chapter II justiciable.

Thus by this judgment it is a settled proposition that the courts have no jurisdiction to entertain matters relating to the provisions of chapter II of the constitution. This judgment also is in line with the reasoning of Eboborah when he stated thus “this position agrees with the contention by Ghai and Cottrell that part of the argument against justiciability of socio-economic rights in states where such rights are expressed as Directive Principles of State Policy is that these rights are non-justiciable because the constitution makers have, for other policy reasons, chosen to exclude courts from these areas by casting these rights as directive principles of state policy... rather than individual rights<sup>[54]</sup>.”

In the case Attorney General of Ondo State v. Attorney General of the Federation and 35 ors,<sup>[55]</sup> the Supreme Court upheld the powers of the National Assembly to Legislate on the provisions of Section 15(5) which has to do with directive principles relating to combating corruption.

Also in Attorney General of Lagos State v. Attorney General of the Federation & ors.,<sup>[56]</sup> the Supreme Court upheld the competence of the National Assembly to make laws relating to environmental matter in furtherance to section 20 of the 1999 constitution – which is a directive principle. Without prejudice to the attitude of the courts in the interpretation of the provisions of chapter II with respect to its non-justiciability, it is worthy of note that the provisions of section 6(6)(c) of the constitution is not total. Justice Niki Tobi had this to say in the case of Federal Republic of Nigeria v. Anache & ors. In Re Olafisoye<sup>[57]</sup>.

“The non-justiciability of section 6(6)(c) of the constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words except as otherwise provided by this constitution. This means that if

the constitution otherwise provided in another section, which makes a section or sections of chapter II justiciable it will be so interpreted by the courts.”

The court was therefore of the view that chapter II could be justiciable under certain circumstances namely:

1. Where the constitution makes another provision on any of the subjects in the chapter which, being outside the chapter is justiciable;
2. Where the National Assembly makes any legislation making any of the subjects of the chapter the subject of such an Act and thus justiciable, since the National Assembly cannot by any law oust the jurisdiction of the court.

The above is also in the light of item 60(a) of the Exclusive Legislative List which empowers the National Assembly to make laws for the establishment and regulation of authorities to promote and enforce the provisions of chapter II. Thus section 6(6)(c) is subject to the legislative powers of the National Assembly with respect to enforcing the provisions of chapter II of the constitution.

Again, chapter II could be justiciable if its breach also constitutes a breach of chapter IV i.e. the fundamental rights or any other provision of the constitution that is justiciable on its own, then the chapter becomes justiciable also by way of what is called indirect justiciability<sup>[58]</sup>.

Again chapter II could be indirectly justiciable by invoking the provisions of African Charter on Human and Peoples Rights, which has been domesticated making the said charter part and parcel of Nigerians domestic laws<sup>[59]</sup>. The charter guaranteed some socio-economic rights similar to the ones contained in chapter II of the 1999 constitution like equal pay for equal work, the right to health, right to education family rights, right to economic, social and cultural development right to satisfactory environment etc.<sup>[60]</sup> These rights are made justiciable before the African Commission on Human and Peoples Right. In Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights v. Nigeria<sup>[61]</sup> the African Commission on Human and Peoples Rights held Nigeria liable for the violation of the rights to freedom from discrimination, right to health, right to life, right to property, right to housing, right to food, right to people to freely dispose of their wealth and resources and the right to safe environment, provided under Articles, 16, 18, 4, 24 of the African charter on Human and peoples Right 1981. The charter did not differentiate between civil and political rights and economic, social and cultural rights, and by article 45 of the charter all the rights enumerated therein are justiciable. Nigeria having signed, ratified and domesticated the charter is under obligation to respect, promote, protect and fulfill these rights.

Also in Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President Federal Republic of Nigeria and Universal Basic Education Commission<sup>[62]</sup> the economic community of West African States Court of Justice held that the rights guaranteed by the African charter on Human and Peoples Rights are justiciable before the court, and further held that every Nigerian has a right to education which can be enforced before the court, as guaranteed by the African Charter on Human and Peoples Right.

The charter therefore could be used as another normative basis for justiciability of Directive Principles especially with respect to those economic, social and cultural rights that are replicated in both the constitution and the chapter, after all, the state parties are under obligation to respect, protect and fulfill all the rights in the charter whether they are civil, political, economic, social cultural or group rights. The obligation to respect, like that arising under the International Covenant on Economic, Social and Cultural rights, according to S. Ibe means that states must refrain from actions or conduct that contravene or are capable of impeding the enjoyment of economic, social and cultural rights<sup>[63]</sup>.

In *Oronto Douglas v. Shell Petroleum Development Company Ltd.*<sup>[64]</sup> the court of Appeal upheld the justiciability of an action brought pursuant to article 24 of the African charter on Human and Peoples Rights (Ratification and Enforcement) Act. From the foregoing, despite the justiciability confusion, chapter II is not a redundant chapter, it is the chapter that gives life and meaning to the fundamental rights and entire constitution. The chapter also is not entirely non-justiciable as we have noted. Thus in realizing the efficacy of chapter II, it will need a sincere and responsible executive and legislature, a pragmatic judiciary and a verile and active civil society and an enlightened citizenry. It is not within the scope of this paper to discuss extra judicial means of enforcing the directive principles, suffice to observe that justiciability is not an end in itself, it is a means to an end.

## 6. Conclusion

From a general point of view, in this paper we have looked at the legal adjudication of Directive Principles of state policy, in the constitution of Nigeria. In the course of that we have also considered the argument generally put forward for and against the judicial enforcement of socio-economic rights which is principally the embodiment of Directive Principles of State Policy. It can be observed that the Nigerian Judiciary is a little too cautious in the legal enforcement of Directive Principle, this no doubt could be likened to the relatively infant nature of constitutional democracy and the consequent adoption of directive principles in the constitution.

The Nigerian judiciary is enjoined to adopt some of the approaches taken by the judiciary in other jurisdictions like India in her creative effort towards enhancing the enforceability of Directive Principles, which approaches are well articulated by Muralidhar,<sup>[65]</sup> as follows:

1. The declaration of the indivisibility of the fundamental rights on the one hand and the Directive Principles of State Policy on the other;
2. The assertion of the doctrine of substantive due process as permeating the entire part III of the Indian constitution comprising the fundamental rights. Thus in order to pass judicial scrutiny an executive, quasi judicial or legislative action would have to satisfy the “just” “fair” and “reasonable” test;
3. The expansion of the scope and content of the fundamental right to life as encompassing the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms;
4. The innovation of Public Interest Litigation (PIL) as a

tool to achieve social objectives by enabling easy access to courts for those disadvantaged socially and economically: a conscious attempt made to relax the rules of standing and procedure and free litigants from the strangle hood of formal law and lawyering;

5. The expanded notion of the right to life enabled the court, in its public interest jurisdiction, to overcome objections on grounds of justiciability to its adjudicating the enforceability of economic, social and cultural rights.
6. Courts normally for warn on the consequences of disobedience to the order or non-implementation – so that the executive or the body will know in advance that the court will invoke its contempt power if there is disobedience;
7. Court normally explain the legal basis for its intervention. This is to ensure that they are still within the limits of justiciability;
8. Courts intervene when they observe that there is failure by those statutorily and constitutionally empowered to perform those functions or take care of these problems.

The Directive Principle of State Policy is like a beneficial or social welfare legislation, therefore, the Nigerian Courts must interpret it to achieve that benefit for which it is inserted in the constitution. The courts must adopt a very liberal construction and ensure that every doubt is resolved in favour of the citizens for whose benefits the chapter was introduced. The court therefore need to be liberal, innovative, dynamic and pragmatic in the interpretation of the provisions of chapter II.

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