



THE CONSTITUTIONAL FRAMEWORK FOR SOCIO-ECONOMIC RIGHTS / BENEFITS IN NIGERIA AND SOUTH AFRICA: A COMPARATIVE SURVEY *¹

Abstract

Social, economic, and cultural rights (Socio-economic rights) are those human rights relating to issues such as healthcare, education, housing, standard of living, food, water and sanitation, social security, the workplace, family life and participation in cultural life. Along with civil and political rights, they are part of the international body of human rights. The amount of money that is often reported to be missing or to have been embezzled in Nigeria is mindboggling whereas the masses are progressively/continually languishing in poverty, unemployment, and all manner of ill-conditions. Using comparative lens, the researcher conducted a survey on the constitutional framework for socio-economic rights / benefits in Nigeria and South Africa. It was found inter alia that comparatively speaking, the Constitution of South Africa provides a better conducive constitutional climate for the protection and enforcement of economic, social, and cultural (socio-economic) rights. It is recommended inter alia that Chapter II of the Constitution of Federal Republic of Nigeria 1999 be expressly made justiciable so that there will be legal cum constitutional checks on, and remedy against, ‘the wickedness of greedy politicians’ and ‘political godfathers’ who are only seeking and seizing political powers and opportunities in Nigeria to sit like “political octopus” on the seats of powers and/or to occupy the corridors of power whereby they continue to loot the commonwealth of Nigeria and subject the masses in Nigeria to poverty, unemployment, sicknesses, and all manners of inhumane conditions.

Keywords: Rights, Constitution, Framework, Socio-economic, Justiciable.

1. Introduction

Alongside with civil and political rights, socio-economic rights are part of the international body of human rights. The strongest form of constitutional recognition is to list socio-economic rights as judicially enforceable rights in a manner similar to that in which civil and political rights are usually enforced. Given the widespread commitment by countries to social and economic rights in international law, the inclusion of those (social and economic) rights in the constitutions is fast becoming the norm rather than the exception. In this research, a comparative survey is conducted on the constitutional framework for socio-economic rights / benefits in Nigeria and South Africa.

2. Conceptual Clarifications

2.1 Social, Economic, and Cultural Rights (Socio-Economic Rights)

Social, economic, and cultural rights (Socio-economic rights) are those human rights relating to issues such as healthcare, education, housing, standard of living, food, water and sanitation, social security, the workplace, family life and participation in cultural life. Along with civil and political rights, they are part of the international body of human rights.

2.2 Constitution and Constitutionalism

Understanding the concepts of constitution and constitutionalism are relevant and inevitable in this research since this paper is poised and set to comparatively enquire into the constitutional framework for socio-economic rights / benefits in Nigeria and South Africa.

The word, ‘constitution’ is a noun. The verb, ‘constitute’ means to assemble, put together, and bring into being. A Constitution therefore, is an assemblage of documents; documents put together or brought into being for the guidance of government and ordering of relations in a nation,

¹ ***Odinakachukwu E. Okeke**, LLB, BL, LLM, PhD, Lecturer, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria. Email: oe.okeke@unizik.edu.ng Telephone number: 234 8066740136.



society, state, community or organization. The documents that translate into a Constitution may be aspirations, values and general interests endorsed by the people, which may be in writing and in one single volume (written Constitution) or may be in writing but not in one single volume (unwritten Constitution).² A Constitution is the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.³

Today the idea of a constitution and constitutional government is widespread all over the world. The idea of modern Constitution began to emerge after the “Reformation in Europe”, particularly in the works of the English philosopher and scientist Thomas Hobbes (1588 – 1679), and the English philosopher John Locke (1632 – 1704), and the French philosopher and writer Jean-Jacques Rousseau (1712 – 1778), all of whom developed the theory that a Constitution is a social contract, whereby, people agree among themselves to give up a portion of the absolute freedom that characterized the pre-social “state of nature” in return for the security that a government can provide. It was John Locke’s work particularly, on the division of rights between the government and the individual, and on the doctrine of separation of powers among the three arms of government, that influenced the 18th Century authors of the American Declaration of Independence, the U.S. Constitutions, and the French Declaration of the Rights of Man and the Citizen.⁴ Examples of modern Constitutions of the United Kingdom, Canada, India, South Africa, and the Constitution of Federal Republic of Nigeria 1999 (as amended).

It has been submitted that ‘for there to be a viable legal system within a defined area, there must be in place, certain ultimate principles from which all others are derived but which themselves are self-existent.’⁵ The ultimate principle(s) constitutes the *fons et origo* (supreme law or grundnorm) of the legal system to which every other rule or principle or law must conform for validity. Any law, rule or principle that is inconsistent with the tone and tenor of the *fons et origo* (the ultimate law) should to the extent of that inconsistent be void. For example, the *fons et origo* in the Nigerian legal system can be ascribed to be the Constitution of the Federal Republic of Nigeria, 1999 (as amended) although the Constitution derives authority and legitimacy from the people of Nigeria. That is the supreme law in Nigerian and all other laws, principles or rules derive validity therefrom; in effect therefore, any law, rule or principle that is inconsistent with the Constitution shall to the extent of such inconsistency to be void.⁶ To buttress the supremacy of the extant Nigerian Constitution as the *fons et origo* of the Nigerian legal system, the researcher would at this juncture, allow a decision of the Supreme Court of Nigeria to talk, to wit:

It is by it (the Constitution) that the validity of any law, rule or enactment for the government of any part of the country will always be tested. It follows therefore, that all powers; be it the legislative, executive and judicial, must be traced or predicated on the Constitution for the determination of their validity. All these three powers that I have mentioned must and indeed, cannot be exercised inconsistently with any provisions of the Constitution. Where any of them is so exercised, it is invalid to the extent of such inconsistency. Furthermore, where the Constitution was enacted exhaustively on any situation, subject or conduct, anybody or authority that claims to legislate, in

²GN Okeke, *Introduction to Consular Immunities & Privileges, Jurisprudence and Constitutional Law* (Enugu: Noli Educational Publications, 2010) p. 176.

³ BA Garner(ed), *Black’s Law Dictionary* (8th edn, Minnesota: Thomson West Publishing Co., 2004) p. 330.

⁴ E Malemi, *The Nigerian Constitutional Law* (Ikeja: Princeton Publishing Company, 2012) pp. 12 – 13.

⁵ A Ojo, *Constitutional Law and Military Rule in Nigeria* (Ibadan: Evans, 1987) p.82.

⁶ *Ibid*, s. 1 (3).



addition to what the Constitution had enacted must demonstrate, in clear and unambiguous terms, that it has derived the legislative authority from the Constitution to so do. I go further to say that where the Constitution has set out certain conditionalities for doing a thing, no legislation of the National Assembly (in the absence of clear amendment of the particular provision of the Constitution so stipulating the afore-mentioned conditionalities) or of a State House of Assembly can alter those conditionalities in any way, directly or indirectly, unless the Constitution itself, as an attribute of its supremacy, so expressly authorized, such is the eminent position of the power and authority which the Constitution enjoys. The Constitution is very much supreme to all other laws of the land and its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria.⁷

In another decision of the Supreme Court, per Niki Tobi, JSC (as he then was) stated *inter alia* that:

The Constitution of a nation is the *Fons et Origo*, not only of the jurisprudence but also of the nation, it is the beginning and the end of the legal system. In Greek language, it is the alpha and omega. It is the barometer in which all statutes are measured. In line with this kingly position of the Constitution, all the three arms of Government are slaves of the Constitution.⁸

The summary of what appears from the foregoing is that ‘a constitution is incontestably a legal document and it is the *fons et origo* of all rights within the polity’⁹. However, it is instructive that we quickly note that a constitution is not a mere or common legal document. It is, essentially, a document relating to and regulating the affairs of a nation state and stating the functions and powers of the different apparatus of the government, as well as regulating the relationship between the citizens and the state. It makes provisions for the rights of the citizens within the compass of the state.¹⁰ A Constitution is, therefore, a body of fundamental principles according to which a state is organized.¹¹ Its provisions are supreme and have binding force on all authorities and persons throughout the state.¹² Any other law or any governmental policy that cannot find a foothold or place on the Constitution, nor adapt itself to the Constitution is unconstitutional, and null and void to the extent of its inconsistency with the Constitution.¹³

The term ‘constitutionalism’ is used to represent the extent of fidelity or adherence to the spirit and principles of the Constitution in a given political unit. The concept of constitutionalism entails the maintenance of the ideology of a constitution by all segments of government and the public.¹⁴ Constitutionalism is basically concerned with the implementation, observance and enforcement of constitutional limitations and values. It should be viewed as a method of limiting political abuse and ensuring that the powers of the State are constrained so that the State cannot act

⁷ Per Aderemi, JSC in *Tanko v The State* (2009) LPELR-SC.53/2008. Also reported in [2009] 4 NWLR (Pt. 1131) 430.

⁸ *Attorney General of Abia State v Attorney General of the Federation* (2002) 17 WRN 1.

⁹ GA Karibi-Whyte, “The Relevance of the Judiciary in the Polity in Historical Perspective” (Lagos: NIALS, 1987) p. 27. Cited in E Malemi, *op cit*, p. 34.

¹⁰ *Abaribe v The Speaker, Abia State House of Assembly* [2000] FWLR (Pt. 9) 1560.

¹¹ BO Nwabueze, *The Presidential Constitution of Nigeria* (London: Hurst & Co., 1982) p. 7.

¹² J Akande, *Introduction to the Nigerian Constitution* (London: Sweet & Maxwell, 1982) p. 1. See also *The Constitution of the Federal Republic of Nigeria, 1999 (As Amended)*, s. 1.

¹³ See for example the Supremacy in *The Constitution of Federal Republic of Nigeria, 1999 (As Amended)*, s. 1.

¹⁴ GN Okeke, *op cit*, p. 205.



capriciously.¹⁵ Ronsenfeld¹⁶ maintains that constitutionalism is a “three-faceted concept” as it requires imposing limits on governmental powers, adherence to the rule of law and protection of human rights. Constitutionalism is thus the antithesis of arbitrary rule. An important bulwark of constitutionalism is the existence of an efficient and effective mechanism controlling and compelling compliance with the letter and spirit of the Constitution.¹⁷

3. Socio-Economic Benefits in the Constitution of Nigeria

Chapter II of the extant Constitution of Nigeria¹⁸ contains the “Fundamental Objectives and Directive Principles of State Policy”, which, *prima facie*, are guidelines to the government of Nigeria to promote democracy, social justice and order. The said objectives appear to encompass social inclusiveness with a view at reducing socio-economic and political inequality in status and opportunities in Nigeria. In other words, economic, social, and cultural benefits/rights are found in Chapter II of the Constitution of the Federal Republic of Nigeria 1999.

Professor Ogugua V. C. Ikpeze,¹⁹ in one of her contributions on this subject submitted that the whole of Chapter II of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (made up of 12 sections spanning through sections 13 to 24) contain the economic, social, cultural and developmental rights of the citizens. She clearly observed, that the said Chapter II of the Constitution is non-justiciable by virtue of section 6 (6) (c) of the same Constitution; that examination of the implications of such non-justiciability show that citizens cannot obtain redress from the courts if denied their socio-economic, developmental and other rights provided for in this chapter of the constitution, thus constituting a formidable impediment to socio-economic development. Furthermore, the learned author opined that continuation of non-justiciability of Chapter II CFRN may result to lack of development and non-accountability by the Executive and Legislative arms of government, without any hope of a successful judicial challenge. It is further highlighted by the learned author that some other African countries and India now have provisions to allow Courts to adjudicate on socio- economic rights relying on the African Charter on Human and Peoples Rights, which should be applicable in Nigeria. The learned author recommended that Nigeria repositions to correct this aberration and allow for justiciability of Chapter II of the Constitution in order to facilitate socio-economic development. It is noted that the learned author in her work defined and or classified economic rights as:

rights provided for in chapter II of the CFRN 1999 in sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 under the Fundamental Objectives and Directive Principles of the State Policy of the economic, social and cultural rights otherwise referred to as Policy Directives Rights generally and mostly

¹⁵ LE Habasonda, ‘Presidentialism and Constitutionalism in Africa: Third Term Phenomenon/Extension of Tenure: the Zambian Experience’ <https://www.google.com/url?q=http://www.zesn.org.zw/wp-content/_protected/publications/publication_107.doc&sa=U&ved=2ahUKEwie_ckf6fTwAhVVgFwKHWYBDv00FjAAegQIAhAB&usg=AOvVaw07wpTKEk-S-0G5gMK4xFIz> accessed on 31 March 2023.

¹⁶ M Rosenfeld, ‘Modern Constitutionalism as Interplay between Identity and Diversity’ in M Rosenfeld (ed) *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham and London: Duke University Press, 1994) p.23

¹⁷ CM Fombad, ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2011) 59 *Buffalo Law Review*, 1012 – 1013 <http://www.buffalolawreview.org/past_issues/59_4/Fombad.pdf> on 31 March 2023; <www.saifac.org/docs/repapers/RPS%20NO%2018paf..> accessed on 31 March 2023.

¹⁸ The Constitution of the Federal Republic of Nigeria 1999 (as amended)

¹⁹ OVC Ikpeze, ‘Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development’ (2015) 5, 18 *IISTE*, 48.



non justiciable as government claim it is difficult to implement due to lack of funds.²⁰

Professor Godwin N. Okeke,²¹ in one of his academic inquiries touching on the justiciability of the provisions of Chapter II of the Constitution of Federal Republic of Nigeria, 1999 (as Amended), noted that the provisions of the Fundamental Objectives and Directive Principles of State policy in the Constitution of the Federal Republic of Nigeria of 1999 are a welcome development. The author and Professor of law submitted that these provisions include objectives on political, economic, social, educational, foreign policy, environmental, cultural, media, national ethics matters and duties of citizens. However, he observed that the drawback to the appropriation of these 'dreams' or objectives by citizens as of right is the provision in *section 6, sub-section (6), paragraph (c) of the 1999 Constitution* which makes the objectives non-justiciable.

Shehu,²² in his analysis of the legal framework in Nigeria for the recognition and judicial enforcement of socio-economic rights, submitted that there is no gainsaying that poverty and all forms of deprivations are prevalent in Nigeria, but little or no attention has been placed on the need for full constitutionalization and judicialization of socio-economic rights. He further submitted that all Nigeria has experienced for now is the inclusion of socio-economic rights in the fundamental objectives and directive principles of state policy, which are made non-justiciable unless and until the legislature enacts laws for the enforcement of any aspect of the fundamental objectives.

The non-justiciable status of chapter II of the Constitution and the effect thereof on the jurisdiction of courts appear to have received judicial certification in the case of *Archbishop Anthony Okogie v. AG Lagos State*,²³ whereby it was held *inter alia* that:

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

The amount of money that is often reported to be missing or to have been embezzled in Nigeria is mindboggling whereas the masses are progressively/continually languishing in poverty, unemployment, and all manner of ill-conditions. The researcher is worried that if those magnificent provisions of Chapter II of the Constitution are not expressly made judicially enforceable, then combating corruption in Nigeria will be a reverie – the politicians will continue to loot the wealth of this naturally endowed country and will keep misappropriating the resources which should have been channeled or committed toward progressive national developments and realization of socio-economic rights in Nigeria.

²⁰ *Ibid.*

²¹ GN Okeke, 'Fundamental Objectives and Directives Principles of State Policy: A Viable Anti-Corruption Tool in Nigeria' (2011) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2, 175-184. (<http://www.google.com.ng/url?q=http://www.ajol.info/index.php/naujilj/article/download/82400/72555&sa=U&ved=0ahUKewi_j9j-kLDPAhXDURoKHZRwCR8QFggNMAE&usg=AFQjCNFg_ocrxmofjfbF6ZnMPwtLSZOqtQ> accessed on 27 September 2022.

²² AT Shehu, 'Enforcement of Social and Economic Rights in Africa' (2013) 2:1 *Journal of Sustainable Development Law and Policy*, 101 – 120

²³ [1981] 2 NCLR 337 at 350.



4. Socio-Economic Benefits in the Constitution of South Africa

In South Africa, multi-party negotiations, which led to the post-apartheid constitutional regime, considered the inclusion of socio-economic rights in the Constitution. The result of this was the inclusion of these rights initially in the 1993 Interim Constitution and later in the 1996 Final Constitution. The inclusion of these rights in the Constitution was however contested. Some were of the view that socio-economic rights were inherently non-justiciable and not fit for judicial enforcement. The proponent of this view submitted that the protection of such rights should be a task for the legislature and the executive and that providing for them in the Constitution would mean transferring powers from these two branches to the judiciary, which does not have direct democratic legitimacy necessary to make decisions concerning allocation of social and economic resources.²⁴ Those who argue in support of the inclusion of socio-economic rights in the Constitution on the other hand contend that there is no principled objection to the inclusion of those rights in a justiciable bill of rights and that the vital question should be the extent and nature of the inclusion of these rights.

One hastens to point out that the inclusion of socio-economic rights in the South African Constitution needs to be seen in the context of unique history of the country. Her history was known characterized by denial of access to social goods and services to the majority of the people, lack or inadequate access to economic resources and means and gross violation of human rights. Also, one has to see it in the context of widespread of poverty level caused by historically unfair economic and political system- a system created by a society of gross inequality described long ago as a country of 'poverty amidst plenty.' It was therefore anticipated that where these rights were included in the constitution, it would play some roles in reducing the inequality and offsetting the imbalance in the socio-economic status in the country.

The Bill of Rights contained in the South African Constitution is not in particular order or sequence but provides for a number of socio-economic rights. These include rights dealing with labour relations, environmental rights, property rights, right of access to adequate housing; right of access to health care, sufficient food and water; the right to social security, basic and on-going education. It is also for this reason that sections 26 and 27 are seen as the most significant of all the socio-economic rights in the South African Bill of rights. This has to be seen in the context of the preamble to the Constitution which envisions the adoption of the constitution as the supreme law of the Republic in order to, inter alia, improve the quality of life of all citizens and to free the potentials of each person. It is therefore not amazing that almost all cases involving socio-economic rights that have come before the South African Courts, particularly the Constitutional Courts have been based on the rights under section 26 and 27.

In *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*,²⁵ was the first case concerning socio-economic rights to be taken to the Constitutional Court. The case involved an application for an order directing a state hospital to provide the appellant with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit. The Constitutional Court held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach section 27(1) right of everyone to have access to health care services, and the section 27(3) right to emergency medical treatment. This decision represents the low water-mark in relation to the application of socio-economic rights by the court in South Africa. The applicant in this case, Thiagraj Soobramoney, a 41-year-old and unemployed man, was suffering

²⁴ H Klug, *Constituting democracy: Law, globalism and South Africa's political Reconstruction* (Cambridge: Cambridge University Press, 2000) p. 9.

²⁵ (CCT32/97) [1997] ZACC 17; [1998] 1 SA 765 (CC); [1997] 12 BCLR 1696 (CC).
<<http://www.saflii.org/za/cases/ZACC/1997/17.pdf>> accessed on 27 March 2023; also available on
<<http://www.saflii.org/za/cases/ZACC/1997/17.html>> accessed on 27 March 2023.



from chronic renal failure resulting from diabetes. This condition was irreversible. His life could only be prolonged by an on-going dialysis treatment. He approached a state hospital for this treatment but the hospital refused him admission to its renal unit following a set policy. According to the policy, the primary requirement for this treatment was eligibility for a kidney transplant. The treatment could be administered until a donor was found and the transplant completed. Furthermore, to be eligible for a kidney transplant, a patient has to be free from other "significant" diseases. The Appellant failed to satisfy the requirements for a kidney transplant as he was suffering from other serious diseases such as heart disease. This refusal prompted the applicant to ask for a court order directing the hospital to provide him with on-going dialysis treatment, and restraining the provincial Minister of health from refusing him admission to the renal unit of the hospital. The High Court dismissed the application. Thereupon, he appealed to the Constitutional Court, arguing that patients who suffered from terminal illnesses and required treatment to prolong their lives were entitled to be provided with such treatment by the State pursuant to section 27(3), which guarantees the right to everyone not to be denied emergency treatment. Reliance was also placed on section 11, which guarantees the right to life. The Constitutional Court of South Africa held, among other things, as follows:²⁶

1. The right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees". This right is dealt with directly under section 27.
2. The right not to be refused emergency medical treatment under section 27(3) of the Constitution was interpreted to mean that the State is under an obligation not to deny a person remedial treatment that is necessary and available to forestall harm in the case of a sudden catastrophe or emergency. It did not extend to the provision of ongoing treatment of chronic illness for prolonging life. To hold otherwise, "it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to 'everyone' within its available resources".
3. The Court then considered the applicability of section 27(1)(a) read with (2) of the Constitution. This provision gives everyone the right of access to health care services, including reproduction health care. This obligation is qualified in that the State is required to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."
4. The Court found that all renal units were stretched in terms of resources. There were more people suffering from renal failure than there were dialysis machines to treat them. The Court indicated that "it would be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters". It took the view that the guidelines drawn up by the hospital authorities for determining patients who qualified for dialysis treatment were reasonable. It was not shown that these guidelines had been applied irrationally or unfairly in the present case.

Thus, the long and short of the decision of the Constitutional Court of South Africa in this case as we have seen is that the Court refused to order the provision of the treatment arguing that the guidelines had the advantage of allocating scarce resources rationally to ensure that a greater number of patients are cured than would be the case if the dialysis machines were used to keep alive persons

²⁶ <<http://www.ivr.uzh.ch/dam/jcr:00000000-3c97-4228-ffff-ffff31ead37/Soobramooney.pdf>> accessed on 27 March 2023



with chronic renal failure.²⁷ This case was the first case in South Africa in which the Constitutional Court had to decide on the constitutional right to health care for everybody in light of the problem of scarce resources for the funding of the health care system. The Court accepted that rationing of resources is integral to health service delivery in the public sector even though this might support ongoing inequities between the private and public sector. However, the Court implied that there might be grounds for the challenge of executive policies if such policies were unreasonable or if they were not applied fairly and reasonably.²⁸

In *The Government of the Republic of South Africa & Ors. v Irene Grootboom & Ors.*,²⁹ the applicants, including a number of children, had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living. They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed. They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The order was granted pursuant to section 28(1)(c) of the Constitution, which guarantees the right of children to, among other things, shelter. On appeal by all three spheres of government (national, provincial and local) to the Constitutional Court, the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) intervened as *amici curiae* in the case. Although the parties to the case focused their arguments on section 28(1)(c) (the right of every child to shelter), the *amici* broadened the issues to include a consideration of section 26 of the Constitution, which provides for the right of access to housing. They essentially argued that all members of the community, including adults without children, were entitled to shelter because of the minimum core obligation incurred by the State in terms of section 26. The Constitutional Court of South Africa held *inter alia* as follows:³⁰

1. According to the Constitutional Court, the question was not whether socio-economic rights were justiciable under the Constitution, "but how to enforce them in a given case." This could not be decided in abstract, but would have to be "carefully explored on a case-by-case basis."
2. The Court held that the state had an obligation to ensure, at the very least, that the eviction was executed humanely. The fact that the eviction was carried out a day earlier and that the possessions and building materials of the respondents were destroyed and burnt amounted to a breach of the negative obligation embodied in the right of access to adequate housing recognized under section 26(1) of the Constitution.
3. Housing "entails more than bricks and mortar". It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have "access to" adequate housing all of these conditions must be met: "there must be land, there must be services, there must be a dwelling."
4. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of housing, "but that other agents within our society, including

²⁷ <<http://www.ivr.uzh.ch/dam/jcr:00000000-3c97-4228-ffff-fffff31ead37/Soobramooney.pdf>> accessed on 27 March 2023.

²⁸Significance of the case <<https://www.escri-net.org/caselaw/2008/soobramoney-v-minister-health-kwazulu-natal>> accessed on 27 March 2023.

²⁹ [2001] 1 SA 46 (CC); also reported in [2000] 11 BCLR 1169 (CC) <https://www.escri-net.org/sites/default/files/Grootboom_Judgment_Full_Text_%28CC%29_0.pdf> accessed on 27 March 2023.

³⁰ <<http://www.ivr.uzh.ch/dam/jcr:00000000-3c97-4228-ffff-ffffb4fdb418/Grootboom.pdf>> accessed on 27 March 2023.



individuals themselves, must be enabled by legislative and other measures to provide housing." The state's duty is to "create the conditions for access to adequate housing for people at all economic levels of our society."

5. The Court rejected the contention that section 26(1) created a minimum core obligation to provide basic shelter enforceable immediately upon demand. It held that section 26(1) should be read together with subsection 2, which enjoins the state to realise this right progressively within available resources.
6. Thus, 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." The Court emphasised that it would not enquire into "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent". The housing programme must include measures that are reasonable both in their conception and in implementation.
7. A given measure will pass the reasonableness test if it is comprehensive and well-coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances.
8. The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by examining legal, administrative, operational and financial hurdles and, where possible, lowering this over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses."
9. The phrase "within available resources" was interpreted to mean that "both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources". According to the Court, section 26 "does not expect more than is achievable within (the state's) available resources".
10. In the present case, it was held that, although the programme satisfied all the other requirements of the reasonableness test, it was nevertheless unreasonable in that "no provision was made for relief to the categories of people in desperate need". The state was therefore found to be in violation of section 26(2) of the Constitution. Accordingly, a declaratory order was made requiring the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need.
11. The Court found no violation of the right of children to shelter in terms of s 28(1)(c), contrary to the High Court's decision, holding that that the State incurs an immediate obligation to provide shelter only in respect of those children who are removed from their families. The primary duty to fulfil the children's socio-economic rights in section 28(1)(c) rests on the parents or family and only, failing such care, on the State. As children in this case were under the care of their parents or families, the Court did not grant any relief based on section 28(1)(c).

However, the court emphasised that this did not mean that the state incurred no obligation to children who were being cared for by their families. The state must provide the legal and administrative



infrastructure necessary to ensure that children are accorded the protection contemplated by section 28.³¹

In *Lindiwe Mazibuko & Ors. v City of Johannesburg & Ors.*,³² five residents of *Phiri* in Soweto brought a case against the City of Johannesburg, Johannesburg Water (a company wholly owned by the city) and the national Minister for Water Affairs and Forestry. There were two key questions at issue. The first was whether the City's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water policy), was in conflict with the Water Services Act and the right to have access to sufficient water set out in section 27 of the Constitution. The second was whether installation of pre-paid water meters in *Phiri* which charged consumers for use of water in excess of the free basic water allowance was lawful. The South Gauteng High Court found that the installation of pre-paid water meters in *Phiri* was unlawful and unfair. It also held that the City's Free Basic Water policy was unreasonable in terms of Section 27(2) of the constitution and therefore unlawful. It ruled that the City should provide 50 litres of free basic water daily to the applicants and 'similarly placed' residents of *Phiri*. On appeal, the Supreme Court of Appeal varied this order, holding that 42 liters of water per day would be 'sufficient water' within the meaning of the Constitution, and directing the City to reformulate its policy in light of this conclusion. The Supreme Court of Appeal also held that installation of the pre-paid water meters was unlawful on the ground that the City's by-laws did not make provision for them and that the cut-off in water supply that occurs when the free basic water limit has been exhausted constituted an unlawful discontinuation of the water supply. The Court suspended its order for two years but held that, pending the reformulation of the water policy, any accountholder in *Phiri* who is registered as an 'indigent' must be supplied with 42 liters of free water per day per member of his or her household. Having referred to its previous jurisprudence, the Constitutional Court overturned the Appeals Court decision and held that the right of access to sufficient water does not require the state to provide upon demand every person with sufficient water. Rather it requires the state to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient water, within available resources. The Court rejected the applicants' argument that the Court should adopt a quantified standard determining the 'content' of the right not merely its minimum content. According to the Court, that argument must fail for the same reasons that the minimum core argument failed in its earlier decisions in *Grootboom*'s case. In doing so, the Constitutional Court stated that 'ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realization of the right.' The Court stated that, the positive obligations imposed upon government by the constitutional social and economic rights will be enforced by courts in at least the following ways:

- a) where government takes no steps to realize the rights;
- b) where the government's adopted measures are unreasonable; and
- c) where the government fails to give effect to its duty under the obligation of progressive realization to continually review its policies to ensure that the achievement of the right is progressively realized.

³¹ <<http://www.ivr.uzh.ch/dam/jcr:00000000-3c97-4228-ffff-ffffb4fdb418/Grootboom.pdf>> accessed on 27 March 2023.

³² Case CCT 39/09, [2009] ZACC 28.



The Constitutional Court therefore found that the City's Free Basic Water policy fell within the bounds of reasonableness and therefore did not contravene either section 27 of the Constitution or the national legislation regulating water services.³³

Relatively, the case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,³⁴ concerned the disconnection of water supply based on arrears in payment. The applicant brought an action for an urgent interdict as a member and in the interest on Bon Vista residents, alleging that the disconnection of residents' water was an infringement of section 27(1)(a) of the Constitution. In coming to the conclusion that the interdict should be granted, the court noted that as the disconnection deprived the applicant of an existing right, the action was *prima facie* in breach of constitutional duty to respect the and the onus accordingly fell right to access to water on the respondents to justify such breach. As the respondent had failed to discharge this onus, the court held that the applicant's right of access to water had been infringed and the respondent were ordered to restore the water supplied.

In *Manquele v Durban transitional Metropolitan Council*,³⁵ the applicant water supply had been disconnected by the respondents on the basis of non payment. The applicant sought a declaratory order that the disconnection was unlawful and invalid on the ground that the bye-law in terms of which the disconnection took place was ultra vires the water service Act, and that the disconnection resulted into the denial of access to water for the reason of non-payment due to being unable to pay contrary to section 4 (3) (c) of the Act. Although the applicant did not rely directly on the constitutional guarantee to access to sufficient water but rather on the rights protected in section 3 of the Water Services Act, the Court nevertheless confirmed that this right was in turn rooted in section 27 of the Constitution, however, the applicant was unsuccessful in her case as the Court found that she had exceeded the 6 kiloliters of Water per month provided free of charge as a basic service by the respondent.

In *Van Biljon v Minister of Correctional Services*,³⁶ the appellants were HIV infected prisoners who sought, inter alia, that their right to adequate medical treatment entitled them to the provision of expensive anti- retroviral medication. The applicant contended that because the right to adequate medical treatment was guaranteed in the Bill of rights, the prison authorities could not on the basis of lack of funds, refuse to provide treatment which was medically indicated. This court was of the view that lack of funds could not be an answer to a prisoner's constitutional claim to adequate treatment. He had a constitutional right to adequate medical treatment. The applicant order was granted and the respondents were ordered to supply them with the combination of anti retro viral medication which had been prescribed for them for as long as such medication continued to be prescribed.

Lastly in *Khosa v Minister of Social Development*,³⁷ legislation that excluded permanent residents and their children from access to social assistance was successfully challenged and found

³³ *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28 <<https://www.escribnet.org/caselaw/2009/lindiwe-mazibuko-others-v-city-johannesburg-others-case-cct-3909-2009-zacc-28>> accessed on 27 March 2023.

³⁴ 2002 (6) BCLR 625 (W) <<http://dullahomarinate.org.za/socio-economic-rights/Cases/South%20African%20Cases/high-court-cases/residents-of-bon-vista-mansions-v-southern-metropolitan-local-council-2002-6-bclr-625-w>> accessed on 27 February 2023.

³⁵ 2002 (6) SA 423 (D) cited in Challenges in Claiming the Right to Water: South Africa <<http://www.righttowater.info/rights-in-practice/legal-approach-case-studies/challenges-in-claiming-the-right-to-water-south-africa/>> accessed on 27 February 2023.

³⁶ [1997] 4 SA 441 (CC) (SAHC 1997 C) <http://www.chr.up.ac.za/undp/domestic/docs/caselaw_27.pdf> accessed on 27 February 2023.

³⁷ <<http://www.saflii.org/za/cases/ZACC/2004/11media.pdf>> accessed on 27 March 2023.



to be inconsistent with section 27(1) which provides for the right of everyone to have access to social security and assistance and also section 9(3) which prohibits unfair discrimination.

It is therefore crystal clear from the fore-going decisions of courts that while the courts in Nigeria are yet reluctant to uphold the justiciability of these socio-economic rights, it is being upheld in South Africa. The reason appears to be that the Nigerian courts' powers have been limited by section 6(6)(c) of the Constitution which precludes the courts from deciding matters contained under chapter II of the Constitution. In South Africa however, the Constitution as earlier stated allows it justiciability and the courts have done a lot to uphold it justiciability.

5. Conclusion and Recommendations

From the comparative survey on the extant constitutional framework for the protection of socio-economic rights in Nigeria and South Africa, it could be gleaned that the constitutional framework in South Africa stands out. This is because the socio-economic provisions are made justiciable in South Africa unlike Nigeria, which has merely provided most of socio-economic rights / benefits in her Constitution as fundamental objectives and directive principles of state policy and declared them non-justiciable by virtue of an ouster clause in her Constitution.

Comparatively speaking, South Africa provides a better conducive constitutional climate for the constitutional protection and enforcement of economic, social, and cultural rights. The future is seen to be bright for Nigeria as democracy, which breeds constitutionalism, rule of law, political pluralism, religious tolerance, interest in/independence of the judiciary and judicial process is now in place in Nigeria. However, the challenges for realizing adequate protection of these rights are enormous. They include, as revealed in this work, illiteracy, poverty, unemployment, lack of political will, pure implementation of economic policies, internal conflicts and political strife, corruption in public office, non-justiciability of these provisions in view of the ouster clause in the Constitution of Nigeria, poor judicial attitude.

It is recommended that Chapter II of the Constitution of Federal Republic of Nigeria, 1999 be expressly made justiciable so that there will be a check on, and remedy for, 'the wickedness of greedy politicians' and 'political godfathers' who are only seeking and seizing political powers and opportunities to sit like "political octopus" on the seats of powers and/or occupy the corridors of power thereby continually looting the commonwealth of Nigeria and subjecting the masses in Nigeria to poverty, unemployment, sicknesses, and all manners of inhumane conditions.

It is further recommended that Nigeria should borrow a constitutional leaf from the South African Constitutional disposition, and accordingly amend her Constitution to duly provide for all the human rights, which include [at least some] socio-economic rights as well as civil and political rights, in a single bill of rights, making all of them equally justiciable, without segregating between the so-called justiciable civil and political rights and the non-justiciable socio-economic rights, otherwise called fundamental objectives and directive principles of state policy.