COMPARATIVE STUDY OF THE ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN NIGERIA, GHANA AND SOUTH AFRICA.

BY

IDRIS, ABDULLATEEF MUHAMMAD
NSU/LLM/LAW/0085/17/18

MASTERS OF LAW (LL.M)
CONSTITUTIONAL AND HUMAN RIGHTS LAW

DEPARTMENT OF LAW
FACULTY OF LAW
NASARAWA STATE UNIVERSITY, KEFFI
NIGERIA.

SUPERVISOR: DR. HUSSEIN SHAT SALEH

JUNE, 2019

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A THESIS SUBMITTED TO THE SCHOOL OF POST GRADUATE STUDIES, NASARAWA STATE UNIVERSITY, KEFFI IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF LAW (LLM) IN CONSTITUTIONAL AND HUMAN RIGHTS LAW.

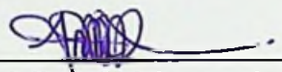
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FACULTY OF LAW
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SUPERVISOR: DR. HUSSEIN SHAT SALEH

JUNE, 2019

DECLARATION

I hereby declare that this thesis titled "*Comparative Study of the enforcement of Social and Economic Rights in Nigeria, Ghana and South Africa*" has been written by me and it is a report of my research work. It has not been presented for another post graduate degree at this or any other University. All quotations are indicated and sources of information specifically acknowledged by means of references.



Idris Abdullateef Muhammad
NSU/LLM/LAW/0085/17/18

21/02/2020
Date

CERTIFICATION

This thesis titled "*Comparative Study of the Enforcement of Social and Economic Rights in Nigeria, Ghana and South Africa*" by Idris Abdullateef Muhammad meets the regulations governing the award of Masters of Law (LL.M), of the School of Postgraduate Studies, Nasarawa State University, Keffi, and is approved for its contribution to knowledge.

Dr. Hussein Shat Saleh (Supervisor)	21/2/2020 Date
Dr. Halima Doma (Head of Department)	21/02/2020 Date
Prof. Jamiu Adedoyin-Raji (Dean of Faculty)	21/02/2020 Date
Prof. Jonathan Ayuba (Dean, School of Postgraduate Studies)	Date
Dr. S. Nchi (Internal Examiner)	21/2/20 Date
(External Examiner)	Date

2nd Supervisor
Barr. S.C.C. Okoronkwo

DEDICATION

I dedicate this thesis to my Mum and Dad, Mal. Idris Muhammad and Fatima Muhammad for giving me the necessary educational training to be what I am today.

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TABLE OF CONTENTS

COVER PAGE i

TITLE PAGE ii

DECLARATION iii

CERTIFICATION iv

DEDICATION v

ACKNOWLEDGEMENTS vi

TABLE OF CONTENTS vii

TABLE OF STATUTES AND TREATIES xi

TABLE OF CASES xv

TABLE OF ABBREVIATIONS xvi

ABSTRACT xvii

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study 1

1.2 Statement of the Research Problem 3

1.3 Research Questions 4

1.4 Aim and Objectives of the Study 4

1.5 Scope of the Study 5

1.6 Significance of the study 6

1.7 Research Methodology.....6

1.8 Synopsis of the Chapters.....7

CHAPTER TWO

LITERATURE REVIEW

2.1 Theoretical Framework on Human Rights.....9

2.1.1 Natural Theory of Human Rights 9

2.1.2 Legal Theory of Human Rights 11

2.1.3 Religious Theory of Human Rights 13

2.2 Afro-cultural notions..... 15

2.3 Conceptual Framework.....16

2.4 The concept of Human Rights.....16

2.4.1 Social and Economic Rights.....18

2.5 Origin of Social and Economic Rights 20

2.6 Clarifying core concepts in socio-economic rights practice 24

2.6.1 Obligation to respect, protect and fulfill 24

2.6.2 Minimum core obligation 25

2.6.3 Progressive realization 26

2.7 Normative Framework of Social and Economic Rights.....27

2.8 Literature review 28

2.9 Conclusion.....34

CHAPTER THREE
INTERNATIONAL AND REGIONAL NORMATIVE FRAMEWORK ON SOCIO-ECONOMIC RIGHTS

3.1 Introduction 36

3.2 Socio and Economic Rights under the Universal Declaration of Human Rights.....36

3.2.1 Bifurcation of UDHR into two separate legal instruments.....38

3.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR) 39

3.3.1 Annotation of substantive Rights contained in the Covenant.....40

3.3.2 Mechanisms for implementation and enforcement.....45

3.4 The African Charter on Human and Peoples Right (ACHPR).....50
3.5 Implementation mechanisms of the Rights under the ACHPR.....53
3.5.1 State Party Report.....53
3.5.2 Fact-findings/Locus inquo or On-site visits.....55
3.5.3 Treaty body's rapporteur.....57
3.6 Conclusion.....58

CHAPTER FOUR
ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN NIGERIA, GHANA AND SOUTH AFRICA

4.1 Introduction.....59
4.2 Brief Annotation of SERs provisions under Chapter Two of the 1999 Nigerian Constitution.....59
4.2.1 The status of SERs under the 1999 Nigerian Constitution.....60
4.2.2 Judicial attitude to the enforcement of SERs in Nigeria.....64
4.3 Evaluation of the Nigerian Experience.....69
4.4 SERs under the 1992 Constitution of Ghana.....71
4.4.1 The status of SER under the 1992 Constitution of Ghana.....73
4.4.2 The courts of Ghana SERs.....74
4.4.3 Evaluation of the Ghanaian Experience.....81
4.5 SERs under the 1996 South African Constitution.....83
4.6 Enforcement of SERs in South African Courts.....84
4.6.1 Right of Access to Adequate Healthcare and Emergency Medical Treatment.....85
4.6.2 Right of Access to Adequate Housing.....87
4.6.3 Right of Access to Social Security and Assistance.....89
4.7 Evaluation of the South African Experience.....90
4.8 Challenges of the enforcement of SERs in Africa.....92
4.8.1 Content and Scope of African Charter Provisions on SERs.....93
4.8.2 Corruption and Inept Leadership.....94
4.8.3 Debt and Structural Adjustment.....95
4.9 Conclusion.....98

CHAPTER FIVE
CONCLUSION

5.1 Summary of Findings.....99

5.2 Observations.....101

5.3 Recommendations.....103

5.4 Contribution to Knowledge.....106

5.5 Suggested Areas for Further Studies.....106

5.6 Conclusion.....107

BIBLIOGRAPHY.....109

TABLE OF STATUTES AND TREATIES

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A9 Laws of the Federation of Nigeria, 2004.....68

Constitution of the Federal Republic of Nigeria, 1999

Chapter Two.....31, 59, 60, 61, 62, 63, 66, 67, 69, 99

Chapter Four.....69, 71, 99, 100, 101

Sections 13.....60, 65

Sections 16.....60, 64

Sections 17.....60

Section 6(6)(c).....61,62,67,69

Item 60(a) of the Exclusive Legislative List Second Schedule 67

The 1979 Nigerian Constitution

Chapter Two.....64, 66

Section 13.....65

Section 16(1) (c).....65

Section 18(1).....64

Section 6(6) (c).....65

Section 4(2).....65

Item 59(a) of the Exclusive Legislative List.....65

Constitution of Ghana, 2002

Chapter Five.....71,72, 76, 79, 82, 98

Chapter Six.....71,73, 74, 75, 77, 78, 79, 80, 81,99

Article 2(1).....74, 75

Article 12(1).....76, 77

Article 21.....70,78

Article 34.....78, 81

Article 35.....72, 73, 76,77,78,81

Article 36(2).....72, 80

Article 37.....72

Article 37(1).....72

Article 37(2).....72, 78

Article 37(6).....73

Constitution of South Africa, 1996

Chapter 2.....84, 99

Section 7(2) 90, 102

Section 26.....88

Section 27(1).....86, 87

Section 27(2).....86

Section 39(1) (b).....90

Additional Protocol in the Area of Economic, Social and Cultural Rights to the American Convention on Human Rights (Protocol of San Salvador) (1988).....27

African Charter on Human and Peoples Rights (ACHPR) (1981)...3, 27, 28, 50, 53, 55, 56, 57, 102, 106, 119

Article 13.....43, 44

Article 14.....44, 50

Article 17.....37, 51

Article 18.....47, 51

Article 30.....51, 55

Convention on the Elimination of All forms of Discrimination Against Women

(CEDAW) (1979).....27

Convention on the Rights of the Child (1989).....27

Declaration on Social Progress and Development (1969).....27

European Social Charter (revised 1996).....27

International Covenant on Civil and Political Rights (ICCPR).....2, 39

International Covenant on Economic, Social and Cultural Rights,

(1966).....2, 24, 27, 28, 36, 39, 47, 93, 102

Article 6.....40

Article 7.....40

Article 2(1).....41

Article 9.....41

Article 10.....41

Article 11.....42

Article 12.....37, 43

Article 12(2).....43

Article 13.....43, 44

Article 13(3).....44

Article 13(4).....44

Article 14.....44, 50

Article 16(1) 45

Article 18.....47, 51

International Covenant on the Elimination of All Forms of Racial Discrimination

(ICEAFRD) 1965.....27

International Convention on the Protection of the Rights of Migrant Workers

and Members of their family.....27

National Lotto Act, 2006(Act 722).....79, 80

Section 4.....79

Optional Protocol to the International Covenant on Economic, Social

and Cultural Rights (OP-ICESCR) (2009).....24,46, 47

Social Assistance Act 59 of 1992.....89

Universal Declaration of Human Rights.....1, 2, 3, 18, 17, 27, 28, 38, 39

Article 17.....37

Article 22.....37

Article 23.....37

Article 24.....37

Article 25.....37

Article 25(1).....38

Vienna Declaration and Programme of Action, 1993.....2, 29

Article 14.....44, 50

Article 16(1) 45

Article 18.....47, 51

International Covenant on the Elimination of All Forms of Racial Discrimination

(ICEAFRD) 1965.....27

International Convention on the Protection of the Rights of Migrant Workers

and Members of their family.....27

National Lotto Act, 2006(Act 722).....79, 80

Section 4.....79

Optional Protocol to the International Covenant on Economic, Social

and Cultural Rights (OP-ICESCR) (2009).....24,46, 47

Social Assistance Act 59 of 1992.....89

Universal Declaration of Human Rights.....1, 2, 3, 18, 17, 27, 28, 38, 39

Article 17.....37

Article 22.....37

Article 23.....37

Article 24.....37

Article 25.....37

Article 25(1).....38

Vienna Declaration and Programme of Action, 1993.....2, 29

TABLE OF CASES

Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State [1981] 2 NCLR 350.....64

Attorney General of Ondo State v. Attorney General of the Federation & Ors [2002] 6 SC (PT. 11) 179.....66

Badejo v. Federal Minister of Education [1990] LRC (Const) 735 66

Fawehinmi v. Abacha [1996] 9 NWLR (Pt. 375) 710 68

Minerva Mills Ltd v Union of India [1980] SC.....19

Ghana Lotto Operators Association & Ors v National Lottery Authority [2007-2008] SCGLR 1088 79

Government of the Republic of South Africa v. Grootboom [2001] (1) SA 46 (CC); [2000] (11) BCLR 1169 (CC) 87

Minister of Health v. Treatment Action Campaign. [2002] (10) BCLR 1033 (CC).....85

New Patriotic Party (NPP) v. *Attorney-General* [1993-94] 2 GLR 35.....74

NPP v Attorney General (CIBA case) [1996-97] SCGLR 729. 77

Ogugu v. The State [1994] 9 NWLR (Pt. 366).....69

Olga Tellis and Ors. v Bombay Municipal Corporation and Ors Manu/SC/0039/1985.....83

Opayemi Bamidele & Ors v. Professor Grace Alele Williams and the University of *Benin*, (Unreported Suit) No. 13/6m/89 (Benin) 68

Oshevire v. British Caledonian Airways Ltd. [1990] 7 NWLR (Pt 163) 489.....68

Soobramoney v. Minister of Health [1997] (12) BCLR 1696 (CC); 1997 SACLR LEXIS 41.....85

Unni krishnan v State of Andhra Pradesh & Ors. [1993] 4 LRC 234.....83

TABLE OF ABBREVIATIONS

ACHPR	Africa Charter on Human and Peoples' Right
Afr. J. Legal Stud.	Africa Journal of Legal Studies
AHRLJ	Africa Human Rights Law Journal
CEDAW	Convention on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights of the United Nations
CESR	Centre for Economic and Social Rights
Harv. Hum. Rts. J	Harvard Human Rights Quarterly
Hum. Rts. Q.	Human Rights Quarterly
ICCPR	International Covenant on the Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SERs	Socio-economic rights

ABSTRACT

Before the Second World War, there was hardly any support for the protection of universal human rights. However, the idea of fundamental rights and freedom received international attention in the aftermath of the violations of human rights during the Second World War, which led to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The Declaration provides for, and accords equal recognition to two sets of human rights: the civil and political rights as well as the economic, social and cultural rights. The Declaration was later transformed into legally binding obligations in two separate covenants to wit, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). These covenants, together with the UDHR, constitute the International Bill of Rights. It is noteworthy that the United Nations (UN) and the individual member states take the official position that these two sets of rights are complementary, universal, indivisible, inter-dependent and inter-related. However, it has been observed that, in practice, civil and political rights have for years received, both at the international and national levels, much more prominence than socio-economic rights. This attitude invariably affects the degree of seriousness given to the enforcement of socio-economic rights in various jurisdictions of the world. Using the doctrinal approach where both primary and secondary sources are examined which include statutes, case-laws and other legal sources, this dissertation sets out to carry a comparative study of the enforcement of SERs in three selected jurisdictions, i.e Nigeria, Ghana and South Africa. The dissertation aims to identify among others, the nature of economic and social rights in each of these jurisdictions and the extent to which they are protected and enforced. Constitutional protection and judicial attitude are the common indices used in comparatively assessing the jurisdictions chosen for this research. The dissertation also traces the origins and historical evolution of human rights, in general, and socio-economic rights in particular and also examined the legal and institutional framework of socio-economic rights under international and regional instruments. The findings of this dissertation among others, is that while South Africa provides the most constitutionally conducive environment for the enforcement of SERs, Ghana comes as second by virtue of the hybrid constitutional framework and the positive attitude of Ghanaian courts towards the enforcement of socio-economic rights while Nigeria is found to be lagging behind as a result of the non-justiciable character of SERs in Nigeria's Constitution as well as the weak judicial attitude towards their enforcement. The dissertation also identifies some challenges to the enforcement of SERs in Africa which include corruption and inept leadership which has taken the center stage in depriving its citizens from the enjoyment of SERs. The dissertation advocates the recognition of SERs as enforceable rights in Nigeria and Ghana which recommendation is in consonance with their obligations as signatories to the ACHPR and ICESCR. The study also recommends the enactment of strict sanctions which will serve as deterrent to public officials in order to curb the menace of corruption and ensure that the resources of the state are harnessed for the benefit of citizens. The dissertation concludes that a combination of constitutional strategies, political will and virile civil society will go a long way in turning things around as far as SERs is concerned in the three selected jurisdictions.

CHAPTER ONE
GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

We are in an era of rights. Before the Second World War, there was hardly any support for the protection of universal human rights. However, due to the gravity of the atrocities committed during the Second World War, the situation changed and there was an interest in the idea of fundamental rights and freedoms.[1] This led to the establishment of the United Nations in 1945.[2] Though the concept of human rights predates the United Nations (UN), but in the formal sense, it was the UN that introduced human rights in its present form to regulate the relation between individuals and the government of their state.[3] The United Nations, through its Economic and Social Council, established the UN Commission on Human Rights[4], charged with submitting reports and proposal on an international bill of rights.

Soon after the adoption of the Universal Declaration of Human Rights (UDHR) in 1948[5] which made provisions for civil and political rights as well as economic, social and cultural (ESC) rights, the ideological divide between the West and the East found its way into negotiations for the development of the framework for the recognition and protection of human rights.[6] This divide resulted in the creation of a dichotomy of human rights along the existing Cold War groupings with the West placing emphasis on civil and political rights and the East showing a preference

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[1] K. Mclean, 'Constitutional Deference, Courts and SERs in South Africa' [2010] (25) *SAPL*; 445

[2] The preamble to, as well as Article 1 of the United Nations Charter reveals the organization's commitment to the promotion of respect for human rights and fundamental freedoms and the dignity and worth of the human person.

[3] A brief history of Human Rights, available at >https://www.humanrights.com/what-are-human-rights/brief-history/the-united-nations.html< accessed 29th January, 2019.

[4] Made up of 18 representatives of different countries. This Commission has been dissolved and the Human Rights Council was established by General Assembly resolution 60/251 of 15 March, 2006, is now charged with addressing human rights violations.

[5] On 10th Dec.,1948.

[6] Wahab O. Egbowole and Taofeeq N. Alatise, 'Realizing SERs in Nigeria and the justiciability question: Lessons from South Africa and India' [2017] (8) *International Journal of Politics and Good Governance*;1

for socio-economic rights.[7] The Western States typically favoured two separate documents, fearing that putting economic and social rights on the same level as civil and political rights would undermine individual rights.[8] They also embraced the view that economic and social rights were non-enforceable and therefore so different from civil and political rights that they must be separated. The delegations from countries that constituted the Eastern Bloc, on the other hand, argued for the preservation of the balanced conception of human rights as stated in the UDHR, arguing that the indivisibility of economic and social rights and civil and political rights, as provided in the UDHR, must be maintained. They further opined that civil and political rights were purely theoretical in character without economic and social rights.[9] They emphasized that all rights must be equal because all rights derived from being citizens of the state.

The inability of the Western and Eastern blocs to be unanimous led to the drafting and adoption of two set of rights documents[10] by the General Assembly in 1966, which, in combination with the Universal Declaration of Human Rights (UDHR) constitute the International Bill of Rights. The position of the United Nation with respect to the rights documents is that they are 'universal, indivisible, interdependent and inter related'.[11] The dichotomy of rights at the international level have polarised the human rights world. Most countries of the world see economic and social rights as mere privileges which can only be granted to the citizens at the will and convenience of the state while others canvass the opinion that these rights are, in fact, superior to civil and political rights.[12] It has also been posited that Africa is home to the world's poor and should be seen paying adequate

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[7] ibid

[8] Linda M. Keller, 'The Indivisibility of Economic and Political Rights' [2001] (1-3) *Human Rights and Human Welfare*; 9

[9] ibid

[10] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[11] See para. 5 of the 12th July Vienna Declaration and Programme of Action, 1993.

[12] H. J. Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford Clarendon Press, 1996).

attention to SERs.[13] It is against this backdrop that this research is conceived, to carry out a comparative analysis of the enforcement of SERs in three selected jurisdictions to wit, Nigeria, Ghana and South Africa who rank among the richest countries in Africa. The choice of the research population, i.e Nigeria, Ghana and South Africa is for very well-considered histo-legal, geographical, and socio-economic reasons.

1.2 STATEMENT OF THE RESEARCH PROBLEM

The UDHR made provisions for civil and political rights as well as economic, social and cultural rights. These rights are accorded equal status by the Declaration as they are regarded as being universal, indivisible, interdependent and interrelated. Furthermore, the ACHPR to which Nigeria, Ghana and South Africa are signatories[14] recognize economic and social rights.[15] However, even though the apparent claim is that these two groups of rights are equal, many governments in Africa today still see economic and social rights to be less important than civil and political rights even as such states are characterized by malnutrition, impoverishment, environmental degradation, illiteracy, homelessness and generally pitiable socio-economic conditions. Many of the African countries who take queue from the western world who conceive economic and social rights as political goals and social policies fail to appreciate that African countries are indigent and cannot compare with the western world's development and implementation of social rights through other means.

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[13] S. Ibe, "Beyond Justiciability: the promise of socio-economic rights in Nigeria" [2010] (1) *AHLI*; 197

[14] Nigeria ratified the Charter on 22/6/1983 while Ghana and South Africa ratified the Charter on 24/01/1989 and 09/07/1996 respectively.

[15] Ajepe Taiwo Shehu, 'The Enforcement of Social And Economic Rights in Africa: The Nigerian Experience' [2013] (2) (1) *Afe Babalola University Journal of Sustainable Development Law and Policy;* 101

In view of the foregoing paradoxical contradictions and considering the overriding importance of economic and social rights as the cornerstone for the overall development of society, there arise the need to inquire into the performance of states in protecting and enforcing these rights. It also becomes necessary to compare the performances of some states with others with a view to identifying their respective strengths and weaknesses and suggesting ways of improving the situation.

1.3 RESEARCH QUESTIONS

The research shall attempt to answer the following questions:

1. What is the nature of economic and social rights in each of the jurisdiction studied in this thesis and to what extent are they constitutionally protected?
2. What is the attitude of the judiciary in each of the jurisdiction in this study towards the enforcement of SERs?
3. Which of the jurisdictions being studied has the most effective statutory institutional outfits for the enforcement of SERs?
4. What are the challenges impeding the enforcement of SERs in the jurisdictions studied in this thesis?

1.4 AIM AND OBJECTIVES OF THE STUDY

The inclusion of SERs in the Constitution of the jurisdictions chosen in this thesis as well as the ratification of international agreements that provide protection to these rights is the first step for their enforcement. However, the existence of different controversies in relation to their suitability for judicial adjudication has created doubt on their enforcement unlike civil and political rights. Hence, the aim of the dissertation is to carry out an assessment of the

performance of the three selected jurisdictions in the enforcement of SERs and also to identify the challenges faced with respect to their enjoyment. In particular it seeks:

(i) To determine the nature of SERs in each of the jurisdictions studied in this thesis and the extent to which they are constitutionally protected.

(ii) To carry out a comparative assessment of the attitude of the judiciary in each of the jurisdictions towards the enforcement of SERs.

(ii) To find out, through a comparative evaluation of their performances, which of the jurisdictions has the most effective institutional outfits for the enforcement of SERs.

(iii) To identify the challenges impeding the enforcement of SERs in the jurisdictions studied in this dissertation.

1.5 SCOPE OF THE STUDY

The study is a comparative evaluation of the enforcement of SERs in the selected jurisdictions to wit, Nigeria, Ghana and South Africa. The major laws employed in the analysis are the respective Constitutions of each of the three selected jurisdictions, the ICESCR and the African Charter on Human and Peoples' Rights to which countries selected in this thesis are signatories. The study does not intend to analyze their enforcement before international and regional human rights monitoring bodies. Though this study is strictly on the three selected jurisdictions, a few references are made to the state of affairs in some other jurisdictions not directly being studied in this dissertation. Such references are, however, for illustration, clarification and explanation purposes only.

1.6 SIGNIFICANCE OF THE STUDY

The study will have both legal and social significance. Its legal significance relates to its role in the implementation of the provisions of the ratified international instruments on SERs. In other words, the study will serve as a reminder to the three selected jurisdictions of their obligations to ensure the enjoyment of SERs by their citizens as contained in ratified international human rights instruments. The social significance, on the other hand, is related to its contribution in the promotion of the realization of SERs and the resulting benefit that the right holders will get. It will also provide individuals and civil society organizations with necessary knowledge about socio-economic rights litigation and enable them to lodge complaints in cases where there is a violation of these rights.

It is also hoped that this study will also serve as a reference to the legislative and the executive branch of the government of the countries studied in this thesis in the making of policies and in the drawing of budgets. This study will awaken these two organs to give due consideration for the enforcement of SERs provided for in the Constitution as well as ratified international human rights instruments. The study aims at contributing and improving immensely towards strengthening the socio-economic well-being of the citizens of the selected jurisdictions.

1.7 RESEARCH METHODOLOGY

In order to achieve its objectives, this study employed the doctrinal research methodology which places emphasis on analysis of the relevant available literature on the subject of research. In doctrinal research, the researcher mainly uses different judgments, treaties, statutes texts, legal journals, magazines etc. to collect all relevant materials on the topic and then with reasoning

power, researcher tries to find out gap, problem and draws out final conclusion.[16] Thus, the study specifically relies on examining international human rights instruments, general comments, books, research studies, journals and academic articles, and domestic laws that have some relevance to the study. In addition, various internet sites have been consulted for relevant data and information. Thus, the dissertation critically analysed views and opinions expressed by learned authors in textbooks, journals, newspapers, seminar papers as well as the internet on the subject matter of the research. This also involved a critical analysis of decided cases and statutory provisions on the subject matter in the various jurisdictions.

1.8 SYNOPSIS OF THE CHAPTERS

Chapter One provides a general overview of the study. The chapter conceptualizes the research problem with short introduction of what gave rise to the research, what challenge exist, what questions need to be resolved in dealing with the challenges as well as the methodology used in exploring the research questions.

Chapter Two discusses the theoretical and conceptual framework for the research. The chapter deals with the origin and evolution of human rights particularly social and economic rights in human rights jurisprudence. A review of previous works by scholars and writers on the subject of the study (i.e social and economic rights) is also carried out in this chapter.

Chapter Three discusses the international and regional normative frameworks on SERs. The mechanisms for implementation and enforcement of SERs under the international and regional instruments are also examined in this chapter.

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[16] Debashree Chakraborty, 'Empirical (non-Doctrinal) Research Method and It's role in Legal Research' [2015] Volume 3(1) *International Journal of Advances in Social Sciences*; 23

The enforcement of SERs in the three selected jurisdictions which is the kernel of this study is examined under chapter Four. Accordingly, the constitutional provisions of each of the three selected jurisdictions on SERs as well as case laws are examined in this chapter. The chapter also looks the respective experience of each of the jurisdiction being studied and the challenges to the enforcement of SERs.

Chapter Five sums up the findings of this study, based on which recommendations are made. The chapter proposes specific recommendations to be undertaken in order to overcome the challenges identified. The contribution of this study to knowledge as well as suggested areas for further research is also captured in this chapter.

CHAPTER TWO
LITERATURE REVIEW

2.1 Theoretical Framework on Human Rights

Human Rights as a concept, has an evolving nature. It has been developed through laws, customs and religions, throughout the centuries. Here, the natural and legal origins, religious foundations as well as Afro-cultural notions of the concept of human rights shall be examined.

2.1.1 Natural law theory of human rights

The early philosophical and legal theories of natural law school of jurisprudence postulated that there is a higher law which the positive law[17] of the state must take cue from, to be recognized as law. According to Henry Campbell Black, natural rights are those rights which grow out of the nature of man and depend upon his personality and are distinguished from those rights which are created by positive laws enacted by a duly constituted government to create an orderly civilized society.[18] While explaining natural law (*jus naturale*), Lloyd posited that it is a law based on moral principles which is predicated on the nature of the universe and can be understood by the reasoning which rule human conduct and the nature of the universe is part of man's nature.[19]

What this means, therefore, is that the theory of natural law is based on the reasoning that the rule of human conduct is a deduction from the nature of man as it reveals itself in reason and independent of any man-made enactment.[20] It follows from this assumption that a law of nature exists and that all things, including man, ought to behave in conformity with the tenets and principles of the said law of nature. It follows also that as human nature is identical in all men and does not vary, its precepts have

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[17] This refers to man-made laws.
[18] Henry Campbell Black, *Black's Law Dictionary* (Minnesota: West Publishing Co., 1990)
[19] D. Lloyd , *Introduction to Jurisprudence* (4th Edition, London, 1979)
[20] Pierluigi Chiassoni, 'Kelsen on Natural Law Theory: An Enduring Critical Affair' [2014] (3) *Journal for Constitutional theory and philosophy of Law*: 135

universal and immutable validity, notwithstanding the diversity of individual conditions, historical and geographical environments, civilizations and cultures.[21]

In the middle ages, the concept of natural law was propounded by christian theologians like St. Augustine and St. Thomas Aquinas, who postulated that Natural law was the participation in the eternal law of the mind of a rational creature; the state is not above the law which regulates between her and the individuals, rather the legitimacy of the state is determined by service to the individual. Any State or King who is unfaithful to this law forfeits his right to rule and command obedience.[22] This led to the flourishing of natural law in the middle ages.

Natural rights have its foundation on natural law and was developed in England which articulated that every individual has natural, fundamental, inherent, absolute and sacred rights from birth. As Marcus Tulliius Cicero puts it, 'There is one eternal and immutable law which apply to all people at all times and which emanates from God is natural law'.[23] The Eighteenth century saw the development and ascendance of natural rights to human rights. In this century. the writings of John Locke (1632-1704) became popular in Europe. He propounded the concept of natural rights such as right to life, liberty/freedom and property as well as social contract which articulates where government fails to protect the right of its citizens. it forfeits its power to rule.[24]

Baron De Montesquieu, Thomas Hobbes and Jean Jacques Rosseau were philosophers who elaborated that all men are born free and created equal, and are endowed with certain inalienable

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[21] ibid

[22] Steven J. Heyman, 'The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty' [2018] (101) *Marquette Law Review*; 705

[23] G. S. Bajwa, *Human Rights in India: Implementation and violations*, (1st Edition, Anmol Publication, New Delhi, 1995)

[24] Icelandic Human Rights Centre, Part 1: The concept of human rights/definitions and classifications. >www.Humanrights.is/.../human-rights-human-rights/definitions-and-c.< last accessed on the 25th April, 2019.

rights to life, liberty and the pursuit of happiness and sovereign derives its power from the citizen in the form of social contract.[25] Their works deeply influenced the philosophical and legal foundations of natural rights as it is known today. It is noteworthy the theories of these philosophers concentrated more on civil rights which was a tool in fighting the arbitrariness of rules and freedom from slavery. Modern conceptions of human rights also drew great inspiration directly or indirectly, from their writings.

2.1.2 Legal Theory of human rights

According to this theory, rights are created and maintained by the state.[26] The state is the only source of right and outside the state an individual has no rights at all and never claim rights against state. The theory further maintains that rights are not natural to man. One of the legal theorist, Jeremy Bentham in a posthumously published work, defined law as an:

> Assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[27]

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[25] ibid
[26] David P. Forsythe., *Encyclopaedia of Human Rights* (Oxford University Press, New York, 2009)
[27] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation,* (Dover Publications, 1780)

Another popular exponent of this theory is John Austin who postulated that states create rights. as such individuals have no rights to claim against the state rather the states ensures them.[28] Austin developed what he calls 'legal positivism' which he explained to mean that laws exist "by position".[29] Austin's famous formulation of what could be called the dogma of legal positivism is as follows:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.[30]

Austin gave illustrations regarding what constituted to be the laws made by private citizens in pursuance of their legal rights. One such illustration of the laws made by private citizen was of rules made by the guardians for their wards and those rules imposed upon the slaves by the slave owners. So, as all the legal rights happen to be founded by laws of the sovereign, the ultimate source of these private powers remains the sovereign.[31]

The proponents of this theory kept law and moral principles on a completely separate footing.[32] The above postulations of whittled down natural law in direct attack until the despotic attack of Nazi Germany which carried out gruesome killings and disregards for human rights. Also, the

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[28] P. Sadish, Theories of Human Rights, >Available at https://www.academia.edu/6894687/theories_of_human_rights< last accessed on the 25th April, 2019.

[29] Austin John, *The Province of Jurisprudence Determined* (2nd edn, London, 1861)

[30] Ibid

[31] Ibid

[32] L. Pragalbh Bhardwaj and Rishi Raj, 'Legal Positivism: An Analysis of Austin And Bentham' (1)(6) *International Journal Of Law And Legal Jurisprudence Studies*, Availabale at >http://ijlljs.in/wp-content/uploads/2014/10/Legal-Positivism-An-analysis-of-Austin-and-Bentham.pdf< last accessed on the 25th April, 2019

atrocities of the Second World War which relied heavily on positive law revived natural law from its deadly blow.[33]

2.1.3 Religious theory of human rights

The concept of human right has also been ascribed a religious origin. Major religions of the world[34] have their various views and ideas corresponding to the concept of human rights. However, this study will only consider Islam and Christianity.

Under Islam, rights are directly linked to the Islamic faith and are believed to be divinely ordained. According to Azra Awan,[35] the distinguishing feature of human rights in Islam is that they are the natural outcome of a broader practice of faith, deeds and social behaviour that muslims believe are divinely mandated. Because of this, human rights in Islam are seen as religious obligations which everyone must protect and restore whenever they are violated.[36] Muhammad Zafrullah Khan[37] posits that the most striking feature of Islam is its universality and the place it assigns to man as the centre of the universe. Islam therefore teaches and insists upon the acceptance and comprehension of the Unity of the Creator which results in the unity and co-ordination of creation and the unity and equality of man. According to him, the object of Islam is to establish a balance and to bring about accord in the relationship of man to his Maker, to the Universe and to his fellow men through beneficent adjustment.[38] Islam therefore preaches the equality of all people in terms of human values and that all individuals are equal before the Islamic code of

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[33] ibid

[34] Such as Islam, Christianity, Hinduism, Judaism and African traditional religion.

[35] 'Human Rights in Islam' Available at >https://www.whyislam.org/islamicteachings/human-rights-in-islam/< last accessed on the 25th April, 2019.

[37] Muhammad Zafrullah Khan , *Islam and Human Rights,* (5th edn, Islam International Publications Ltd, 1999). Also available at > https://www.alislam.org/library/books/Islam-HR.pdf < last accessed on the 26th April, 2019.

[38] See the Holy Quran 55:8-10.

Law. The rights protected under Islam include the right to life[39], respect for the chastity of women[40], right to a basic standard of life[41], right to justice[42] as well as equality of all human beings.[43] Thus, it can confidently be concluded that Islam, as a religion and a way of life, makes elaborate provision for the effective protection and enforcement of human rights, not just for its adherents alone, but for the whole of mankind.

The ideas of human rights can also be profoundly identified in the teachings of Christianity. The biblical account of the first trial ever recorded, that is the one that took place in the Garden of Eden, established one of the cardinal pillars of natural justice[44] which today has found expression in most modern constitutions as the fundamental human right to fair hearing.[45] Also, the ten commandments given by God Moses and seen by all Christians as both primal and ultimate is indeed one of the most ancient catalogues of fundamental human rights and duties.[46] Christians believe that all men, having been made in the image and likeness of God are, by nature, free and equal. These doctrines, no doubt, influenced the postulations of the early Christian philosophers like St. Augustine and St. Thomas Aquinas. While St. Augustine asserted that no man was by nature a slave since the grace of God abides in all men, St. Thomas Aquinas identified the law of nature with the law of God and came to the conclusion that laws were therefore to be judged by the test, whether every human law has just so

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[39] Ibid 5:32.
[40] Ibid. 17:32
[41] Ibid. 51:19.
[42] Ibid. 5:2, 5:8, 4:135.
[43] Ibid. 49:13.
[44] *Audi alteram partem*
[45] See, for example, sec. 36 of the CFRN, 1999 (as amended).
[46] Rene Cassin, 'From the Ten Commandments to the Rights of Man' Available at >http://renecassin.over-blog.com/article-from-the-ten-commandments-to-the-rights-of-man-72080499.html< last accessed on the 26th April, 2019.

much natural law, as it is derived from the law of nature and is founded on reason.[47] It can therefore be concluded that Christianity has its own ideas of human rights akin to the concept of natural law.

2.2 Afro-cultural notions

It is opined that prior to the advent of colonialism in Africa, laws, customs and practices which were the equivalence of what today may be referred to as modern concept of human rights existed and developed in traditional African societies.

Musa Ballah Conteh[48] argues that human rights were present in the first phase of traditional society, although in a context quite unlike that of the West and quoted Mbaya[49] who asserted thus,

> Traditional Africa does possess a coherent system of human rights, but the philosophy underlying that system differs from that which inspired [in France] the Declaration of the Rights of Man and of the Citizen. The traditional African system of human rights not only affirmed the rights to life and to freedom of expression and association and religious liberty, but also the obligation to provide for those without the means of sustenance. Rights were derived from duties.

Claude E. Welch, Jr. also agrees that the protection of human rights certainly existed in the precolonial period.[50] He identifies six major sets of rights in traditional society: the right to life,

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[47] Tsoncho S. Tsonchev, *The Political Theology of Augustine, Thomas Aquinas and Reinhold Niebuhr* (Montreal, Canada, 2018)

[48] Musa Ballah Conteh, 'Human Rights Teaching in Africa: The Socio-Economic and Cultural Context', in Asbjørn Eide and Marek Thee (eds), *Frontiers of Human Rights Education*, (New York: Columbia University Press, 1983)

[49] Report titled 'Development, Human Rights and the Rule of Law' presented in a conference held in The Hague, 27 April-1 May 1981, International Commission of Jurists. Keba Mbaya who is a former President of the Senegal Supreme Court first asserted this right in an address to the International Institute of Human Rights in Strasbourg, France.

the right to education, the right to freedom of movement, the right to receive justice, the right to work, and the right to participate in the benefits and decision making of the community. He notes that in contrast to European conceptions stressing individual protection, African conceptions have emphasized collective expression. The web of kinship, of family and clan, provided the framework in which individuals asserted their rights and accepted their responsibilities.

Similarly, Yougindra Khushalani[51] opines that traditional Africa does possess a coherent system of human rights, including the right to life, the right to receive justice, the right to participation, freedom of religion, freedom of association, and freedom of expression. She asserts that in traditional African culture, the right to life stems from the respect which Africans have for their traditional religious beliefs. Furthermore, Khushalani asserts that traditional African society recognized freedom of movement, the right to work, and the right to education. These rights were not stated in adversarial terms, but were derived from the responsibilities of various members of the community. Thus, she concludes that traditional African society recognized the rights of both individuals and groups and through consensual procedures provided "an almost sacred protection" of fundamental human rights.[52]

2.3 Conceptual Framework

2.4 The concept of Human Rights

Human rights are the rights that everyone has equally by virtue of their humanity. The UN defined human rights as those rights which are inherent in our state of nature and without which

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[50] Claude E. Welch, Jr. and Ronald I. Meltzer, *Human Rights as a Problem in Contemporary Africa*, (SUNY Press, 1984)

[51] Yougindra Khushalani, 'Human Rights in Asia and Africa' [1983] (4)(4) *Human Rights Law Journal* : 415

[52] ibid., 418

we cannot live as human beings.[53] In other words, they are those rights[54] without which human beings cannot live with dignity, freedom (political, economic, social and cultural) and justice[55] in any nation or state regardless of colour, place of birth, ethnicity, race, religion or sex or any other such considerations. These rights are fundamental and inherent in human nature and therefore guaranteed and protected by the state without distinction of any sort. They constitute, as opined by Michael Freeden, 'a conceptual device, expressed in linguistic form that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being that is intended to serve as a protective capsule for those attributes; and that appeals for a deliberate action to ensure such a protection.[56]

The concept of human rights can be understood as being universal, incontrovertible and subjective.[57] Human rights are universal since they belong to every human being without any distinction of ethnicity, race, gender, religion, or type of government. They are incontrovertible, that is, they are absolute and innate. Human rights are subjective as they are properties of individuals who possess them because of their capacity for rationality, agency and autonomy.[58] The modern concept of human rights is comprehensive in its nature and content. It includes three types of rights: civil and political, economic, social and cultural rights and the emerging collective or group rights. Some scholars have described these three set of rights as first, second and third generation of rights.[59]

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[53] Mishra Pramod, *Human Rights: Global Issues* (Delhi: Kalpaz Publications, 2000)

[54] such as right to life, liberty and freedom, freedom from discrimination, Freedom of Religion, Freedom of Speech, Freedom of Movement, Freedom of Association, Freedom of Thought.

[55] The Preamble to the Universal Declaration of Human Rights adopted by the United Nations General Assembly on the 10th December, 1948

[56] Biswal Tapan, *Human Rights, Gender and Environment.* (New Delhi: Viva Books Private Limited, 2006)

[57] O' Byrne J. Darren, *Human Rights: An Introduction.* (Singapore: Pearson Education, 2005)

[58] ibid

[59] Patrick Macklem, 'Human Rights in international law: three generations or one?' [2005] (3) (1) *London Review of International Law; 61*

In fact, the catalogue of rights is expanding every day. It must be noted that no catalogue elaborating specific human rights will ever be exhaustive or final.[60] Its content goes hand in hand with the state of moral consciousness or development of civilization at any given time in history.[61]

2.4.1 Social and Economic Rights

Social and Economic rights are generally referred to as 'second generation' rights. They have been described as rights which are positive in nature[62] as they require affirmative action by the government for their realisation. They are rights connected to the socio-economic issues of life which require government to provide the necessary living conditions without which the enjoyment and realization of the civil and political rights will be a day dream. Rights such as the right to work and favourable conditions of work, the right to social security, the right to an adequate standard of living, the right to physical and mental health and the right to education belong to the category of socio-economic rights. Rights of this character are also to be found in other human rights documents such as the Universal Declaration of Human Rights and the Convention of the Rights of the Child as well as regional agreements like the African Charter on Human and Peoples' Rights.

The general nature of socio-economic rights has been succinctly captured in the following words:

> Economic and social rights are objectives to be achieved progressively. Therefore a much longer period of time is contemplated for the fulfilment of the objectives. For civil and

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[60] Rachna Suchinmanye, *Gender, Human Rights and Environment*, (New Delhi, Atlantic Publishers and Distributors Ltd, 2008)

[61] Ibid

[62] Helen Hershkoff, 'Positive Rights and State Constitutions: The Limits of Federal Rationality Review' [1999] (112) (6) *Harvard Law Review* ; 1131

political rights, states ratifying the Covenant will immediately be subjected to an obligation to give effect to the rights. The enactment of legislation is generally sufficient to effect the enjoyment of civil and political rights, while legislation is not sufficient for the attainment of socio-economic rights. Very much depends on the economic condition of the State. The machinery of complaint, the Committee on Human Rights envisaged for civil and political rights is not a suitable body for dealing with economic and social rights, since they can only be achieved progressively and since the obligation of members with respect to them are not as precise as those for the other set of rights.[63]

Nyerere[64] however observed that the continued emphasis on civil and political rights will be meaningless without the realisation of socio-economic rights. He alluded to the life of a person who cannot afford medical treatment when he is sick. This was re-echoed by the Indian Supreme Court in the classicus case of Minerva Mills Ltd v Union of India[65] thus

> To the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a free society, would sound as empty words bandied about in the drawing rooms of the rich and the well-to-do and the only solution for making these rights meaningful to them was to re-make the material conditions and use in a new social order where socio-economic justice will inform

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[63] Wahab O. Egbowole and Taofeeq N. Alatise,'Realizing socio-economic rights in Nigeria and the justiciability Question: Lessons from South Africa and India' [2017] (8) *International Journal of Politics and Good Governance;* 1

[64] Nyerere Julius, "Stability in Africa", An address presented at the University of Toronto, Canada in 1969, reproduced in Africa Contemporary Record 2 (1969 - 1970) pp. 30-31, cited by J.O. Ihonvbere in his article, "Underdevelopment and Human Rights in Africa" in Shepherd, G. W. Jr. (ed.) *Emerging Human Rights: The African Political Economy Context* (New York: Greenwood Press, 1990)

[65] (1980) AIR SC 1789, per Bhagwati, J.

all institutions of public life so that the preconditions of fundamental liberties for all may be secured.

2.5 Origin of socio-economic rights

The historical background of social and economic rights shows that there is not one history with one direction. Steiner and Alston[66] are of the opinion that the injunctions or admonitions reflected in various religious traditions is based on taking care of one's neighbour and the needy which to a large extent is predicated on socio-economic rights. This argument finds support in the work of Krishna Mohar Mathur[67] where he stated as follows:

> Man, is not an individual. He is a social organism. God loves only who serves other beings; men, cattle and other creatures. His glory lies in being a member of a big family. On the one hand, man is bound by blood, kinship, his parents. His wife, his children, and on the other, he is linked with every individual of society whether near or far, it is given to man to link himself to those who could be his posterity. Man, thus lives, works and dies, for society possessed of certain inalienable rights. Man, is expected to develop his craft, sciences and technology, and lead society from poverty to posterity, with a happy today and a happier tomorrow.

In political and philosophical theory, Steiner and Alston further noted that the ideas and theories of scholars such as Thomas Paine, Karl Marx, Immanuel Kant and John Rawls have provided

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[66] Steiner, H and Alston, P, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 1996)

[67] M. Mathur, '*Crime, Human Rights and National Security*' (Gyan Publishing House, New Delhi, 1996)

important input to the ideas of socio-economic rights.[68] The political programs of the nineteenth century, introducing ideas of the modern welfare state, have also provided foundations for socio-economic rights. For instance, during the 1880s, Chancellor Otto von Bismarck of Germany launched social insurance programmes for old age. job-related accidents and medical costs. The programme, according to Esping-Andersen[69] sought to achieve, among others, a consolidation of divisions among wage-earners by legislating distinct programs for different class and status groups, each with its own conspicuously unique set of rights and privileges which was designed to accentuate the individual's appropriate station in life. The Fabian socialists in Great Britain partly built on Bismarck's model when creating its welfare state at the start of the 1900s while in the US, the New Dealers created major welfare programmes during the 1930s and 1960s.[70]

Reflecting on the introduction of the Social Security Act of 1935 in the United States which introduced at a very modest level some old-age pension and unemployment benefits, Gordon L. Clark in his article stated thus:

> The need for protection of the old and the unemployed is inescapably allied with industrial development and had for long been so recognized. An industrial society has its own built-in system of social security. The farms or peasant holdings are passed on to the offspring, and the latter, often by rigorously enforced custom, look after their elders. A major reason for rural population increase in much of the world is the need to be assured of sons who will do the work in the fields and be responsible for their parents in their old age. As to unemployment compensation, there is the stolid fact that there is no unemployment on a farm. By lowering the effective wage, some or much of which can be

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[68] Steiner, H and Alston, P, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 1996)

[69] *The Three Worlds of Welfare Capitalism,* (Princeton University Press, 1990)

[70] Steiner and Alston, op. cit., p. 242

earned in kind, some employment can always be provided or invented. It is with urbanization and industrialization that old age pension and unemployment compensation. become socially essential. It is then that, with a much loosened famer structure, the old have no support, the unemployed have no income.[71]

Also, the emergence of socio-economic rights is also linked to Karl Marx's critique of capitalist exploitation of the 19th century during socialist revolutions. However, Prof. Claire Palley in her work[72] maintained that the United Kingdom Factory Act of 1833 and the Mines Regulation Act of 1842 as well as Royal Commission Reports antedated Marx's works from which he drew largely from. In the words of Palley,

> The concept of socio-economic rights sprang in large measure from legislation and criticism of social policy (in the United Kingdom) from the 18th century onwards...contrary to prevalent opinions that such rights arose out of Marxist critique and third world socialism, it would be more appropriate to say that Engels' and Marx's analyses derived from perusal of statutory reports under the United Kingdom Factory Act of 1833 and the Mines Regulation Act of 1842, as well as from Select Committee and Royal Commission Reports.[73]

In his writing,[74] C. C. Nweze concurred with the position maintained by Palley and further posited that industrialism laid the foundation for the emergence of socio-economic rights. The erudite scholar further postulated that the negative impact of industrialism in the United

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[71] Gordon L. Clark, 'Pension Fund Capitalism: A causal Analysis: [1998] (80) (3) *Geografiska Annaler. Series B.* Human Geography; 139.

[72] C Palley, *The United Kingdom and Human Rights* (London: Sweet & Maxwell, 1991)

[73] ibid

[74] Nweze, C.C, 'Evolution of the Concept of Socio-economic Rights Jurisprudence: International and National Perspectives' (2001) (1) (1) *The Nigerian Bar Journal*; 79

Kingdom brought into focus the need for industrial reforms and the government was, therefore, propelled into taking steps to ameliorate, through legislation, the indignities occasioned on factories and factory workers which led to the passage of the Health and Morals Act 1802, Factory Act, 1833 and Mines Regulation Act, 1842.[75] The reports of factory inspectors under the Factory Act precipitated actions to protect women and children.

It is also believed that the above developments inspired philosophical musings throughout Europe, one of such being the two classical works of Fredrick Engels, *Conditions of the Working Class in England* and *Capital* which books helped in shaping Marx's philosophical views.[76] According to Nweze, Karl Marx's *Communist Manifesto* was Marx's reaction to the onset of metropolitanism which resulted from industrial revolution with the attendant rural migration, culminating in loss of identity and traditional family values.[77] To the learned scholar, it would be anachronistic to trace the historical origin of socio-economic rights to Karl Marx's critique of 19th century capitalism when it is clear that Karl Marx drew inspiration from Fredrick Engel who himself was inspired by the socio-economic fallouts of the industrial revolution.

From an international human rights law perspective, an appropriate point of departure can be traced to the establishment of the International Labour Organisation (ILO) in 1919 with its goal to promote worker's right in guaranteeing 'fair and humane condition of labour'.[78] ILO adopted minimum standards in a wide range of issues that now would be labelled as socio-economic rights.[79]

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[75] ibid
[76] ibid
[77] See G. Ehusani, *The Social Gospel* (Lagos: Ambassador Publications, 1992)
[78] Steiner and Alston, op. cit., p. 242
[79] Kelley, D. 'A Life *of* One's Own: Individual Rights and the Welfare State', in H.J. Steiner and P. Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2000)

2.6 Clarifying core concepts in socio-economic rights practice

Over the past several years the United Nations Committee on Economic Social and Cultural Rights (UNCESCR) through its General Comments, other international agencies, jurists, judicial decisions and scholars have played an active role to reverse these misconceptions and to deepen receptivity to socio-economic rights jurisprudence; particularly in proving that socio-economic rights are not profoundly dissimilar to civil and political rights.[80] These devoted efforts have contributed, to some extent in clarifying, even though they have not completely quelled the debate and controversy on the practical difficulties inherent in the judicial enforcement of socio-economic rights.

2.6.1 Obligation to respect, protect and fulfill

It is settled that all rights impose both positive and negative obligations[81] described in an accepted three-pronged tripology of the duties of states, namely: the obligations to *respect*, *protect* and *fulfill*.[82] The obligation to *respect* implies that states ought to restrain from any actions that may constrain an individual from enjoying or limiting the individual's capacity to realize those rights.[83] The obligation to *fulfill* is a duty on the states to take affirmative steps towards actual enjoyment of the rights by the individuals. The duty to promote, regarded as a

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[80] The works of CESCR includes the General Comments 3 and 9, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted 10 December, 2008 GA Res A/RES/63/117. CESCR Statement, "An Evaluation of the Obligation to take steps to the Maximum under an Optional Protocol to the Covenant" 10 May 2007 E/C 12/2007/1.

[81] See H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press, 1990) where it is propounded that all rights (he calls them basic rights) entail both positive and negative obligations with three kinds of obligation: 'the duty to avoid depriving', the 'duty to protect from deprivation' and the 'duty to aid the deprived'. See further supportive terminological reference of the duties by Asbjorn Eide, " Economic, Social and Cultural Rights As Human Rights" in A Eide, C Krause and A. Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd Revised edn 1995).

[82] See Victor Dankwa, Cees Flinterman and Scott Leckie, 'Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' [1998] (20) *Human Rights Quarterly;* 705.

[83] ibid

component of the obligation to fulfill is a recent addition, requiring the state to create awareness and sensitization among the people on their rights.[84] In the totality of these obligations are two obligations: of *conduct* and *result;* whereby the obligation of conduct mandates the state to deploy action-oriented programmes to realize the enjoyment of a given right; whereas the obligation of result 'requires states to achieve specific targets to satisfy a detailed substantive standard'.[85]

2.6.2 Minimum core obligation

The Committee on Economic, Social and Cultural Rights has proffered definitions of the nature, scope and content of most socio-economic rights through its General Comments to clear uncertainty regarding the normative framework of interpretation and enforcement. The '*minimum core obligation*' has been interpreted to mean that states have an 'obligation to ensure the satisfaction of, at the very least minimum essential levels of each of these rights,[86] and to direct all their available resources to fulfil the minimum core. The Committee has observed that a 'state party in which any significant number of individuals is deprived of essential foodstuffs, of essential 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'.[87] It is taken that this obligation imposes a threshold minimum level below which rights provision should not

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[84] ibid
[85] ibid
[86] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 10, of the Covenant)*, 14 December 1990, E/1991/23, available at: >http://www.refworld.org/docid/4538838e10.html< last visited on 6th July, 2019
[87] ibid

go, an essential ingredient of a right without which a right is rendered nugatory and life put to jeopardy.[88]

Where a state alleges that the resources are 'demonstrably inadequate', there is still a duty to ensure 'the widest possible enjoyment of the relevant rights under the prevailing circumstances'.[89] Thus, it has been emphasized that the minimum core is to be met regardless of the availability of state's resources or any other encumbering factors, however of note is that resource capacities of states in fulfillment of these rights is recognized.[90]

2.6.3 Progressive realization

The Committee has also taken note that '*progressive realization*' entails a recognition that full realization of all rights is a gradual process to be undertaken over time.[91] States are accorded a margin of discretion to select modalities of implementation, however this does not detract from the state's duty to fulfil some rights immediately and others as soon as possible.[92] It means that though states are bound by same legal obligations, the progressivity of a measure may differ from state to state depending on the varying cultural, religious, developmental and historical circumstances. In the Committee's view, the leverage accorded is in keeping with the practical exigencies of the world in confronting the challenges involved in providing socio-economic rights to individuals of a country. The states are however expected to move expeditiously and effectively as possible and to refrain from any unjustified retrogressive measures that

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[88] G Van Bueren, 'Alleviating poverty through the Constitution Court' [1999] (15) *South African Journal on Human Rights*; 57
[89] General Comment 3, para 11.
[90] ibid
[91] General Comment 3, para 9.
[92] ibid.

circumstances may not allow, for instance relying on religious inclinations as a scapegoat for derogating from or limiting the rights.

2.7 Normative Framework on socio-economic rights

There are several international and regional human rights instruments that provided for socio-economic rights. At the International level, they include the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights,(1966); the International Covenant on the Elimination of All Forms of Racial Discrimination (ICEAFRD, 1965), the Declaration on Social Progress and Development (1969). the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (1979); Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (1990) and The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) (2009). At the regional level, we have instruments such as African Charter on Human and Peoples Rights (ACHPR) (1981); Additional Protocol in the Area of Economic, Social and Cultural Rights to the American Convention on Human Rights (Protocol of San Salvador) (1988): European Social Charter (revised 1996) and the Additional Protocol thereto.[93]

SERs are also enshrined in municipal legal systems. In some legal systems, they act as mere guides for the formulation and implementation of state policies and programmes of governance such as Nigeria, India and Mexico.[94] Some of these domestic legal systems recognize them as fully justiciable rights.[95] Due to the constraint of this thesis, a detailed discussion of all the legal instruments that

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93 United Nations, *Economic, Social and Cultural Right Handbook for National Human Rights Institutions* (2005) 3 available at www.ohchr.org/Documents/Publications/training12en.pdf last accessed on the 25th April, 2019)

94 ibid

95 Examples of legal systems that provide for the full justiciability of ESC rights are South Africa and Portugal.

constitute the normative framework for socio-economic rights cannot be carried out. However, a detailed analysis of the principal international legal and regional instruments on socio-economic rights to wit the Universal Declaration of Human Rights (UDHR), The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 and The African Charter on Human and Peoples' Rights (ACHPR) shall be respectively discussed in the subsequent chapter. The domestic legal framework on these rights with respect to the jurisdictions within the purview of this dissertation shall be respectively discussed in subsequent chapters.

2.8 Literature Review

There are plethora of scholarly materials on the subject matter (i.e social and economic rights) written by authors and human rights advocates. This section of the dissertation carries out a review of the views and opinions expressed by these learned authors in their various works.

While analysing the attitude of States towards SERs, it was observed by H.J Steiner and Phillip Alston[96] that the support which states give to SERs at the international level is merely rhetorical, as most states fail to consistently follow it up with practical and sustained domestic programmes of implementation. In their jointly edited work, Varun Gauri and Daniel Brinks[97] critically appraised the role of courts in the enforcement of social and economic rights in Brazil, India, Indonesia, Nigeria and South Africa and came to the conclusion that whether courts expand or limit the protection of social and economic rights will depend on a number of social, legal and political factors. In his book[98], Frans Viljeon while decrying the bifurcation of Human Rights posited that human rights are not western-based or neo-colonial imposition or African. Aligning

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[96] H. J. Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 1996)

[97] Varun Gauri and Daniel Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008)

[98] Frans Viljeon, *International Human Rights Law in Africa* (Oxford University Press, 2007)

with the Vienna Declaration and Programme of Action, 1993 that 'human rights are the birth right of all human beings', he observed that 'national and regional particularities and various historical, cultural and religious backgrounds' which inform the debate of universality against cultural relativism of rights should be acknowledged.

Manisuli Ssenyonjo[99], writing on the domestic protection of social, economic and cultural rights noted that the effectiveness of International Human Right treaties at the national level must be reflected in the content of the domestic law. The reason being that through the instrumentality of the municipal/national law, domestic institutions (e.g courts and national human right commissions) can effectively enforce these rights. In their article[100], Damian U. Ajah & Ijeamaka Nnaji opined that most member-States of the United Nations and signatories to the ICESCR treat socio-economic rights as inferior step-cousins of their civil and political counterparts, resulting in the second-class treatment of the former by member-States. They also found out that the classification of human rights into civil and political rights and economic, social and cultural rights creates an unnecessary dichotomy between these two categories of rights leading to a negation of the interdependent, indivisible and interrelated features of all human rights.

Christopher Mbazira[101] and Chidi Odinkalu[102] evaluate the extent to which states parties fulfill their treaty obligations to domestically enforce SERs contained in the African Charter on Human and Peoples' Rights. While Mbazira is of the view that so far, it has been a bag of mixed losses and gains, pointing out that the greatest problem confronting the realization of the SERs in the African Charter

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[99] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing Ltd, Oxford, 2009)

[100] Clearing the Hurdles, 'A Therapeutic Examination of the Challenges to the Protection and Enforcement of Economic, Social and Cultural Rights' [2015] (13) *The Nigerian Juridical Review*; 25

[101] 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides" [2006] (60) (2) *AHRLJ*; 341.

[102] 'Analysis of Paralysis or Paralysis by Analysis? : Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' [2001] (23) (2) *Human Rights Quaterly*; 327.

is the lack of domestic enforcement of judicial and quasi-judicial decisions on the rights, Odinkalu on the other hand notes among other things, that African leaders blame their inability to effectively implement these rights on unavailability of resources. Stanley Ibe[103] articulates the justiciability of socio-economic rights at the regional level, elucidating that the African Charter on Human and Peoples Right made all human rights justiciable before the African Commission on Human and Peoples' Rights (African Commission), which is laudable in the Commission's landmark judgments on socio-economic cases while interpreting the provisions of some articles in the African Charter on Human and Peoples' Right.

In an article titled, 'Sustaining Development Through Socio-Economic Rights: Prospect and Challenges In Selected African Countries',[104] Ainul Jaria Maidin, A. O. Sambo, A.H. Ansari, A.B. Abdulkadir faulted the judicial attitude of Nigeria and Ghana as well as other countries as they have shown unwillingness to enforce these rights perhaps based on their perceived non-justiciability of those provisions. They further argued that the perception appears incorrect because Nigeria and Ghana are parties to at least one of the international legal instruments relating to socio-economic rights and also parties to African Charter on Human and Peoples' Rights which have also made provisions for socio-economic rights. Shedrack Agbakwa[105] sees the effective protection and enforcement of economic and social rights as a *sine qua non* to continued peace and human development. Agbakwa, however, note that in practice, states have paid less attention to the enforcement and implementation of SERs than other rights.

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[103] S. Ibe, 'Beyond Justiciability: Realising the promise of socio-economic rights in Nigeria, [2007] (7) (1) *AHRLJ*: 225.

[104] [2011] (7)(13) *Journal of Applied Sciences Research (Special Issue on Law)*; 2366

[105] Shedrack Agbakwa, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the cornerstone of African Human Right' [2002] (5) *Yale Hum. Right and Development L. J.*;154

On socio-economic rights in Nigeria, M. T. Ladan[106] opines that the 1999 Constitution of Nigeria does not make any specific provision for SERs as human rights. He maintained that even though Chapter Two of the 1999 Constitution of Nigeria provides the nearest articulation of socio-economic rights in Nigeria, the ideals of SERs embodied in the said chapter are couched not as rights but as duties of state. He notes that although the 1999 Constitution does not contain an express provision on the right to work, sections 16 and 17, read together, allude to the existence of such a right. He further states that a community reading of sections 17, 33, and 35 of the Constitution alludes to the right to health which is not expressly provided in the Constitution. G. N. Okeke[107] opines that justiciability of the directive principles will tackle the monstrous social ill called corruption and make government duty-bound to engage all at its disposal for the realization of SERs immediately and progressively which will be a step ahead in attenuating corruption in Nigeria. He further submitted that the era of duty without responsibility will be a thing of the past as accountability will serve as checks on the extravagancies of government officials.

While discussing the attitude of the Nigerian courts, Legislature and Executive to SERs, Prof. Wahab Egbowole and Taofeeq N. Alatise[108] opined that the incapacity of the Nigerian courts has emboldened the executive to regard SERs as insignificant, leading to increased poverty amongst Nigerian populace. They submitted that the Nigerian judiciary must shun the reactionary trend and engage in judicial activism as it is in other jurisdictions such as South Africa and India as this is the only way the political class can be pushed to make these rights available to the

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[106] 'Introduction to National and International Frameworks on Human Rights'', lecture material for the course 'PSD 127', Abdusalami Abubakar Institute for Peace and Sustainable Development, Niger State College of Education, Minna, held November 2-7, 2009; p.3.

[107] G. N Okeke, 'Fundamental Objectives and Directives of State Policy: A viable anti-corruption tool in Nigeria' [2011] (2) *Nnamdi Azikwe University Journal of International Law and Jurisprudence*; 176

[108] 'Realizing socio-economic rights in Nigeria and the justiciability Question: Lessons from South Africa and India' [2017] (8) *International Journal of Politics and Good Governance;* 1

citizens. Stanley Ibe[109] observed that there is no integrative approach to the interpretation of human rights in Nigeria and further submitted that the judiciary is reluctant to hear and determine cases on socio-economic rights. The Executive and Legislature have failed to live up to their responsibility to provide security and welfare for the people which the Constitution affirms sovereignty belongs to.[110] He argues that recourse should be had to the judiciary to enforce SERs in a poverty-stricken state like Nigeria.

In his article, A. T. Shehu[111] noted 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 SERs. All Nigeria has experienced for now is the inclusion of SERs in the fundamental objectives and directive principles of state policy, that are made non-justiciable unless and until the legislature enacts laws for the enforcement of any aspect of the fundamental objectives. He went further to identify population growth and corruption as some of the challenges of the enforcement of socio-economic rights in Nigeria adding that with the pervasive and endemic corruption in Nigeria, hardly could the enforcement of SERs be effective irrespective of any institutional, legal or constitutional framework.

With respect to Ghana, Nana Twaiah Okyir in his article[112] analysed the case of *Ghana Lotto Operators et al.* v. *National Lottery Authority*[113] (*Ghana Lotto* case) which marked a turning point in Ghana's SERs jurisprudence. He submitted the Supreme Court decision to enforce socio-economic rights in flexible and imaginative ways is progressive. He however noted that the

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[109] S. Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Oppurtunities' [2010] (1) *AHRLJ*; 197

[110] Section 14 of the CFRN, 1999 (as amended)

[111] Ajepe Taiwo Shehu, 'The Enforcement of Social and Economic Rights in Africa: The Nigerian experience' [2013] (2) (1) *Afe Babalola University Journal of Sustainable Development Law and Policy;* 101

[112] N. T. Okyir, 'Toward a Progressive Realisation of Socio-Economic Rights In Ghana: A Socio-Legal Analysis [2017] (25) (1) *African Journal of International and Comparative Law;* 91

[113] [2007–2008] 2 SCGLR 1088.

judiciary cannot play a solitary role and there is the need to fashion other ways of ensuring that the entire governance and development setup is structured to make the nation capable, ready and willing to take the required decisions that will ensure the implementation and realisation of SERs. It is against this background that the article suggests a well-coordinated and focused social movement that can provide in Ghana the drive to compel government action even beyond the mere adoption of policies and legislation to their actualization. Modibo Ocran[114] noted that the one of the problems facing the realization of economic and social rights in Ghana is that it subscribe to the dualist view of treaty law application. He argued that domestic law is not the only place to look when searching for SERs as Ghana is a party or signatory to some important and relevant international instruments and there should be an interface between domestic law and international legal instruments. He maintained that there is the constant need to ensure not just the parliamentary ratification of signed treaties, but also their enactment into statutes as annexes. schedules or appendices so that the treaty rights and obligations of Ghanaian citizens will become meaningful.

Acknowledging that judicial enforcement of SERs in Africa has been fraught. Bonolo Ramadi Dinokopila[115] observes that South Africa stands out as the most progressive country in Africa as regards the judicial enforcement of these rights and gives the credit for this to their egalitarian and progressive constitution. J. C. Mubangizi[116] and G. Devenish[117] attribute South Africa's judicial success to the 1996 South African Constitution, which they describe as one of the most socio-

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[114] Modibo Ocran, 'Socioeconomic Rights in the African Context: Problems with Concept and Enforcement' [2007] (5)(1) *Loyola University Chicago International Law Review*; 1

[115] Bonolo Ramadi Dinokopila, 'The Judicial Enforcement of Socio-Economic Rights in Botswana', [2013] (57)(1). *Journal of African Law*; 108

[116] J. C. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta & Co, Cape Town, 2004)

[117] G. Devenish, *A Commentary on the South African Bill of Rights* (London: Butterworth, 1999)

judiciary cannot play a solitary role and there is the need to fashion other ways of ensuring that the entire governance and development setup is structured to make the nation capable, ready and willing to take the required decisions that will ensure the implementation and realisation of SERs. It is against this background that the article suggests a well-coordinated and focused social movement that can provide in Ghana the drive to compel government action even beyond the mere adoption of policies and legislation to their actualization. Modibo Ocran[114] noted that the one of the problems facing the realization of economic and social rights in Ghana is that it subscribe to the dualist view of treaty law application. He argued that domestic law is not the only place to look when searching for SERs as Ghana is a party or signatory to some important and relevant international instruments and there should be an interface between domestic law and international legal instruments. He maintained that there is the constant need to ensure not just the parliamentary ratification of signed treaties, but also their enactment into statutes as annexes, schedules or appendices so that the treaty rights and obligations of Ghanaian citizens will become meaningful.

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[115] Bonolo Ramadi Dinokopila, 'The Judicial Enforcement of Socio-Economic Rights in Botswana', [2013] (57)(1), *Journal of African Law*; 108

[116] J. C. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta & Co, Cape Town, 2004)

[117] G. Devenish, *A Commentary on the South African Bill of Rights* (London: Butterworth, 1999)

economic rights–friendly constitutions in the world. Mubangizi in another article titled "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation''[118] also carried out a comparism of the constitutional provisions on socio-economic rights in African countries including South Africa. He analysed the attitude of the South African judiciary in the protection and enforcement of these rights, presenting that jurisdiction as a beacon of reference for other African countries. Also, Carol C Ngang in his article, 'Judicial enforcement of socioeconomic rights in South Africa and the separation of powers objection: The obligation to take 'other measures'[119], submitted that the framework for constitutional democracy in South Africa assigns to the courts a pivotal role in assuring effective protection and translation of the range of entrenched SERs into material entitlements which has enabled the courts in some instances to exercise considerable authority that has significantly influenced the doctrine of separation of powers to the extent that power relations between the judiciary and the political arms of government have been threatened. He observed that in spite of South Africa's acclaimed global leadership in the enforcement of socio-economic rights, little has actually been accomplished in terms of improving the livelihood for victims of socio-economic deprivation and suggested that the judicial enforcement of socio-economic rights should be seen as a complementary strategy to the political objective of social transformation, rather than as an oppositional force to the proper functioning of government.

2.9 CONCLUSION

The chapter examined the theoretical bases for the jurisprudence of human rights in general with a view to providing a clear understanding of the subject of the study (i.e social and economic

[118] [2006] (2) *Afr. J. Legal Stud;* 1
[119] [2014] 14 *AHRLJ;* 655

rights). This chapter also discussed the concept of social and economic rights as well as its origin. Previous studies carried out by scholars and writers on the subject of this study were also reviewed. From the analysis contained in the chapter, it is opined that the concept of human rights in general, and socio-economic rights in particular, cannot be said to have originated from any particular region or location. The ideas about human rights, including SERs, exist in every society, including African societies as highlighted herein and are expressed in various ways.

CHAPTER THREE

INTERNATIONAL AND REGIONAL NORMATIVE FRAMEWORK ON SOCIO-ECONOMIC RIGHTS

3.1 Introduction

This chapter will focus on the international declarations and treaties as well as regional instruments which form the bedrock of our present day human rights jurisprudence particularly SERs. The chapter takes a look at social and economic rights under the Universal Declaration on Human Rights. The articles of the International Covenant on Economic, Social and Cultural Rights being the primary instrument of SERs will also be annotated under this chapter. Also, the articles of the African Charter on Human and Peoples' Right on SERs are also considered to enable us understand the African jurisprudence as it relates to SERs. The implementation mechanism of SERs on the international and regional level concludes the chapter.

3.2 Socio and Economic Rights under the Universal Declaration on Human Rights

The Universal Declaration on Human Rights which was adopted by the UN General Assembly in 1948, is one of the most important sources of social and economic rights. It was the first international human rights instrument that declared a broad range of social and economic rights which was further improved and set out as binding treaty in the International Covenant on Economic, Social and Cultural Rights.[120] As stated earlier, the UDHR was adopted by the UN in the attempt to confront the atrocities of World War II. Consequently, the UDHR was adopted to

[120] M. Chitra, *Human Rights* (Aph Publishing Corporation, New Delhi, 1996)

counter those violations in an attempt to create mutual relationships among the nations and to encourage them to work for peace in the attainment of human dignity, freedom and equality.[121]

The UDHR guarantees several substantive provisions pertaining to SERs including the right to social security.[122] In elaborating this right, it is notable that although it has received minimum attention, numerous ILO standards provide an interpretation and definition of the right to social security.[123] This right is essential specifically when a person lacks the necessary means such as property or is unable to secure a decent standard of living through work due to either unemployment or disability.[124] Another substantive provision contained in the UDHR includes the right to work provided in Article 23.[125] Other SERs provisions considered under the UDHR are the right to property provided in Article 17,[126] the rights to rest and leisure including reasonable limitation of working hours and periodic holidays with pay[127] and the right to an adequate standard of living including food, housing and medical care.[128] In light of the right to health, Article 25(1)[129] of the UDHR enunciates that "everyone has the right to a standard of living adequate for health and wellbeing of himself and of his family including food, clothing, housing, and medical care and the necessary social services and security in the advent of unemployment, sickness or disability". A correlate right to Article 25 is granted in Article 12 of the ICESCRs which guarantees the most authoritative and comprehensive provision on health at the international level.

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[121] See the Preamble of the UDHR.
[122] Article 22 UDHR
[123] Landis MacKellar and Carla Henry, *The ILO's Strategy to Extend Social Security: An Independent Evaluation Report* (International Labour Office, Geneva, ILO, 2010)
[124] ibid
[125] Article 23 UDHR
[126] Article 17 UDHR
[127] Article 24 UDHR
[128] Article 25 UDHR
[129] Article 25(1) UDHR

However, the UDHR was a declaration and not a strictly legally binding document,[130] which led to the enactment of two separate but interrelated legally-binding instruments.[131] Notably, a unique feature of the UDHR is that since its inception, it has had a significant impact in shaping other treaties protecting human rights at the regional and international level.[132] Similarly, it is noteworthy that although the UDHR is not a legally binding document, it objectives have been adopted as benchmarks in the development of international human rights law and it is now regarded as customary international law.[133]

3.2.1 Bifurcation of UDHR into two separate legal instruments

The desirability for a legally binding document to protect human rights internationally and mechanism for enforcing the UDHR led the United Nations General Assembly (UNGA) to mandate the UN Commission on Human Rights (UNCHR) to draft an instrument for this purpose.[134] Soon after this mandate, there was a dichotomy between civil and political rights on the one hand and economic, social and cultural rights on the other hand as a result of the way these concepts were construed by the dominant ideological worldview at that time.[135]

Initially, the UN General Assembly's decision was to create a single document for civil and political rights together with economic, social and cultural rights[136] but due to the cold war

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[130] See Universal Declaration of Human Rights, adopted by the United Nations General Assembly.GA Res 217 A (III), UN Doc A/810 (10 December 1948) last accessed on 4th May, 2019.

[131] The ICCPR and ICESCR. The two covenants came into force almost ten years later on the 3rd January 1976 and together with the UDHR are referred to as the international bill of human rights

[132] For a further description of the legal significance and influence of the UDHR at international, regional and national levels, see R. E. Asher et al, *The United Nations and the Promotion of the General Welfare* (The Brookings Institution, 1957)

[133] I. Brownie, *Principles of International Law* (7th edn., Oxford University Press, 2008)

[134] D. Lloyd et al, *Introduction to Jurisprudence*, (London: EI.BS. 1998)

[135] M. Chitra, *Human Rights* (Aph Publishing Corporation, New Delhi, 1996)

[136] UN General Assembly Resolution (GAR) 412 (V) of 4 December, 1950.

politics, the General Assembly change its stand in 1952[137] and mandated the Human Rights Commission to separate the UDHR into two international covenants or categories of rights but they should be almost similar as far as possible in their provisions and they should be approved and opened for signature and ratification simultaneously.[138] On 16th December, 1966, both covenants, International Covenants on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were ready for signature and ratification and they entered into force on 3rd Janaury, 1976. The dissertation will narrow its discussions to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in view of the limitation of this study.

3.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCRs) is the principal UN international human rights instrument that was adopted in the attempt to convert the non-legally binding provisions of the UDHR into legally-binding State obligations and it specifically and comprehensively addresses the promotion and protection of SERs. The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by a United Nations General Assembly resolution[139] after almost 20 years of drafting debates. It entered into force on January 3, 1976, a decade later. This Covenant is one of the legs of the tripod on which the International Bill of Rights stands. The other two legs, as earlier stated, are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), including the latter's first and second Optional Protocols. The Covenant is monitored by the UN Committee on Economic, Social and Cultural

[137] GAR 543 (VI) of 5 February, 1952
[138] UN Doc A/2929 (1955) 7, Annotation on the Text of the Draft International Covenant on Human Rights.
[139] UN Gen. Assembly Res. 2200A (XXI) of 16th December, 1966.

Rights. Parties are under a treaty obligation to ensure the protection and implementation of the rights contained in the Covenant.

3.3.1 Annotation of substantive Rights contained in the Covenant

The ICESCR contains six sections, comprising a Preamble and five Parts. The Parts contain 31 articles. The Preamble is worded almost exactly as that of the ICCPR and provides a framework for the interpretation of the rights contained in the Covenant. One very important feature of the Preamble is that it underscores the indivisibility of civil and political rights and ESC rights by stating that man's freedom from want can only be attained in environments made so conducive that everyone can enjoy both the civil and political rights and ESC rights. Part III marks the beginning of the substantive rights outlined in the Covenant.

Article 6[140] provides for the right to work, defined as the opportunity of everyone to gain their living by freely chosen or accepted work.[141] Parties are required to take appropriate steps to safeguard this right, including technical and vocational training and economic policies aimed at steady economic development and ultimately full employment. The right implies states parties must guarantee equal access to employment and protect workers from being unfairly deprived of employment. They must prevent discrimination in the work place and ensure access for the disadvantaged.[142] The fact that work must be freely chosen or accepted means state parties must prohibit forced or child labor.[143] The work referred to in Article 6 must be decent work.[144] This is effectively defined by Article 7 of the Covenant which recognises the right of everyone to just and favourable conditions of work which ensure the following: fair wage and equal remuneration for work of equal value without distinction of

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[140] Article 6 of the ICESCR
[141] Article 6(1) ICESCR.
[142] CESCR General Comment 18: The Right to Work: UN Economic and Social Council, 6th February, 2006.
[143] CESCR General Comment 18; paragraph 23.
[144] CESCR General Comment 18; paragraph 7.

any kind, equal opportunity in the work place; and sufficient rest and leisure, including limited working hours, paid holidays and safe and healthy conditions.

Article 8 recognises the right of workers to form or join trade unions of his/her choice subject only to the rules of the organization concerned for the promotion and protection of his economic and social interests. The Article allows these rights to be restricted for the members of the armed forces, police or government administrators. Several state parties have placed reservations on this clause, allowing it to be interpreted in a manner consistent with their Constitution or extending the restriction of union rights to groups such as firefighters.[145]

Article 9 recognizes the right to social security, including social insurance.[146] It requires parties to provide some form of social insurance scheme to protect people against the risks of sickness, disability, maternity, employment injury, unemployment or old age, to provide for survivors, orphans and those who cannot afford health care and to ensure that families are adequately supported. The problem with social security in almost every country is the interpretation of this provision into Article 2(1) that the state party shall take steps to the maximum of its available resources, with a view to achieving progressively the full realization of these rights. As a result, may states normally rely on no available resources to avoid Article 9.[147] The committee on Economic, Social and Cultural Rights has noted persistent problems with the implementation of this right, with very low level of access.[148]

Article 10 recognizes the right to the protection and assistance that should be accorded to the family as the natural fundamental group unit of society as well as marriage to be entered with the

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[145] UN Treaty Collection: International Covenant on Economic ,Social and Cultural Rights; UN 3 Janaury. 1976.
[146] ICESCR, Article 9.
[147] CESCR General Comment 18; paragraph 7.
[148] ibid

free consent of the intending parties. The Article did not define family because it includes different types of families. The Article places obligation on the state to protect and maintain the mother through developmental policies and to also take special measures to protect children from economic and social exploitation, including setting a minimum age of employment and barring children from dangerous and harmful occupations.[149]

Article 11 recognizes the right of everyone to an adequate standard of living. The Article concern the UN minimum core (i.e food, housing, healthcare and clothing) which is fundamental, basic and binding on the state parties to provide. The right to adequate food is interpreted as requiring 'the availability of food in a quantity and quality sufficient to satisfy the dietary needs of the individuals, free from adverse substances, and acceptable within a given culture'.[150] The right to adequate food also implies a right to water.[151] The right to adequate housing is "the right to live somewhere in security, peace and dignity".[152] It requires "adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost".[153] The right to adequate clothing has not been authoritatively defined and has received little in the way of academic commentary or international discussion. What is considered "adequate" has only been discussed in specific contexts, such as refugees, the disabled, the elderly, or workers.[154]

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[149] Article 10(3) of the ICESCR.
[150] CESCR General Comment 12: The right to adequate food; UN Economic and Social council. Accessed
[151] CESCR General Comment 12: The right to water; UN Economic and Social council.
[152] CESCR General Comment 12: The right to adequate housing'. UN OHCHR 13 December 1991, paragraph 7
[153] ibid
[154] Stephen James, "A Forgotten Right? The Right to Clothing in International Law" A paper presented at The Sixteenth Annual Australian and New Zealand Society of International Law (ANZSIL) Conference: 'Security, Scarcity, Struggle: The Dilemmas of International Law,' Canberra, ACT, Australia, 26–28 June 2008. >https://web.archive.org/web/20140127025739/http://anzsil.anu.edu.au/Conferences/2008/Stephen%20James.pdf<, last accessed on 9th May, 2019.

Article 12 provide for the highest attainable standard of physical health. Health is understood not just as a right to be healthy, but as a right to control one's own health and body (including reproduction), and be free from interference such as torture or medical experimentation.[155] States must protect this right by ensuring that everyone within their jurisdiction has access to the underlying determinants of health, such as clean water, sanitation, food, nutrition and housing, and through a comprehensive system of healthcare, which is available to everyone without discrimination, and economically accessible to all.[156]

Article 12(2) requires parties to take specific steps to improve the health of their citizens, including reducing infant mortality and improving child health, improving environmental and workplace health, preventing, controlling and treating epidemic diseases, and creating conditions to ensure equal and timely access to medical services for all. This Article is subjective or rather relative to available resources of a country to ensure its provisions which renders it unenforceable.

Article 13 recognizes the right of education, especially for the full development of human personality and his/her dignity, respect for human rights and freedom. Education is seen both as a human right and as an indispensable means of realizing other human rights and so this is one of the longest and most important articles of the Covenant.[157] Article 13(2) lists a number of specific steps parties are required to pursue to realise the right of education. These include the provision of free, universal and compulsory primary education, generally available and accessible secondary education in various forms (including technical and vocational training), and equally

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[155] CESCR General Comment 14: The right to the highest attainable standard of health". UN Economic and Social Council. 11 August 2000. pp. paragraph 9.

[156] CESCR General Comment 14, paragraphs 11–12

[157] CESCR General Comment 13: The right to education". UN Economic and Social Council. 8 December 1999. paragraph 1.

accessible higher education. All of these must be available to all without discrimination. Parties must also develop a school system (though it may be public, private, or mixed), encourage or provide scholarships for disadvantaged groups. Parties are required to make education free at all levels, either immediately or progressively.

Article 13(3) and 13(4) require parties to respect the educational freedom of parents by allowing them to choose and establish private educational institutions for their children, also referred to as freedom of education. It also recognises the right of parents to "ensure the religious and moral education of their children in conformity with their own convictions".[158] This is interpreted as requiring public schools to respect the freedom of religion and conscience of their students, and as forbidding instruction in a particular religion or belief system unless non-discriminatory exemptions and alternatives are available.[159]

Article 14 enjoins the state parties who have not taken steps to ensuring free and compulsory primary education to rapidly adopt a detailed plan of action for its introduction to achieve free education for all.

It is noteworthy that several shortcomings of the ICESCR have been identified by some writers[160] which include the claim that the rights therein provided are merely aspirational and programmatic. The obligations imposed on the states are alleged to be subject to progressive realization while those of civil and political rights are of immediate effect. Another shortcoming advanced is that the provisions in the ICESCR are vague and indeterminate.[161] One of the rights

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[158] Article 13(3) ICESCR

[159] CESCR General Comment 13, paragraph 28.

[160] Shedrack Agbakwa, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights', [2002] (5) *Yale Human Rights and Development L. J:* 192

[161] S. I. Nwatu, 'Legal Framework for the Protection of Socioeconomic Rights in Nigeria' [2011-2012] (10), *Nigerian Juridical Review*; 22.

often cited to buttress this argument is the right to adequate standard of living. The questions are often asked; what amounts to adequate standard of living? Who determines the standard or yardstick for the evaluation? Another criticism is that the ICESCR does not have an in-built mechanism for the enforcement of the rights. However, it is humbly opined that these alleged shortcomings are not enough reasons to deny SERs protection and enforcement in view of the fact that civil and political rights are meaningless without the realisation of SERs.

3.3.2 Mechanisms for implementation and enforcement

(a) Periodic Reports to the UN Committee on Economic, Social and Cultural Rights

One of the most important international mechanisms for defending and promoting the provisions of the Covenant is the United Nations Economic and Social Council.[162] By Article 16 (1) of the Covenant, States parties undertake to submit reports on the measures which they have adopted and the progress they have made in achieving the observance of the rights recognized in the Covenant. This function of monitoring compliance is now being performed by the Committee on Economic, Social and Cultural Rights, consisting of 18 independent experts who are experts in the area of human right, elected by the Economic and Social Council. They serve in their personal capacity for four years and not as representatives of governments.[163]

The CESCR overviews five or six reports every year. If a country fails to report, the CESCR may review the situation in that country using alternative sources.[164] After examining a country's report and other sources, the CESCR then releases concluding observations which highlight the progress made in fulfilling ESCR, difficulties in achieving these rights, areas of concern, and

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[162] Art. 16(2) (a), ICESCR.

[163] See >http://en.wikipedia. org/wiki/Internal-Covenant-on-Social-Economic-and-Cultural-Rights< Accessed on 6th May, 2019.

[164] See >https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations< Accessed on 6th May, 2019.

recommendations. CESCR also accepts reports by members of the civil society on the situation of ESCR in their countries as part of the review process.[165] It is here submitted that while the committee's concluding observations, suggestions, and remarks may not be legally binding, they carry the weight of the opinions of the only expert body entrusted with, and capable of, making such pronouncements. Consequently, for state parties to ignore such views, it would be to show bad faith in implementing their covenant-based obligations.

The Committee introduced the preparation of General Comments on the rights and provisions of the Covenant in 1988 as a means of promoting the implementation of the Covenant, by drawing the attention of States parties to insufficiencies disclosed by a large number of States parties' reports, and by inducing renewed attention to particular provisions of the Covenant on the part of States parties, United Nations agencies and others with a view to achieving progressively the full realization of the rights established under the Covenant.[166] These General Comments give further substance to the norms and provisions of the Covenant and provide the much-needed jurisprudence on the content, character, nature and substance of ESC rights as well as the extent of state parties' obligations therein.[167]

(b) The Optional Protocol to the International Covenant on Economic Social and Cultural Rights.

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights OP-ICECR)[168] is an international treaty establishing complaint and inquiry mechanisms for

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[165] ibid

[166] 'Universal Instruments' (United Nations publication, Sales No. E.94.XIV.1). Also available at >https://www.escr-net.org/resources/united-nations-fact-sheet-no16-rev1-committee-economic-social-and-cultural-rights< last accessed on the 6th May, 2019.

[167] There are at least 20 such well-articulated comments adopted and issued by the committee at the present. See ECOSOC Resolution E/RES/1985/17 of 28 May, 1985.

[168] See UN General Assembly Resolution A/RES/63/117.

the International Covenant on Economic, Social and Cultural Rights. It was adopted by the UN General Assembly on 10 December 2008,[169] and opened for signature on 24 September 2009 and on that day, 32 states parties[170] signed the protocol into force. As of October 2018, the Protocol has 45 signatories and 24 state parties. It entered into force on 5 May 2013.[171] The realization of this optional protocol represents a veritable milestone in the history of human rights, bridging a historical gap and making a very strong statement about the equal value and importance of all human rights and the need to strengthen and intensify the struggle for the protection and enforcement of ESC rights.[172]

The Optional Protocol mandates the CESCR to receive and consider communications from individuals or groups of individuals who are victims of the violations of any of the socio-economic rights contained in the ICESCR from State Parties to the ICESCR who have similarly ratified or acceded to the Protocol.[173] For a communication to be admissible under the Optional Protocol, it must meet certain requirements.[174] A decision on the admissibility of a communication is to be made by a simple majority of the members of the CESCR or by a unanimous decision of a working group established by the CESCR under the Rules of Procedure.[175] Like the communication procedures under other treaty monitoring mechanisms, the

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[170] including Argentina, Armenia, Belgium, Bolivia, Chile, Congo, Ecuador, Finland, Gabon, Guinea Bissau, Italy, Luxemburg, Madagascar, Mali, Mongolia, Netherlands, Portugal, Senegal, Slovenia, Spain, Togo, Ukraine and Uruguay. See >http://www.communion lawcenter.org.za/cle-projects/socio- economic-rights/advocacy-monitoring and submissions< last accessed on the 6th May, 2019.

[171] OP-ICESCR, Article 18.

[172] See the press release of the UN General Assembly at its 65th and 66th meeting held on the 10th December, 2008, available at >https://www.un.org/press/en/2008/ga10795.doc.htm<, last accessed on the 6th May, 2019.

[173] OP-ICESCR preambular para 6. Where communications are submitted on behalf of victims of ESCR violations, this must be done with their consent unless other justifications exist. Also see *Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2012) Rule 4.

[174] F. Viljoen and N. Orago, 'An argument for South Africa's accession to the optional protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications'[2014] (17) (6) *AJOL*; 2555.

[175] *Provisional Rules,* Rule 8.

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[171] OP-ICESCR, Article 18.

[172] See the press release of the UN General Assembly at its 65th and 66th meeting held on the 10th December, 2008, available at >https://www.un.org/press/en/2008/ga10795.doc.htm<, last accessed on the 6th May, 2019.

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[174] F. Viljoen and N. Orago, 'An argument for South Africa's accession to the optional protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications'[2014] (17) (6) *AJOL*; 2555.

[175] *Provisional Rules,* Rule 8.

Optional Protocol empowers the CESCR to issue interim measures to avoid possible irreparable damage to victims of socio-economic rights violations,[176] to offer its good offices for the friendly settlement of disputes submitted to it[177], to consider inter-state communications through an opt-in clause[178] and to conduct an inquiry for grave or systematic violations of socio-economic rights by a State Party through an opt-in inquiry procedure.[179]

Further, in noting the importance of resources in the realisation of SERs, the Optional Protocol affirms the importance of international assistance and cooperation, giving the CESCR the mandate to request, with the consent of the specific State Party, technical assistance from relevant UN specialised agencies to the State Party.[180] It also envisages the creation of a trust fund to enhance the realisation of SERs through the building of national capacities.[181] It has been observed by Dennis and Stewart that one of the difficulties in enhancing the justiciability of socio-economic rights at the international level has been the challenge of designing workable criteria and standards of measurement for the judicial or quasi-judicial enforcement of these rights.[182] In their argument opposing the adoption of the Optional Protocol, they contended that States would be reluctant to ratify an Optional Protocol for the international adjudication of SERs unless a clear standard was developed beforehand which indicated the criteria that will be

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[176] OP-ICESCR a 5; *Provisional Rules* Rule 7.
[177] OP-ICESCR a 7; *Provisional Rules* Rule 15.
[178] OP-ICESCR a 10; *Provisional Rules* Rules 36-46 .
[179] OP-ICESCR aa 11-12; *Provisional* Rules Rules 21-35.
[180] OP-ICESCR a 14.
[181] OP-ICESCR a 14(3).
[182] Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?'[2004] (98) *A.J.I.L.*; 462

used to determine whether and to what extent they have violated the provisions of the ICESCR.[183]

In responding to the concerns, the CESCR reiterated its elaboration of the nature of the obligations arising from the ICESCR in its General Comment Number 3, emphasizing the need for State Parties to take concrete, deliberate and targeted steps through all appropriate means, including the enactment of legislation as well as the provision of judicial and other remedies, in order to achieve the progressive realisation of the Covenant rights.[184] It further reiterated the immediate nature of the obligation to take steps, emphasising that the unavailability of resources on its own is an insufficient defence to the total failure to take steps aimed at the realisation of the Covenant rights, and that low-cost measures must be put in place to protect the most marginalised and vulnerable groups where resources are demonstrably inadequate.[185]

It has to be noted that since 1966 when the ICCPR and the ICESCR were adopted, the ICCPR has already had two optional protocols[186] while the ICESCR had been existing without any optional protocol save the protocol under discussion. This situation arose as a product of the second-class position accorded ESC rights in comparison to their civil and political counterparts. Though long overdue, the adoption of this current optional protocol is, therefore, a very welcome momentous development in the history and development of international human rights, in general, and the protection and enforcement of SERs in particular.[187] With this protocol now in place, individuals or groups who claim that any of their socio-economic rights as set forth in the Covenant has been

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[183] ibid.
[184] CESCR Statement para 3.
[185] CESCR Statement para 4
[186] The First Optional Protocol to the ICCPR which was adopted by the UN General Assembly on 16 December, 1966 and entered into force on 23 March. It allows individuals to submit complaints to the Human Rights Committee concerning cases of violation of the rights guaranteed under the Covenant. The Second which aims at the abolition of the death penalty was adopted in 1989 and entered into force on 11 July, 1991.
[187] See >http:/www.right-to-education.org/node/571<. last accessed on 7th May, 2019.

violated, can bring a complaint to the Committee on Economic, Social and Cultural Rights [188] which can then review the said complaint the same way as the traditional court. It is noteworthy that at the time of this research, none of the jurisdictions being appraised in this dissertation had ratified the Protocol.

3.4 The African Charter on Human and Peoples Right (ACHPR)

The African Charter on Human and Peoples' Rights is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. The Charter was adopted at the 18th Assembly of Heads of State and Government of the then Organization of African Unity (OAU) in Nairobi Kenya in 1981, but came into effect on 21 October, 1986 having been ratified by a majority of African states.[189]

The Charter also recognises certain social and economic rights and place considerable emphasis on them. These rights, found in articles 13 and 14 of the Charter[190], include the right to participate in the government of one's country, the right of access to the public services of one's country and the right of access to public property and services. The thrust of this right is an insistence of equal access to the public services of one's country.[191] Article 14 guarantees the right to property, but qualifies this right by sanctioning the limitation of this right in the interest of public need or in the general interest of the community.[192]

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[188] Art. 2, OP-ICESCR

[189] Nigeria, Ghana and South Africa have all ratified the Charter. Nigeria ratified the Charter on 22/6/1983 while Ghana and South Africa ratified the Charter on 24/01/1989 and 09/07/1996 respectively.

[190] African Charter on Human and Peoples' Rights.

[191] Pierre De Vos, 'A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights', (2004) (Volume 8, No. 1) *Ajol*;1-24.

[192] ibid

The classical social and economic rights contained in the Charter include the right to work under equitable and satisfactory conditions, and to equal pay for equal work.[193] The Charter also guarantees the right to health, stating that every individual has the right to enjoy the best attainable state of physical and mental health and obliging states to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick".[194] Article 17 of the Charter guarantees every person's right to education as well as the right to take part in the cultural life of his or her community, while placing a duty on the state to promote and protect "moral and traditional values recognized by the community".[195] The Charter has been criticized for the absence of any express guarantees of the rights of social security, food, an adequate standard of living or housing and prohibition on Forced labour.[196] Article 18 of the Charter places a duty on the state to assist the family, deemed to be the natural unit and basis of society and to eliminate discrimination against women. It also guarantees for the disabled and the aged the right to have special measures of protection in keeping with their needs.

The Charter in accordance with Article 30[197] established the African Commission on Human and Peoples' Rights as a quasi-judicial regional body. The mandate of the Commission is to "promote human and peoples" rights on the African continent[198] and to ensure that the rights guaranteed under the Charter are protected. Following in the footsteps of the Europe and inter-America in their creation of regional human rights institutions, the Commission is the third regional body to be established and is the only quasi-judicial continental institution for the implementation of the African Charter. As one of its principal mandates, the Commission is

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[193] Article 15 of the African Charter on Human and Peoples' Rights.
[194] Article 16 of the African Charter on Human and Peoples' Rights.
[195] Article 17 of the African Charter on Human and Peoples' Rights.
[196] Joe Oloka-Onyango, 'Beyond the Rhetoric Reinvigorating the Struggle for Economic and Social Rights in Africa' [1995] (26) *California Women's International Law Journal;* 1
[197] Art.30 of the African Charter on Human and Peoples' Rights.
[198] Art.45 of the African Charter on Human and Peoples' Rights.

empowered to provide an interpretation of the provisions of the Charter and to carry out any other duties that might be assigned to it by the AU Assembly.[199]

The interpretation of the Charter and the performance of any other tasks are aimed at complementing the promotional and the protective mandates of the Commission. In addition to providing interpretative opinions, the Commission is authorized to deal with inter-state and individual complaints and to monitor the rights enshrined under the Charter by receiving and examining state reports.[200] Through its promotional role, the Commission discharges its duties by promoting human rights, disseminating information on human rights issues, organizing seminars, carrying out research and studies and encouraging and assisting National Human Rights Commissions (NHRCs).[201] The Commission holds two ordinary sessions as required. These sessions are usually attended by Member States, national liberation movements, special institutions and NGOs with Observer status. Notably, one state will notify another of a violation after which either will have up to three months to notify the Commission for consideration. Further, the Commission will review a compliant only if local remedies have been exhausted or if it involves a case that has been unduly delayed in domestic courts.

With regard to complaints, it is notable that the powers of the Commission to deal with inter-state and individual complaints are much more limited than those conferred by the European and inter-American instruments. Arguably, this is partly because its findings with regard to the communications it receives cannot be made public without the consent of the AU's Assembly of Heads of State and Government, (AHSG). The Commission's power to deal with individual

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[199] Art. 45(3) African Charter on Human and Peoples' Rights.

[200] E. A. Ankumah, *The African Commission on Human and Peoples Rights: Practice and Procedures* (The Hague Martinus Nijhoff Publishers, 1996)

[201] N. Udombana, 'Toward the African Court of Human and People's Rights: Better Late than Never'. [2002] (3) *Yale Human Rights and Development Law Journal* ;45

petitions is limited furthermore, to 'cases which reveal the existence of a series of serious or massive violations of human and peoples' rights.'[202]

On the other hand, the Commission is also empowered to render interpretative opinions. Towards this end, State parties, the AU, and inter-governmental African organizations recognized by the Commission may request advisory opinions from the Commission regarding the interpretation of the Charter.[203] These advisory powers acquire special significance in light of two Charter provisions notably Articles 60 and 61.[204] These radical provisions have provided the Commission with an expansive interpretative tool in ensuring that its interpretations of the Charter are consistent with developments in the field of international human rights law in general. Through its jurisprudence, the Commission has progressively relied on these unique provisions with a view to strengthening the normative content of the African Charter.[205]

The Charter's provisions should therefore not be understood in isolation but must be interpreted as forming part of human rights protection as espoused by international and regional human rights instruments. When interpreting the SERs provisions of the Charter, the interpretation given to them by the Commission will be of paramount importance.

3.5 Implementation mechanisms of the Rights under the ACHPR

The Commission fulfills its mandate in a number of several distinctive ways. These implementation mechanisms shall be discussed in the section below.

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[202] Art. 58(1) African Charter
[203] Art. 45 of the African Charter.
[204] Art.60 & 61 African Charter
[205] F. Viljoen, 'The African Charter on Humana and Peoples' Rights: The Travaux Prepara-toires in the Light of Its subsequent Practice' [2004] (25) (9-12) *Human Rights Law Journal;* 313

3.5.1 State Party Reports

The African Commission monitors the implementation of the Charter through state periodic reports which are examined during ordinary sessions. In accordance with Article 62, State parties to the Charter[206] are required to submit periodic reports in the attempt to show policy and legislative measures undertaken by States to give effect to the Charter. However, although the state reporting procedure has become the cornerstone of the Commissions' monitoring mechanism[207], the system has been fraught with several obstacles that have hindered its effective realization. Much like other regional systems, a major impediment that hampers its effectiveness is the ardent failure of member states to submit their state reports on time.[208]

Another significant impediment is that even when States do submit their reports, they barely send competent representatives to present these reports.[209] This scenario coupled with the low level of understanding of SERs has retarded the realization of these rights in Africa. A third obstacle is that the Commission lacks an effective follow-up mechanism of its recommendations as there is no clear definitive procedure to ensure or monitor what the affected state does with the recommendations.[210]

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[206] Art. 62 African Charter.

[207] See Badawi El-Sheikh I. A., 'The African Commission on Human and Peoples' Rights: Prospects and problem' [1989] (7) *Netherlands Quarterly of Human Rights;* 272

[208] See the status of submission of state initial/periodic reports to the African Commission on Human and Peoples' Rights available at >http://www.achpr.org/english/_info/statereport_considered_en.html< last accessed on the 7th May, 2019.

[209] F. Viljoen, 'The African Charter on Humana and Peoples' Rights: The Travaux Prepara-toires in the Light of Its subsequent Practice' [2004] (25) (9-12) *Human Rights Law Journal;* 313

[210] See the Final communiqué of the 28th ordinary session of the African Commission on Human and Peoples' Rights' 23 October - 6 November 2000, Cotonou, Benin, Available at >http://www.africaninstitute.org/html/28th_session.html < (last accessed on 7th May, 2019).

On the contrary, some scholars[211] have noted that the reporting system has more advantages than disadvantages. As one of its advantages, Viljoen and Heyns[212] argued that because the preparation of a State report requires intergovernmental contact between the concerned ministries or departments, it widens the scope of governmental bodies concerned with ways of improving the human rights situation in the country. Thus, it reduces the possibility of the embarrassing questioning of government practices in the international arena. In fact, African countries experience difficulties in complying with the reporting deadlines, guidelines regarding the quality of reports, and the implementation of the African Commission's findings, as well as those of other international bodies. The reporting process does not always function in the way it was intended. As observed by Alston,

> It is one thing to insist that respect for basic human rights cannot be contingent upon per capita gross national product (GNP), or any other comparable economic indicator; it is quite another to demand that poor countries will be able and willing to devote the same level of resources to reporting and complaints procedures as some developed States with strong internal human rights constituencies.[213]

3.5.2 Fact-findings/Locus inquo or On-site visits.

Fact-findings and on-site visits is a component of the protective mandate of the ACHPR.[214] As observed by Ramcharan,

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[211] Heyns C. and Viljoen F., 'Regional Protection of Human Rights in Africa: An Overview and Evaluation' in Zeleza P.T. and McConnaughay P.J. (eds.), *Human Rights, The Rule of Law and Development in Africa* (University of Pennsylvania Press, 2004)

[212] ibid

[213] P. Alston, Beyond Them and Us: Putting Treaty Body Reform into Perspective' in Alston P. and Crawford J. (eds.), *The Future of United Nations Treaty Monitoring* (Cambridge University Press, 2000)

[214] See Article 30 of the African Charter which confers on the ACHPR the mandate to 'promote human and peoples' rights and ensure there is some protection in Africa'.

> Fact-findings is in the heart of human rights activity. The prescription of human rights norms implies an understanding of the needs to be addressed, which in turn requires an appreciation of the factual conditions. The application and supervision of human rights norms do not take place in *abstracto* but in relation to specific circumstances and situations. This also requires an awareness of the factual conditions. Claims that human rights are, or are not being respected, or are being violated, turn essentially on question of facts.[215]

This involves visit and gathering information about alleged human right violation particularly in the state where the violation occurred to enable the Committee avail themselves with primary evidence and to assess the situation, as well as interact with government officials, other nationals and NGOs.[216] According to Motala[217], NGOs have gone a long way in ensuring that the Commission is apprised of the accurate human rights situation in a given state. The ACHPR allows these NGOs audience wherein they virtually motivate their reports and disagree with government delegates to the benefit of the ACHPR. This is a safety measure to minimum bias, intentional misdirection or diffused reporting by some states.[218] The contribution of NGOs towards assisting the Committee in fact-findings is so fundamental that they are given eminence in the system. Statistics reveal that the ACHPR had granted observer status to NGOs in excess of 240 who always play a pivotal role in the dialogue between the ACHPR and the member states.[219]

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[215] Weissbrodt, D. S. and McCarthy J., 'Fact-findings by Nongovernmental Organizations' in B. G. Ramcharan (ed), *International Law and Fact-finding in the field of Human Rights*(Martinus Nijhoff Publishers, 1982)

[216] S. Ibe, 'Implementing economic, social and cultural rights in Nigeria: challenges and oppurtunities' [2010] (1) *AHLJ*;197

[217] A. Motala,'Non-governmental Organisations in the African System' in R Murray & M Evans (eds), *The African Charter on Human and Peoples' Rights: The system in practice* (Cambridge University Press, 2002) 246 - 279

[218] ibid

[219] ibid

3.5.3 Treaty body's rapporteur

The office and mandate of Rapporteurs is one of the recent human rights protection and promotion mechanisms in human rights system[220] including the ACHPR. Rapporteur is a title given to individuals working on behalf of various regional and international organizations who bear specific mandates to investigate, monitor and recommend solutions to specific human rights problems.[221] The Commission appoints rapporteurs either by a consensus or by a vote.[222] ACHPR has Rapporteurs thematic areas such as on extra-judicial, summary and arbitrary executions,[223] on prisons and condition of detention[224] and on the rights of women in Africa.[225] The Rapporteur undertakes a number of duties, including evaluating States' domestic laws and their compliance with international standards, conducting visits to member States and studying relevant human rights conditions or situations, submit report on the situation of defenders in Africa at every Ordinary Session of the African Commission.[226]

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[220] Surya P. Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' [2011] (33) (1) *Human Rights Quarterly;* 201

[221] See >https://en.wikipedia.org/wiki/Special_rapporteur< , last accessed on the 8th May, 2019

[222] See ACommHPR, Rules of Procedure of the African Commission on Human and Peoples' Rights, 2010, Rule 23(2)

[223] Appointed at the 15th Session of the ACHPR as a result of the genocide in Rwanda.

[224] Appointed at the 20th Session of the ACHPR in October, 1996 following serious lobbying by NGOs and in particular, the *Penal Reform International* based in Paris. Part of the mandate was to conduct examination (on-site investigation) of prisons in African countries.

[225] The Working Group on indigenous Populations/Communities in Africa visited Botswana prior to the compilation of a detailed report called Report on the *ACHPR's Working Group on the indigenous Populations/Communities* pursuant to the '*Resolution on the Rights of indigenous Populations/Communities in Africa'*, adopted during the 26th Session of the ACHPR.

[226] See >https://ijrcenter.org/regional/african/special-rapporteur-on-refugees-asylum-seekers-migrants-and-internally-displaced-persons/< which contains report on Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, last accessed on the 8th May, 2019.

3.6 Conclusion

This chapter analysed SERs under international and regional instruments in order to create a foundation for the examination of their enforcement in the jurisdictions selected for this study. It is submitted that there exist general normative standards under international human rights law which sets the standard to be followed at the national level for the enforcement of SERs. Having identified the principal international and regional instruments on SERs, the subsequent chapter will focus on the constitution of each of the selected jurisdiction in order to examine their experience on the enforcement of SERs.

CHAPTER FOUR
ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN NIGERIA, GHANA AND SOUTH AFRICA

4.1 Introduction

Despite the existence of controversies apropos the justiciability of SERS, they are integrated in domestic legal instruments. The inclusion of SERs in domestic legal instruments has a paramount importance in boosting their justiciability before the judicial or quasi-judicial bodies. Hence, understanding the protection accorded to socio-economic rights in the jurisdictions under this study is as vital as clarifying their justifiability as it is a precondition for the latter. Thus, this chapter addresses the protection of socio-economic rights as well as their implementation/enforcement in the three selected jurisdictions, i.e Nigeria, Ghana and South Africa. Furthermore, the chapter will also carry out an evaluation of the experience of each of the three selected jurisdiction in order to bring out the progress achieved in the implementation/enforcement of SERs. The challenges impeding the enforcement of SERs in Africa will be discussed which will be followed with a conclusion.

4.2 Brief Annotation of SERs provisions under Chapter Two of the 1999 Nigerian Constitution

Social and Economic Rights are contained in Chapter Two of the 1999 Nigerian Constitution[227]. The Chapter which is captioned 'Fundamental Objectives and Directive Principles of State Policy'[228] sets out the political, economic, social, educational, foreign policy and environmental objectives of Nigeria.[229] It also outlines the national ethics, obligations of the mass media,

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[227] Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[228] Sections 13-21, Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[229] Samuel I. Nwatu, 'Legal Framework for the protection of Socio-Economic Rights in Nigeria' (2011-2012) (Vol. 10) *Nig. J. R.*;2

directives on Nigerian culture and the duties of the Nigerian citizen.[230] Section 13 of the Constitution[231] imposes obligation and responsibility on the organs of government to conform, observe and apply the provisions of Chapter Two of the Constitution. In other words, Chapter Two is meant to guide the affairs of the government in the formulation of policies.

Section 16 of the Constitution declares the economic objectives of the government. The government shall control the national economy in such a manner as to secure maximum welfare, freedom and happiness of every citizen. It shall also direct its policy towards ensuring that suitable and adequate shelter; suitable and adequate food; reasonable national minimum living wage, old age care pensions, sick benefit and welfare of the disabled are provided for all citizens amongst others. In a nutshell, the provision states the responsibilities of the Government towards national prosperity.

The social objectives are in section 17 of the Constitution. It states that Nigeria is founded on the ideals of freedom, equality and justice. The state shall also direct its policy towards ensuring inter alia that all citizens without discrimination have the opportunity to secure adequate means of livelihood as well as adequate opportunity to secure suitable employment and there are adequate medical and health facilities for all persons.

4.2.1 The status of SERs under the 1999 Nigerian Constitution

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides for socio-economic rights in form of 'fundamental objectives and directive principles of state policy'[232]. According to Olowu[233], the fundamental objectives and directive principles were essentially a set

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[230] ibid
[231] Constitution of the Federal Republic of Nigeria,1999 (as amended).
[232] Section 16-18 of the 1999 Constitution
[233] Dejo Olowu, *An integrative rights-based approach to human development in Africa* (PULP, 2009)

of guidelines designed to secure the national targets of social wee-being, social justice, political stability and economic growth in accordance with the espoused vision of the preamble of the Constitution.

Olowu went further to submit that while these fundamental objectives which contained SERs could have passed as one of the most innovative dimensions in the history of constitution making in Nigeria, they are prone to becoming worthless platitudes[234] as Chapter II of the Nigerian Constitution which houses socio-economic rights has its tragedy in section 6(6)(c) of the Constitution which provides thus:

> 6 (6) The judicial powers vested in accordance with the foregoing provisions of this section;
>
> (a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law;
>
> (b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that persons;
>
> (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.

[234] ibid

Thus, by virtue of section 6(6)(c), Chapter Two of the 1999 Nigerian Constitution which makes provisions for socio-economic rights is enfeebled as it is rendered non-justiciable. It has been noted that this has resulted in the 'dislocation of the foundation of the whole edifice of the Nigerian nation-state'.[235]

The non-justiciability of the directive principles and by implication SERs in Nigeria has since been debated by academics.[236] I. F. Omotosho[237] maintains the view that the rights as well as objectives stated in Chapter Two are values, aims, ideals of the nation. He submitted that to campaign for their justiciability is to misrepresent or misunderstand what they are - values, what the people consider important and fundamental. He further maintained that individuals and Government's performance should be measured and evaluated on the basis of these moral, social, political and economic values. To the scholar, their non-justifiability does not make the ideals and rights unachievable and unimportant.[238] To Ikpeze, the non-justiciability of Chapter Two which contains SERs is a formidable impediment to socio-economic development.[239] He further submitted that any of the provisions of the 1999 Nigerian Constitution especially as relating to economic and social rights that is not justiciable is undesirous and recommended that Chapter Two of the 1999 Nigerian Constitution should be amended and made justiciable in order to make

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[235] Nwuta Samuel I., 'Legal Framework for the Protection of Socioeconomic Rights in Nigeria' [2011-2012] (10), *Nigerian Juridical Review*; 22.

[236] Henry Alisigwe, 'Towards the Justiciability of Chapter Two of the 1999 Constitution', [2010] (3)(1) *Journal of Public Law and Constitutional Practice*; 39-49; MOA Alabi, 'Fundamental Objectives and Directive Principles of State Policy' [2006] *The Jurists*; 77

[237] I. F. Omotosho, 'Fundamental Objectives and Directive Principles of State Policy of Nigeria' [2018] (6)(6) *Global Educational Research Journal*; 768

[238] ibid

[239] Oguagua Ikpeze, 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' [201] (15) (18) *Developing Country Studies*; 48

government accountable to the people which amendment will ensure good governance and sustainable development which is the goal of any democratic government.[240]

This study shares the view that an amendment of Chapter Two of the 1999 Nigerian Constitution from non-justiciable to justiciable status is necessary as Nigeria is a country blessed with enormous human and natural resources. However, these resources are not been harnessed to enhance the quality of life of its citizens as a few individuals sit on the wealth of the nation and command the country's economy which when combined with the governmental corruption perpetuates the circle of 'want' in which a majority of the Nigerian populace wallow in.[241] Therefore, proactive measures such as making SERs justiciable will ensure an even distribution of the nation's resources towards national development. What is more, the trend worldwide is towards justiciability of social and economic rights.[242] Also, the fact that some African countries[243] have provisions in their constitutions which protects the socio-economic rights of their citizens and renders these rights justiciable before their national courts has made it necessary to advocate for the justiciability of SERs in Nigeria.

It has been observed that the national courts have always remained pessimists in the protection and enforcement of socio-economic rights in Nigeria.[244] They are never ready to take proactive approach to the comprehensive interpretation of or attempt a reconstruction of the directive principles giving contents to the rights, and behaving true to their positivists' conservatism of not

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[240] ibid

[241] O. A. Savage-Oyekunle, 'Socio-Economic Rights and their justiciablity in Nigeria' [2015] (1) *IJFR;* 187

[242] M. Scheinin, 'Economic and social rights as legal rights' in A. Eide et al (eds), *Economic, Social and Cultural Rights* (2nd edn, M. Nijhoff Publishers, 2001) 55-60.

[243] such as South Africa and Angola.

[244] Ajepe Taiwo Shehu, 'The Enforcement of Social and Economic Rights in Africa: The Nigerian experience' [2013] (2)(1), *Afe Babalola University Journal of Sustainable Development Law and Policy;* 101

government accountable to the people which amendment will ensure good governance and sustainable development which is the goal of any democratic government.[240]

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[240] ibid

[241] O. A. Savage-Oyekunle, 'Socio-Economic Rights and their justiciablity in Nigeria' [2015] (1) *IJFR;* 187

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seeing beyond the plain words of the provisions.[245] Hence, this study will now shift focus to the attitude of the judiciary towards the protection and enforcement of socio-economic rights in Nigeria.

4.2.2 Judicial attitude to the enforcement of SERs in Nigeria

The judicial attitude to SERs litigation in Nigeria is characterized by great caution and subtle passivity. The Court of Appeal had the first opportunity to define judicial attitude to SERs claims in *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State.*[246] The Plaintiffs in this case brought an action before the court challenging the Lagos State's Government decision to abolish the operation of private schools in the state in pursuit of the educational objectives of ensuring equal and adequate educational facilities at all level under Section 18(1) of the then 1979 Constitution. The plaintiffs challenged the circular as unconstitutional. They applied, under the relevant provisions of the 1979 Constitution, for reference to the Federal Court of Appeal of, inter alia, the question:

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

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

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[245] ibid
[246] [1981] 2 NCLR 350

In his decision, Justice Mamman Nasir (of blessed memory) set out the rationale for Directive Principles and State Policies. He observed that the Directive Principles and State Policies aim to identify the ultimate objectives of the nation and lay down the policies which are expected to be pursued in the nation's quest to realise its objectives. He concluded thus

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

Clarifying the ambiguity as to the precise role of the judiciary, he expressed the view that

> ...the obligation of the judiciary to observe the provisions of chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the chapter are observed . . .[247]

The court made it clear that 'the arbiter for any breach of and guardian of the fundamental objectives . . . is the legislature itself or the electorate',[248] as it is clear from the provisions of section 4(2) and item 59(a) of the Exclusive Legislative List in the Second Schedule to the Constitution[249] that the National Assembly 'has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter II of the Constitution'.[250] Until such authorities are established, it will be 'mere speculation to say which functions they may perform

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[247] Okogie (n 246) 350, paras 1 – 2.
[248] Ibid, paras 7- 8
[249] 1979 Constitution, with equivalent provisions in the 1999 Constitution.
[250] Okogie (n 246) para 1

or in which way they may be able to enforce the provisions of chapter II'.[251] This position was also maintained by the Court of Appeal in the case of *Badejo v. Federal Minister of Education*[252] where it was held that the right to education was not a justiciable right under the 1979 Nigerian Constitution.[253]

The reasoning that the provisions of Chapter Two can be made justiciable through appropriate legislation was again reiterated in *Attorney General of Ondo State v. Attorney General of the Federation & Ors.*[254] where the Supreme Court while affirming the non-justiciability of SERs also held that the provisions of the Fundamental Objectives and Directive Principles of State Policy can be enforced through the promulgation of appropriate legislations. In this case, the court in emphasis affirmed thus

> ...to ensure that the Directive Principles are not a dead letter, whatever is necessary should be 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 of Chapter Two of our Constitution. The Constitution itself 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

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[251] ibid
[252] [1990] LRC (Const.) 735
[253] Section 6 (6)(c) of the 1979 Constitution is the same as Section 6 (6)(c) of the 1979 Constitution of the 1999 Constitution
[254] [2002] 6 SC (PT. 11) 179

the National Assembly, working together; to give expression to anyone of them through appropriate enactment as occasion may demand.[255]

Mowoe[256] argues that this Supreme Court decision makes nonsense of section 6(6)(c) of the Constitution in relation to the non- justiciability of Chapter Two and that the power of the National Assembly to legislate with respect to item 60(a) of the exclusive legislative list is limited to the "establishment and regulation of authorities for the Federation or any part thereof in order to promote and enforce the observance of the Fundamental Objectives and Directive Principles". Thus the phrase "enforce the observance" of the provision of Chapter II 'is probably to be achieved not just through such established authorities but also through the investigative and other regulatory powers of the National Assembly'.[257]

It is easy to understand the attitude towards SERs litigation after a careful review of the *Okogie* case. Besides the fact that the Constitution makes express provisions against entertaining such cases, there is also the challenge of precedent. Nigeria's legal system is based upon a system of judicial precedence. Consequently, High Courts to which disputes arising out of violations of Chapters Two and Four must be instituted at the first instance are obliged to respect the decision of the Court of Appeal until either the Court of Appeal itself or the Supreme Court varies or annuls that decision.

On the attitude of the Nigerian judiciary towards the enforcement of SERs as contained under African Charter on Human and Peoples' Right, it has been observed that the Charter which is incorporated into Nigerian law was subjected to rigorous interpretation by courts in a most

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[255] ibid
[256] K.K. Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Ltd, 2008)
[257] ibid

courageous manner.[258] The courts adopted an attitude of according the Charter primacy over military decrees.[259] The judicial approach of according the African Charter primacy over other municipal laws was expanded by the Court of Appeal in *Fawehinmi v. Abacha*[260]. One of the issues raised for determination by the Court of Appeal in the case was the effect of incorporating the African Charter into municipal law. It was held that the African Charter is *sui generis*, a legislation with international flavour, and as such no government will be allowed to contract out by local legislation its international obligations. Indeed, Pats-Achalonu, JCA pontificated that:

> by not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal.[261]

This decision was greeted with praise and ululation within the human rights community.[262] However, it took the timely intervention of the Supreme Court in the same case when it went on appeal[263] to correct a jurisprudential anomaly as the Nigerian legal system does not admit of any dichotomy or superiority complex in respect of Acts made or deemed to be made by the National Assembly. These cases deal with violations of some of the liberty oriented rights under the Charter. What is not clear is the extent to which the decisions of the courts would have been

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[258] See African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. 10 LFN, 1990, now Cap A9 Vol. 1 LFN, 2004.

[259] See for instance, *Opayemi Bamidele & Ors v. Professor Grace Alele Williams and the University* of *Benin*, Unreported Suit No. 13/6m/89 (Benin); *The Registered Trustees of the Constitutional Rights Project (CRP) v. The President of the Federal Republic of Nigeria & 2 Ors* , Suit No. M/102/93 (Lagos); *Oshevire v. British Caledonian Airways Ltd.* [1990] 7 NWLR (Pt 163) 489.

[260] [1996] 9 NWLR (Pt. 375) 710.

[261] *Ibid.*, at p. 758.

[262] S. Amadi, 'African Charter on Human and Peoples' Rights and the Judicial Protection of ECS Rights in Nigeria' [1998] (2)(2) *Shelter Rights Initiative*; p.11

[263] *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660), 228.

affected if it were a socio-economic right that was in issue.[264] The closest the court came to answering this question was in *Ogugu v. The State*,[265] where the Supreme Court held that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[266] was applicable and enforceable in Nigeria in the same manner and through the same procedure as any other law. This clearly gives the impression that any category of rights under the Charter is enforceable by the Courts.

4.3 Evaluation of the Nigerian Experience

From the foregoing analysis, one can safely assert that with respect to the enforcement of SERs, the Nigerian experience leaves much to be desired and the reasons are not far-fetched. Firstly, these rights are rendered unjusticiable by virtue of Section 6(6)(c) of the 1999 Nigerian Constitution which seemingly ousts courts' adjudicatory powers over Chapter Two thereby relegating socio-economic rights to political policies, economic goals and social wishes to be attained progressively in the future.[267] Hence, these rights remain a mirage to the citizenry. It is noteworthy that civil and political rights which are justiciable under Chapter Four of the 1999 Nigerian Constitution have elements of socio-economic rights contained in Chapter Two of the same Constitution. For example, there cannot be 'right to life' without ancillary rights to access to food, clean water and good environment. Also, there cannot be 'right to human dignity' without corresponding rights to education and employment. As aptly opined by Professor Osita Eze, 'to the extent that SERs

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[264] U. O. Umozurike, 'The African Charter and Nations Laws: The Issue of Supremacy' in C.C. Nweze and O. Nwankwo (eds.), *Current Themes in the Domestication of Human Rights Norms* (Fourth Dimension Publishing Co. Ltd, 2003). Professor U. O. Umozurike argues that this problem stems from the *holus bolus* incorporation of the Charter into the law. He is of the view that it would have been better to rely on the Constitution as already incorporating civil and political rights, and that a resort to 'other measures' such as disseminating the knowledge in civics and in education would have been enough to satisfy our obligations in Article 1 of the Charter.

[265] [1994] 9 NWLR (Pt. 366) 1

[266] Cap. A9 Laws of the Federation of Nigeria, 2004

[267] The courage and ingenuity of Nigerian courts in using global human rights legal resources to shape governmental policy, decisions and actions have been extolled. See O.C. Okafor, "On the Patchiness, Promise and Perils of "Global" Human Rights Law" *NIALS Diaspora Scholars Lecture*, 2011, pp. 19-21.

are not guaranteed, then to that extent will civil and political rights remain palliatives for the masses.'[268] Unfortunately, the integrative approach to enforcing SERs is yet unknown to Nigeria's jurisprudence owing to the attitude of treating civil and political rights separately from SERs, instead of adopting the global standard of indivisibility, interdependent and interrelatedness of human rights.[269]

Secondly, judicial attitude to socio-economic rights claims remains cautious in Nigeria. The approach usually adopted by the Nigerian courts wherein SERs are simply declared non-justiciable or stating that nothing can be done except appropriate legislation is passed is not progressive or in line with current trends and is a fundamental departure from the current Indian jurisprudence from which Nigeria adopted the principle of non-justiciable directive principle. The Indian courts have applied the integrative approach in ensuring that violations of SERs are remedied through reference to their interrelatedness with civil and political rights. In the words of Bhagwati,

> What the Court did was to bring about a revolution in the judicial process. The Court expanded the frontiers of fundamental rights and natural justice and in the process rewrote some parts of the Constitution. The right to life and personal liberty enshrined in Article 21 of the Indian Constitution was converted *de facto* and *de jure* into procedural due process clause contrary to the intention of the makers of the Constitution. This expanding right was construed, through a process of judicial interpretation to encompass the right to bail, the right to speedy trial, the right to dignified treatment in custodial institutions, the right to legal aid in

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[268] Osita Eze, 'Human Right Issues and Violations: The African Experience', in George W. Shepherd Jnr & Mark O. C. Anikpo (eds), *Emerging Human Rights: The African Political Economy Context* (Westport Connecticut: Greenwood Press, 1990)

[269] Vienna Declaration and Programme of Action UN Doc. A/cone 157 12th July, 1993, para. 5.

> criminal proceedings, the right to live with basic human dignity, the right to livelihood, and above all, the right to a healthy environment. The Supreme Court developed a new normative regime of rights insisting that the State cannot act arbitrarily but instead, must act reasonably and in public interest on pain of its action being invalidated by judicial intervention.[270]

Thus, the Nigerian courts must begin to interpret the constitution with a view to securing a concrete basis for the justiciability of SERs. In other words, the attitude of our courts should demonstrate a preparedness to, as the courts in India have done, through progressive interpretation utilize the justiciable and enforceable provisions of chapter four to make chapter two enforceable. Perhaps this could act as the elixir to rouse the executive and legislative arms of government from their apathetic attitude to socio-economic rights.

4.4 SERs under the 1992 Constitution of Ghana

The 1992 Ghanaian Constitution recognizes SERs in its Bill of Rights and Directive Principles provided in chapter 5 and 6 of the Ghanaian Constitution respectively. In Chapter Five which contains Fundamental Human Rights and Freedoms (FHRFs) classically referred to as civil and political rights, SERs included are the right to work[271] and the right to education.[272] Chapter Six of the 1992 Ghanaian Constitution captioned 'Directive Principles of Social Policy (DPSPs)' predominantly contains SERs and is divided into political objectives, economic objectives, social objectives, educational objectives, cultural objectives, international relations objectives and duties of citizen. The introductory provision of Chapter 6 of the 1992 Ghanaian Constitution

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[270] P. N. Bhagwati; 'The Role of the Judiciary in the Democratic Process; Balancing Activism and Judicial Restraint' [1992] (2)(3) *JHRPL*;14

[271] Constitution of the Republic Ghana (Amended Act) 1996, s. 24

[272] ibid, s. 25

states, *inter alia*, that the provisions of the chapter shall 'guide' citizens and all branches of the government 'in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.'[273]

Under the 1992 Ghanaian Constitution, the economic objectives require the state to take 'all necessary action' to manage the national economy so as 'to maximise the rate of economic development' and 'secure maximum welfare, freedom and happiness of every person.[274] More specifically, the state is required to take steps to establish a 'sound and healthy economy', promote the development of agriculture and industry, encourage foreign investment, and safeguard the national environment for posterity.[275] In addition to these general obligations, Article 37 imposes certain specific rights and related obligations. These include the duty to afford equality of economic opportunity to all citizens, to guarantee the ownership of property and the right of inheritance[276], to safeguard the health, safety and welfare of all persons in employment,[277] and to encourage the participation of workers in decision-making at work place[278].

Social objectives are contained in Article 37 of the Constitution. According to Article 37(1), the state 'shall endavour to secure and protect a social order founded on the ideals and principle of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of the Constitution'. Article 37(2) requires the state to enact laws to assure the enjoyment of the right to participate effectively in development processes, and to protect and promote 'all other basic human right and freedoms' including the rights of the disabled, the aged, children and other

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[273] Article 34 (1) of the 1992 Ghanaian Constitution.
[274] ibid, Article 36(1).
[275] ibid, Article 36(2).
[276] ibid, Article 36(7).
[277] ibid, Article 36(10).
[278] ibid , Article 36(11).

vulnerable groups. Article 37(6) is particularly noteworthy as it states that the state 'shall ensure that contributory schemes are instituted and maintained that will guarantee economic security for the self-employed and other citizens' and that the state 'shall provide social assistance to the aged such as will enable them maintain a decent standard of living'. These two provisions relates to aspects of the right to social security.

4.4.1 The status of SERs under the 1992 Constitution of Ghana

Under the 1992 Ghanaian Constitution, the status of SERs with respect to their justiciability or otherwise was, and could still be said to be subject of some uncertainty.[279] Turning on the uncertainty and controversy has been the introductory provision of Chapter 6 which states, *inter alia*, that the provisions of the chapter 'shall guide all citizens, Parliament, the President, the Judiciary . . . in applying or interpreting this Constitution . . . for the establishment of a just and free society.'[280]

It is argued that the provisions in Chapter 6 are merely guiding principles and not of themselves enforceable by the courts.[281] The counter argument is, 'if they are merely guiding principles of interpretation and action, one wonders why all the subsequent substantive articles in Chapter 6, such as Articles 35 through 41, are couched in the normally mandatory language of "shall" rather than "shall endavour to" or "is expected to." [282] In fact, the Ghanaian Supreme Court has held

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[279] N. T. Okyir, 'Toward a Progressive Realisation of Socio-Economic Rights In Ghana: A Socio-Legal Analysis [2017] (25) (1) *African Journal of International and Comparative Law;* 91

[280] Article 34(1) of the 1992 Ghanaian Constitution.

[281] See opinion of Bamford-Addo JSC, in the CIBA case (1996–97) SCGLR 378.

[282] See Justice Professor Modibo Ocran, Former Justice of the Supreme Court of Ghana, and Emeritus Professor of Law, University of Akron School of Law, Keynote Address at the Loyola University Chicago International Law Review Symposium: *The Rule of Law and Delivering Justice in Africa* (15 February 2007).

that the directive principles have a presumption of justiciability.[283] Without further ado, it is imperative to examine the decisions of the Ghanaian Courts in relation to socio-economic rights.

4.4.2 The courts of Ghana and SERs

The Supreme Court of Ghana has, in three landmark judgments, attempted to provide clarity on the justiciability of Chapter 6 which contained SERs. First was the case of *New Patriotic Party (NPP)* v. *Attorney-General*[284] (also known as the 31st December case). In this case, the New Patriotic Party (NPP) brought an action under Article 2(1) of the 1992 Ghanaian Constitution against the Attorney-General for a declaration that the public celebration of the coup d'etat of 31st December 1981 out of public funds was inconsistent with or in contravention of the letter and spirit of the Constitution particularly Articles 3(3) - (7), 35(1) and 41(f) and an order compelling the government to cancel the preparations for the celebration and refrain from carrying out the celebration with public funds. In his defence on the other hand, the Defendant submitted *inter alia*, that the Directive Principle of State Policy contained in Chapter 6 of the Constitution, 1992 were not justiciable and therefore Articles 35 and 41 which were part of the principles could not ground a cause of action.

One of the issues the Supreme Court had to resolve therefore was whether or not the Directive Principles of State Policy contained in the 1992 Constitution of Ghana were justiciable. In a 5 - 4 majority decision, the Supreme Court held that Chapter 6 of the Constitution was justiciable. One of the very profound aspect of the *ratio decidendi* that served as the premise for the court's decision was handed down by Adade, JSC who in his submission stated the following:

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[283] *Ghana Lotto Operators & Others v. National Lottery Authority* [2007 – 2008] SCGLR 1088
[284] [1993-94] 2 GLR 35

I do not subscribe to the view that chapter 6 of the Constitution is not justiciable: it is. First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable. The evidence to establish the non-justiciability must be internal to the Constitution, 1992, not otherwise, for the simple reason that if the proffered proof is external to the Constitution, 1992, it must of necessity conflict with it, and be void and inadmissible: we cannot add words to the Constitution, 1992 in order to change its meaning. Secondly, notice that Article 1 (2) of the Constitution, 1992 speaks of inconsistency with 'any provision of this Constitution, 1992', and article 2(1) of the Constitution, 1992 makes reference to inconsistency with or contravention of 'a provision of this Constitution'. None of these articles expresses an exception in favour of chapter 6. Does it not follow that chapter 6 too, along with the rest of the Constitution, 1992, is in contemplation of articles 1 and 2 of the Constitution, 1992? Thirdly, the very tenor of chapter 6 of the Constitution, 1992 supports the view that the chapter is justiciable. The opening article, i.e 34 of the chapter reads "34(1) The Directive Principles of State Policy contained in this Chapter shall guide all citizens, Parliament, the President, the judiciary, the Council of State, the cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society"[285]

[285] ibid 66.

The Learned Jurist went further to support his position with the following assertions

> The position becomes even clearer if related to the duties created by Article 41 of the Constitution, 1992. How is the judiciary to assist facilitate the performance of a citizen's duty to, e.g combat misuse of public funds as required by Article 41(f) of the Constitution, 1992, if this is not in the course of enforcing another citizen's duty not to misuse public funds? Put illustratively, citizen A, in discharge of his duty under Article 41(f) of the Constitution, 1992 tries to stop citizen B from misusing public funds. Can citizen A turn to the judiciary for help? If no, why not, given the wording of Article 34 (1) of the Constitution, 1992? If yes, what role will the judiciary be playing, short of enforcing Article 41 (f) of the Constitution, 1992? ... I cannot see that the Constitution, 1992 will impose a duty by Article 41 and then turn round to thwart its performance. Such a bizarre intention must be shown by express words or an implication that is imperative. It has been said that the use of the word 'shall guide' in Article 34(1) of the Constitution, 1992 implies that the directive principles are not meant to be justiciable. This argument is obviously weak and unimpressive. After all, all laws are for our guidance, but they are not on that account, non-justiciable. If the Consultative Assembly in 1992 had intended to make the principles non-justiciable, they could have said so: they did not. Apart from Article 12(1) of the Constitution, 1992 which expressly states that chapter 5 (the fundamental human rights and freedoms) 'shall be enforceable by the courts...' no other chapter is expressed to be so. Yet, no one has argued that those other chapters of the Constitution, 1992 are for that reason unenforceable. Chapter 5 of the Constitution, 1992 would be enforceable even

> without direction. The appearance of that phrase in Article 12(1) of the Constitution, 1992 and its absence from chapter 6 of the Constitution, 1992 therefore cannot used as a justification or ground for interpreting chapter 6 of the Constitution, 1992 as unenforceable.[286]

The second major case where the Supreme Court of Ghana addressed the justiciability of Chapter 6 of the 1992 Constitution was the case of *NPP v Attorney General* (CIBA case).[287] In an action against the Attorney-General, the New Patriotic Party (NPP) in this case invoked the original jurisdiction of the Supreme Court under Article 2 (1) and 130 of the Constitution, 1992 for a declaration that the Council of Indigenous Business Association Law, 1993 (PNDCL 312) was inconsistent with and a contravention of Articles 21 (1)(e), 35(1) and 37(2)(a) and (3) of the Constitution, 1992 and consequently void. The Attorney-General, however, raised a preliminary objection to the action on the grounds *inter alia* that articles 35(1) and 37(2) (a) and (3) which were part of the provisions of the Directive Principles of State Policy under chapter 6 of the Constitution, 1992 were not justiciable.

In resolving the issue of whether the provisions contained in chapter 6 of the Constitution were justiciable, the Supreme Court adopted a more restrictive approach than in the *31st December* case. The apex court held as follows

> It was clear from Article 34(1) of the Constitution, 1992 and the report of the drafters of the Constitution that the Directive Principles of State Policy were principles of state policy which taken together constituted a sort of barometer by which the people could measure the performance of government. Thus they provided goals for governmental and legislative programmes and a guide to

[286] ibid 67-68.
[287] [1996-97] SCGLR 729.

judicial interpretation but were not of and by themselves legally enforceable by any court. However, where those principles were read in conjunction with other enforceable provisions of the Constitution as in the case of Article 37(2)(a) and (3) with Article 21(e) in respect of the right to freedom of association, by reason of the fact that the courts are mandated to apply them in their interpretative duty, they were justiciable. Furthermore, where any provision under chapter 5 of the Constitution, 1992 dealing with the directive principles could be interpreted to mean the creation of a legal right, i.e guaranteed fundamental human right such as the freedom of association under Article 37(2)(a) of the Constitution, they became justiciable and protected by the Constitution, 1992. Thus given the criteria or test for justiciability, while each case would depend on its peculiar facts, on the facts of the instant case, article 37(2)(a) regarding freedom to form an association free from state interference was a right which was justiciable.[288]

It can be observed that from the holding in the CIBA case, the Supreme Court of Ghana relied on Article 34(1) and the report of the drafters of the Constitution to render Chapter 6 of the Constitution non-justiciable. The use of the phrase 'shall guide' seems to have convinced the Supreme Court in the CIBA case that the provisions contained in Chapter 6 of the Constitution were more of plethora of goals or objectives for governmental programmes and a guide to judicial interpretation rather than provisions which were of and by themselves legally enforceable by the courts. However, the Supreme Court also established that notwithstanding the purported unenforceability of Chapter 6, provisions in the chapter could be enforced where if read in conjunction with other enforceable provisions of the Constitution. Thus, the apex court in

[288] ibid 745-747

the CIBA case subscribed to the position that they would only treat a directive policy as enforceable provided it can be said to create a legal right when read in conjunction with other enforceable provisions of the Constitution, notably chapter 5 of the Constitution. This appears to be a departure from the Supreme Court's reasoning in the *31st December* case.

The two Supreme Court decisions highlighted above shows a clear case of inconsistency. The uncertainty created by the highest court over the enforceability rights and duties arising from Directive Principle of State Policies in Chapter 6 of the Constitution persisted for more than a decade.[289] A recent attempt was made to mitigate the uncertainty of the justiciability of Chapter 6 of the Constitution in the case of *Ghana Lotto Operators Association & Ors v National Lottery Authority*[290]. The facts embedded in the case were that Section 4 of the National Lotto Act, 2006 (Act 722) prohibited any person other than the National Lottery Authority from operating companies any form of lottery. The second to seventh Plaintiffs were companies established under the laws of Ghana to operate private lotto business. The first Plaintiff was also a company established under the laws of Ghana whose object was to foster a cordial relationship among private lotto operators.

The Plaintiffs' complaint was that after the establishment of the Defendant, it caused newspaper announcements to be issued which directed all persons who before the commencement of Act 722, possessed or owned a machine or equipment used for the operation of lotto of any kind, to within fourteen days after the commencement of this Act surrender machine or equipment to the Director-General of the Authority. The Plaintiffs were aggrieved by the contents of these

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289 Oswald K. Seneadza, *The Attitude of Ghanaian Courts Towards the Enforcement of Socio-economic Rights of the Citizenry: A Critical Review*, at: http://www.articlesbase.com/national-state-local-articles/the-attitude-of-ghanaiancourts-towards-the-enforcement-of-socioeconomic-rights-of-the-citizenry-a-critical-review-1094081.html accessed 6th June, 2019

290 [2007-2008] SCGLR 1088.

announcements and therefore issued a writ of summons against the Authority claiming *inter alia*, a declaration that the National Lotto Act, 2006 (Act 722) violated some constitutional provisions, including Article 36(2)(b) which falls under chapter 6 of the Constitution. As a prerequisite for resolving this issue, the Supreme Court had to determine whether Article 36(2)(b) which falls under chapter 6 as a directive principle was justiciable. The Plaintiffs had relied on Article 36(2)(b) as one of their grounds for claiming that Act 722 was unconstitutional. Article 36(2)(b) provides thus

> The state shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include
>
> b) Affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy...

While delivering the judgment of the court, Date-Bah, JSC decided to embark upon an interpretative exercise which required an assessment and determination of the purpose of Chapter 6. In this exercise, the learned Justice scrutinized the proposals for a Draft Constitution of Ghana of the Committee of Experts which had been used as a basis for the Supreme Court to treat the Directive Principles as generally non-justiciable in the CIBA case and consequently rejected the Committee's report as a basis for such an assertion on the ground that a proposal made by the Committee for inclusion in the Constitution was omitted. The learned Justice subscribed to the opinion of Adade, JSC in the *31st December* case and held that Chapter 6 of the 1992 Constitution was entirely justiciable unless there are strong indications to the contrary in the text or context of the Constitution. In his words,

> It is our view that the strengthening of the enforcement of fundamental rights is a core of our current legal and constitutional system. Therefore, to the extent that there is an ambiguity in the language of article 34, it should be resolved in favour of a greater protection of fundamental human rights. Accordingly, the provisions of Article 34(1) that the Directive Principles of State Policy should guide, inter alias, the judiciary 'in applying or interpreting the Constitution', although ambiguous, can reasonably be interpreted to mean that the judiciary should enforce these principles.[291]

However, the court went further to state that the right rule 'is a presumption of justiciability in relation to the provisions of Chapter 6 of the Constitution, 1992.'[292] It stated that prima facie, all provisions in the constitution should be justiciable.[293] The introduction of a presumption of justiciability in relation to Chapter 6 of the 1992 Ghana Constitution strengthens the legal status of socio-economic rights in the Ghanaian jurisdiction.[294] This judgment appears, for many, as the conclusion on the question of the justiciability of provisions of the Directive Principle and State Policies and the commencement of an era of socio-economic rights advancement in Ghana.[295]

4.4.3 Evaluation of the Ghanaian Experience

The Ghanaian experience with respect to the enforcement of socio-economic rights is an impressing one. From the above analysis, the signal that Ghana was joining the community of

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[291] [2007 – 2008] SCGLR 1106
[292] ibid 1113
[293] ibid 1099
[294] N. T. Okyir, 'Toward a Progressive Realisation of Socio-Economic Rights In Ghana: A Socio-Legal Analysis [2017] (25) (1) *African Journal of International and Comparative Law;* 91
[295] ibid

nation that 'safeguard the protection of socio-economic rights'[296] was sent since the Supreme Court of Ghana has accepted that predominantly embedded in the Directive Principle of State Policies are rights known as economic, social and cultural rights which have become as fundamental as the rights in Chapter 5 of the 1992 Ghana Constitution.[297] Indeed the Ghana Supreme Court took the position that that there was need to elaborate and enforce socio-economic rights in Ghana[298] and that the Court is ready to adopt 'flexible and imaginative' ways to provide for the enforcement of socio-economic rights in the country.[299]

However, despite the apparent commitment to the enforcement of socio-economic rights in the *Ghana Lotto* case, the Ghana Supreme Court was not prepared to apply the standards it uses to enforce civil and political rights.[300] It is humbly opined that having gone this far as to the question of justiciability of socio-economic rights, the Ghana Supreme Court needs to act boldly. The Indian example provides a challenge to the Ghana Supreme Court. The Indian judiciary has today carved a niche for itself as one of the most activist jurisdictions in the world when it comes to the protection and enforcement of the socio-economic rights. This feat was achieved by employing a number of innovative strategies, including the principle of substantive due process, and the doctrine of judicial review, indivisibility of the Fundamental Rights and the Directive Principles of State Policies, Public Interest Litigation and creative and expanded interpretation of

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[296] Kofi Quashigah, 'Trends in the Promotion and Protection of Human Rights under the 1992 Constitution,' in Kwame Baofa-Arthur (ed.), *Ghana: One Decade of the Liberal State* (Zed Books, 2007) 21-26.

[297] See *Ghana Lotto* case (n 290) p. 1105

[298] ibid. See also Article 33(5) of the Constitution of the Republic of Ghana, 1992 which provides that the rights in the constitution are not exhaustive and it includes those 'which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.'

[299] See *Ghana Lotto* case (n 290) p. 61.

[300] *Ghana Lotto* case (n 290) 1107.The Ghana Supreme Court in the *Ghana Lotto* case clearly indicated that socio-economic rights 'need not be implemented in the same way as the political and civil rights embodied in Chapter 5.'

the right to life.[301] Therefore, the Ghanaian Courts need to move a step further beyond the presumption of justiciability and explore the above strategies in order to provide adequate judicial remedies for the enforcement of socio-economic rights in Ghana.

4.5 SERs under the 1996 South African Constitution

The Constitution of the Republic of South Africa, 1996 was promulgated with an expansive bill of rights providing for the constitutionalisation of SERs.[302] The 1996 South African Constitution is considered the most progressive in the world and has become the yardstick for academic discourse on the constitutional protection of socio-economic rights internationally.[303] As noted by Liebenberg, in comparative constitutional law, it is still considered unique for a country to provide for directly entrenched and justiciable socio-economic rights.[304] The Constitution contains a number of both categories of rights but the rights do not appear in any particular order which would indicate that there is a hierarchy among them. In other words, the 1996 South African Constitution provides no distinction between rights which are considered civil-political and those considered socio-economic.

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[301] An example is the case of *Olga Tellis and Ors. v Bombay Municipal Corporation and Ors* Manu/SC/0039/1985, the Indian Supreme Court delivered a decision that the right to life includes the right to livelihood'. The court added that ' the sweep of the right to life... is wide and far reaching' and concluded that persons deprived of their DPSP right to livelihood and work can seek redress based on this sweeping nature of the right to life. Also, in *Unni krishnan v State of Andhra Pradesh & Ors* (1993) 4 LRC 234, the court set out primary education as the minimum core of the right to education which decision prompted a constitutional amendment that formally acknowledged the transformation of this right from a Directive Principle of State Policy to an enforceable fundamental right.

[302] John Cantius Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation',[2006] (2) (1) *African Journal of Legal Studies;* 1

[303] Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems, in Asbjorn Eide et al. (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd revised edn, Martinus Nijhoff Publishers 2001) 55 – 84.

[304] ibid.

Chapter 2 of the 1996 South African Constitution further provides that the bill of rights is applicable to all laws and binds all organs and actors of state.[305] Socio-economic rights protected under the South African Constitution 1996 include the rights of access to adequate housing[306], *access* to healthcare, food, water and social security[307],children's rights to basic nutrition, shelter, basic healthcare services and social services[308], right to education[309], rights of prisoners to 'adequate accommodation, nutrition, reading material and medical treatment'[310], a number of labour rights including the right to form trade unions and the right to strike, [311] a right to an environment that is not harmful to health or wellbeing[312] and the right to property.[313]

It is noted that the inclusion of these rights in the 1996 Constitution of South Africa reflects the overriding desire of the drafters to fill the gaping socio-economic gullies created by the peculiar historical circumstances of the people of South Africa.[314] This assertion is vindicated by the fact that most of these rights reflect specific areas of basic needs or delivery of particular goods and services. The rights also tend to create entitlements to material conditions of human welfare.

4.6 Enforcement of SERs in South African courts

With respect to the enforcement of socio-economic rights, South Africa stands out among countries, not only of Africa, but of the world and is only comparable to India in terms of activism and creative interpretation of constitutional provisions on SERs. According to Dannie

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[305] South African Constitution, 1996, section 8.
[306] ibid section 26
[307] ibid section 27
[308] ibid, section 28
[309] ibid section 29
[310] ibid section 35
[311] ibid section 23
[312] ibid section 24.
[313] ibid section 25.
[314] South African History Online, 'South African Constitution: The Bill of Rights', (Online), available at >https://www.sahistory.org.za/article/south-african-constitution-bill-rights< (last visited on 6th July, 2019].

Brand,[315] courts can protect socio-economic rights by playing two important roles. First, through their law-making powers of interpreting legislation and developing the rules of the common law, and secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights. South African courts, particularly the Constitutional Court, have demonstrated their ability to protect and enforce socio-economic rights through the latter of the two roles above. This dissertation will now examine some of the cases in which the courts demonstrated their resolve to protect and enforce socio-economic rights. It has to be stated that the following cases are not exhaustive of all the SERs issues decided by South African courts.

4.6.1 Right of Access to Adequate Healthcare and Emergency Medical Treatment

The South African Constitutional Court has decided two major health care cases to wit *Soobramoney v. Minister of Health*[316] and *Minister of Health v. Treatment Action Campaign.*[317] In *Soobramoney*'s case, an application was brought before the Constitutional Court for an order of court directing a state hospital to provide the appellant with on-going dialysis treatment and restraining the respondent from refusing him admission to the renal unit. The Court initially recited the Constitution's fundamental principles as follows:

> We live in a society in which there are great disparities in wealth. Millions 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 and a commitment to address them, and to

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[315] D Brand, 'Introduction to SERs in the South African Constitution' in D. Brand and C. Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005) 3- 34

[316] [1997] 12 BCLR 1696 (CC)

[317] [2002] 10 BCLR 1033 (CC)

> transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[318]

However, 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) of the 1996 Constitution which provides for the right of everyone to access to health care services, nor did it breach the section 27 (3) right to emergency medical treatment. According to the court, Mr. Soobramoney's case was not an emergency, since an emergency occurs only when "a person suffers a sudden catastrophe which calls for immediate medical attention"[319] but that his case was "an ongoing state of affairs resulting from a deterioration of (his) renal function which is incurable."[320]

With respect to section 27 (1) and (2) of the 1996 South African Constitution, the court found that while the state was under a duty to provide Mr. Soobramoney with access to health care services, it had been established that it did not have sufficient resources to provide dialysis treatment to all those in need of it.[321] In the view of the court, it would only interfere in the decision of the hospital if it was irrational and taken in bad faith.[322] The *Soobramoney's* ruling against the claimant made some commentators fear the court would render the rights provisions toothless. In fact, Charles Ngwena and Rebecca Cook have argued that from the standpoint of judicial precedent, *Soobramoney's* case did not contribute much to the understanding of socio-economic rights, nor did it really 'lay down any guidelines that could be followed when

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[318] [1997] 12 BCLR 1696 (CC)
[319] ibid 20.
[320] ibid 21.
[321] ibid 24-26.
[322] ibid 29.

interpreting socio-economic rights so as to illuminate and indigenise jurisprudence on socio-economic rights.[323]

In the *Treatment Action Campaign* Case[324] (sometimes referred to as the Nevirapine case), 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. The Treatment Action Campaign, a non-governmental organisation in a bid to force government to provide antiretroviral drugs under the public health care system, specifically demanded that nevirapine be freely distributed to women infected with the virus. The Court held that the government's policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme.

4.6.2 Right of Access to Adequate Housing

The seminal socio-economic rights case in South Africa is *Government of the Republic of South Africa v. Grootboom*[325] which which leapt from the use of a rationality test to a reasonableness test. The facts of the case are that Irene Grootboom was one of several hundred poor people, half of whom were children, who lived in an informal squatter settlement near Cape Town. A large number of these individuals had previously applied with the municipality for subsidised low-cost housing, but despite having been included on a waiting list for many years, no other action had been taken on the part of the authorities. Mrs. Grootboom and some 1,000 adults moved to a

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[323] See C. Ngwena and R. Cook, 'Rights Concerning Health' in D. Brand and C. Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, 2005) 135-137

[324] [2002] 10 BCLR 1033 (CC).

[325] [2001] 1 SA 46 (CC).

vacant hillside in the vicinity that had already been designated for low-cost housing and built makeshift houses by their own means. Subsequently, they were forcibly removed from the area and their makeshift houses were bulldozed.

The Constitutional Court ruled for the settlers after applying Section 26 of the South African Constitution and held thus

> The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide relief for those in desperate need. They are not to be ignored in the interests of an overall programme focused on medium and long-term objectives [rather than short term objectives]. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[326]

The court stated that the key question was whether the measures taken by the state to realise the right afforded by Section 26 are reasonable. Thereafter, the court explained that 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.[327] The court further stated that progressive realization meant that the Government had an obligation to move as expeditiously and effectively as possible towards that goal.[328] The court added that the program must be reasonably implemented, that an otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's [positive] obligations.[329]

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[326] ibid 66
[327] ibid 41
[328] ibid.45(quoting United Nations Committee ESCR, 9 of general comment 3(1990).
[329] ibid 42

Even though the Constitutional Court took a deferential approach by holding that the contours of this programme will be left to the state to decide as seen above, socio-economic rights advocates, socio-economic commentators and academics are united in their views that *Grootboom* heralded the dawn of a glorious era in the judicial protection and enforcement of ESC rights in South Africa. According to Liebenberg, the *Grootboom* case is a positive precedent for the judicial enforcement of economic and social rights[330] while Sloth-Nielsen describes it as a meaningful step forward for SERs.[331]

4.6.3 Right of Access to Social Security and Assistance

In the case of *Khosa v. Minister of Social Development*[332], the question was whether a certain provision in the Social Assistance Act 59 of 1992 was constitutionally invalid as it disqualified non-South African citizens residing in South Africa from receiving certain welfare entitlements. The Applicants were Mozambican citizens living in South Africa as permanent residents. They claimed that section 27 of the Constitution guaranteed the right to social security for everyone, including permanent residents. Hence, the legislation excluding the group should be rendered unconstitutional. The High Court ruled in favour of the Applicants and struck down some provisions of the Social Assistance Act relating to old-age grants, child-support grant and care-dependency grants. Moreover, it ordered the authorities to pay to the Applicants the grants in question and certain outstanding payments.

The Minister of Social Development appealed and the majority of the Constitutional Court held that the South African Constitution endows the right to social security to every one including

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[330] Liebenberg S, 'The implications of Grootboom for current social security policy in South Africa' [2001] (17) *SALJ*; 211

[331] Sloth-Nielsen J., 'The child's right to social services, the right to Social security, and primary prevention of child abuse: some conclusions in the aftermath of Grootboom' [2001] (17) *SAHR*; 210

[332] [2004] 6 SA 505 (CC)

non-citizens who are permanent residents. The Court reasoned that certain rights in the Constitution such as political rights[333] and the right to have access to land[334] have been explicitly limited to citizens but Section 27 of the South African Constitution does not contain such limitation.

4.7 Evaluation of the South African Experience

On the strength of the foregoing, one can safely assert that with respect to the enforcement of socio-economic rights, the South African experience is interestingly instructive. Several socio-economic rights commentators are of the uniform opinion that when it comes to the constitutional protection and enforcement of these rights, South Africa stands out as a reference point among the jurisdictions of the world.[335] Firstly, the South African Constitution, 1996 makes adequate provisions for SERs by including them alongside civil and political rights without distinction in the Bill of Rights. Thus, SERs are made directly justiciable under the South African Constitution, 1996. Secondly, the judiciary in South Africa on the strength of the justiciability of SERs under the 1996 South African Constitution has done well in the interpretation of the provisions for the socio-economic rights. What is more, Section 7(2) of the Constitution[336] enjoins the state to respect, protect, promote and fulfill the rights in the Bill of Rights.

The South African Constitution is regarded as an international-law friendly constitution.[337] As provided under Section 39 (1) (b)[338], the Constitutional Court is under an obligation to consider

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[333] Section 19 of the South African Constitution, 1996.

[334] ibid, section 25(5).

[335] John Cantius Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' [2006] (2) *Afr. J. Legal Stud.*; 1

[336] Section 7(2) of South African Constitution, 1996.

[337] Dire Tladi, 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga'[2016] (16) *African Human Rights Law Journal* ;310

[338] Section 39(1)(b) Constitution of the Republic of South Africa, 1996

international law when interpreting the Bill of Rights. Also, the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[339] This has translated into success story for the enforcement of SERs in South Africa as courts in South Africa apply the provisions of some international conventions and agreements in favourably resolving issues that touch on socio-economic rights. It is also to the credit of the South African judiciary that in endorsing the justiciability of SERs, it made it abundantly clear that the justiciability of the SERs does not offend against the doctrine of separation of powers and that all the traditional arguments against justiciability are of no moment since they are not peculiar to SERs adjudication and are, therefore, not enough to warrant an outright non-justiciability of SERs.

It is noteworthy that the South African judiciary in the enforcement of SERs has received criticisms. For instance, the Constitutional Court's decisions in the *Grootboom* case and the *TAC* case have been criticised by various scholars for failing to give content to the rights adjudicated upon by granting weak remedies and for failing to ensure proper execution of its judgments.[340] Also, the criticism has been viewed from the perspective of rejection of the notion of minimum core obligations by the courts in the enforcement of socio-economic rights. Aarthi Belani sees the rejection of the minimum core approach as disturbing and justifies the preference of the reasonableness approach on the ground that it leaves the court some measure of discretion and flexibility in future.[341]

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[339] Section 232 Constitution of the Republic of South Africa, 1996

[340] Scott and Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise.' [2000] (16) *South African Journal of Human Rights*; 206

[341] Belani Aarthi, 'The South African Constitutional Court's Decision in TAC: A Reasonable choice?' (2004) 7 *Centre for Human Rights and Global Justice*; 5

On the other hand, Marius Pierterse is of the opinion that though the notion of minimum core is useful for understanding the nature of socio-economic obligations and provides a valuable blue print for an entitlement-based approach to socio-economic rights, the rejection of the minimum core arguments in *Grootboom* and *TAC* should not be read as preventing the meaningful enforcement of individual entitlements provided under sections 26 and 27 of the Constitution in appropriate circumstances.[342]

Despite the shortcomings, it is without doubt that among the three jurisdictions under comparison in this research, South Africa remains the most constitutionally conducive environment for the protection of a broad range of SERs and has developed a jurisprudence on the enforcement of these rights which remains an enviable reference point to most jurisdictions of the world, including the most developed democracies of the West.

4.8 Challenges of the enforcement of Social and Economic Rights in Africa

There are a few problems with the enforcement of socio-economic rights in Africa, some are due to their inherent broad nature, others are due to the fact that states cannot afford them and some of the problems are that there are practical hindrances to enforcing these rights in the continent even when they have been provided by the African Charter. This section explores some of the challenges to the protection and enforcement of socio-economic rights in Africa.

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[342] Pieterse M., 'Beyond the welfare state: Globalisation of neo-liberal culture and the Constitutional protection of social and economic rights in South Africa' [2002] (14) *Stellenboch Law Review*; 3

4.8.1 Content and Scope of African Charter Provisions on SERs

The normative inadequacies of the African Charter, particularly the provisions on SERs are well-known.[343] One serious obstacle to the enforcement of the Charter's provisions on socio-economic rights is their lack of conceptual clarity. The Charter's failure to define SERs adequately is not unique among international instruments. In any case, the vagueness of ESCR makes enforcement quite difficult.[344] For instance, the Charter's provision on the right to health[345] entitles individuals to enjoy "the best attainable state of physical and mental health" without prescribing the standard of health or defining what is meant by "the best attainable state."[346] Given this ambiguity, the Charter's right to health depends on how a state construes it. A reasonable interpretation is that it imposes an unlimited obligation to provide free medical services, which leads to the frustrating conclusion that "even if governments employ the services of modern doctors as well as traditional healers, it seems quite impossible for them to carry out the obligation."[347] The provision's ambiguity allows states to avoid this interpretation. For both the individual and the state, the provision provides little guidance as to the state's obligation and the individual's appropriate expectations. As with its correlate in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Charter's right to health needs to be better defined.[348]

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[343] Makau Mutua, 'The African Human Rights Court: A Two Legged Stool?', [1991] (21) *Human Rights Quaterly*; 342

[344] Mario Gomez, 'Social Economic Rights and Human Rights Commission,' [1995] (17) *Human Rights Quaterly*;155

[345] "(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 necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick." See Article 16 of the African Charter.

[346] U. O. Umozurike, 'The African Charter on Human and Peoples' Rights', [1983] (77) (4) *The American Journal of International Law*; 902

[347] ibid.

[348] *See* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

Furthermore, the absence of effective promotion at the agency level also impedes the enforcement of SERs under the Charter. The vagueness problem discussed above might have been alleviated through the promotion of SERs. It has been argued that both in promotion and enforcement, the Commission has concentrated its efforts mainly on civil and political rights to the detriment of SERs.[349] The dearth of cases on SERs is due in part to the Commission's inadequate efforts to encourage such cases and to educate and sensitize people as to their rights.[350] In the absence of effective promotion, individuals are less likely to assert their rights, no matter how clearly they are expressed. Thus, it is most humbly opined that given its broad mandate, the Commission has a responsibility to ensure respect and observance of the provisions of the Charter in its entirety.

4.8.2 Corruption and Inept Leadership

Corruption and inept leadership in developing countries constitutes a major impediment to the realisation of SERs. In a climate where poverty, starvation and underdevelopment are induced by corruption, evidence suggests that the enforcement and protection of human rights become a mirage. As noted by Agbakwa, colonialism left Africa and Africans socio-economically battered, however, the ineptitude and corruption of certain past and present African leaders have worsened the socio-economic woes of the continent.[351] He further maintained that corruption is hardly unique to Africa, but some African states have elevated it to an art form worthy of its own national museum.[352] George Kent on the other hand submits that some African states have had

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[349] Shedrack Agbakwa, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the cornerstone of African Human Right' [2002] (5) *Yale Hum. Right and Development L. J.*;154

[350] ibid

[351] Shedrack C. Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights', (2002) 5 *Yale Hum. Rts. & Dev. L.J.*; 177

[352] ibid

corrupt governments that exploited their own people as viciously as any outsiders have ever done.[353] Resources that should have been utilized to provide basic facilities have been filched and transferred into the private Western bank accounts of high-ranking African leaders and officials.[354]

The government, which more often is the major violator of human rights, continues to tyrannize its civil populace that is economically disempowered and unable to seek redress for such violations.[355] The consequence is human rights become irrelevant to the people's daily struggles and greatly undermined. Moreover, in such atmosphere of induced poverty, ignorance and disease, the civil populace increasingly becomes alienated from the State and its machinery such as the courts.[356] Corrupt leaders reject policies that would better spur development and promote the socio-economic well-being of their citizens. The interests of the people are pursued only to the extent that they coincide with the selfish interests of those in power and for this reasons, the citizens are being deprived the enjoyment of socio-economic rights.

4.8.3 Debt and Structural Adjustment

Many African states, like other developing countries, are overburdened with heavy debts. Debt burdens are major obstacles to meaningful economic development in those states and contribute to non-enforcement of socio-economic rights.[357] According to the 1992 U.N.D.P. *Human*

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[353] George Kent, *Globalization and Food Security in Africa,* available at >http://www2.hawaii.edu/-kent/globaFeb99.html< (last visited on 7th July, 2019).

[354] Shedrack C. Agbakwa, (n 351) 146.

[355] Abiodun Odusote, 'Addressing the Impediments to the Realization and Enjoyment of Socio-Economic Rights under the ICESCR', [2014] (7) (2) *Acta Universitatis Danubius. Relationes Internationales'* 74. Also available at >http://journa

[356] ibid

[357] El Hadji Guisse, *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations,* U.N. Comm. Hum. Rts., 49th Sess., U.N. Doc. E /CN.4/Sub.2/1997/8 (1997), *available at* > http://www.derechos.org/nizkor/impu/guisse.htmi< (last visited 6th July, 2019).

Development Report, from 1983-1989, rich creditor countries received a staggering $1,242 Billion Dollars in net transfers on long term lending from indebted developing countries.[358] As noted by George Kent, the greatest impact of this transfer is in sub- Saharan Africa where the debt load is approximately equal to the region's cumulative gross national product.[359] Servicing these debts, some of which are merely a series of fictitious operations bringing no benefit to the populations concerned greatly incapacitates the states involved.[360]

Debt servicing has a direct negative impact on the realisation of socio-economic rights as it undermines the prospects of the affected states to provide basic facilities to its citizenry. This devastating impact is not mitigated by international development assistance, because, as George Kent notes,

> the amount of money going from the South to the North for debt servicing greatly exceeds the current amounts of official development assistance going from the North to the South. Moreover, official development aid is likely to benefit the rich and the middle class rather than the poor . . . since it does not concentrate on the most needy either within countries or among countries.[361]

Under the dual burden of debt and evaporating aid, many African states were goaded into adopting the structural adjustment policies of the International Monetary Fund (I.M.F.) and

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[358] U.N.D.P. Human Development Report 1992, at page 45. Available at >http://hdr.undp.org/sites/default/files/reports/221/hdr_1992_en_complete_nostats.pdf<. The report also noted yearly debt-related net transfers of $50 billion from developing to industrial countries up to 1992.

[359] George Kent, *Globalization and Food Security in Africa,* available at >http://www2.hawaii.edu/~kent/globaFeb99.html< (last visited on 6th July, 2019).

[360] For instance, Nigeria's External debt increased to 25609.63 USD Million in the first quarter of 2019 from 21,591.68 USD Million in the fourth quarter of 2018. Also, Ghana's External Debt increased to 20,678.69 USD Million in the first quarter of 2019 from 17,895.31 USD Million in fourth quarter of 2018. South Africa's debt on the other hand increased to 68,588 USD Million In the first quarter of 2019 from 66,385 USD Million in the fourth quarter of 2018. *See* >https://tradingeconomics.com< (last visited 6th July, 2019)

[361] George Kent, *supra* note 346.

World Bank. As observed by Osinbajo & Olukonyisola, these policies appear to have worsened their economic circumstances.[362] These states have had to reduce their imports, devalue their currencies, deregulate capital movements, privatize state public utilities, dismantle social programs by cutting government expenditures on social services, such as health care, education etc.[363] It has been opined that the obvious impact of structural adjustment programs is to reduce the capacity of the states to meet their human rights obligations.[364] In Africa and elsewhere, structural adjustment programs adversely affect not only socio-economic rights, but also civil and political rights.[365] As Osinbajo and Olukonyisola observed,

> faced with standards of living well below poverty levels, the citizenry has usually responded with strikes, rioting, and other forms of dissent, which have almost always been met with suppression by force or draconian legislation.[366]

It has been observed that just as debts and structural adjustments are instruments depriving the enjoyment of socio-economic rights, there are growing fears that globalization further exacerbate human suffering and erosion of socio-economic rights.[367] However, it is humbly submitted that African states' relative achievement in the enforcement of civil and political rights shows that where the will does exist, greater achievements will be made in the enforcement of SERs.

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[362] Yemi Osinbajo & Olukonyisola Ajayi, 'Human Rights and Economic Development in Developing Countries' (1994) (Vol. 28, No. 3) *The International Lawyer*; 727

[363] George Kent, *supra* note 346.

[364] Lawrence Tshuma, *The Impact of I.M.F./World Bank Dictated Economic Structural Adjustment Programmes on Human Rights: Erosion of Empowerment Rights, in The Institutionalisation of Human Rights in Southern Africa; 219* (Pearson Nherere & Marina d'Engelbronner-Kolff eds., 1993).

[365] ibid

[366] Yemi Osinbajo & Olukonyisola Ajayi, *supra* note 348.

[367] Robert McCorquodale & Richard Fairbrother, 'Globalization and Human Rights' [1999] (21) *Hum. Rts. Q.;* 34

4.7 Conclusion

This chapter discussed the experience of the three jurisdictions being studied in this dissertation in the area of enforcement of SERs. In doing this, the constitutional provisions on SERs as well as the attitude of the courts towards the enforcement of these rights in the three selected SERs rights enjoy second-class position as mere directive principles and are expressly declared non-justiciable while the Ghanaian Constitution is a step ahead of the Nigerian Constitution as it recognizes some few SERs under Chapter 5 which contains civil and political rights.

Unlike Nigeria and Ghana, the South African Constitution provides the most conducive environment for the enforcement of SERs having departed from classifying these rights as directive principles to making them justiciable. The chapter also found that in addition to the hybrid constitutional protection of SERs under the Ghanaian Constitution, the courts in Ghana are inclined to enforce SERs unlike the Nigerian courts where SERs are still regarded as non-justiciable. On the other hand, South Africa enjoys a robust and enviable jurisprudence in the area of judicial enforcement of socio-economic rights parading landmark decisions in this regard.

This chapter has also illustrated some of the challenges directly and indirectly impeding on the enforcement of SERs in Africa. The root of most problems besieging the developing countries is the result of outright disregard of socio-economic rights. Therefore, it is humbly opined that a change of attitude towards SERs in contemporary Africa is necessary in the face of worsening socio-economic conditions in the continent, for the betterment of the lives of citizens.

CHAPTER FIVE
CONCLUSION

5.1 Summary of Findings

As the analysis of the relevant constitutional provisions of the three selected jurisdictions revealed in Chapter Four, this study confirmed that SERs are encapsulated in the constitution of each of the three jurisdictions under this study. However, the constitutions of Nigeria and Ghana create a divide between SERs and civil and political rights. Under the Nigerian and Ghanaian constitutions, SERs are referred to as Directive Principles of State Policy and provided under a separate chapter different and distinct from the chapter on Fundamental Human Rights.[368] On the other hand, the South African Constitution did not create a dichotomy between these two categories of rights as they are contained in the same provision, describing all of them as the Bill of Rights.[369]

Also, the constitutions of Nigeria and Ghana respectively declare SERs as non-justiciable while the South African Constitution enjoins all authorities, bodies and organs of government to protect, promote and fulfil the rights provided under the Bill of Rights equally, and without distinction. It is further submitted that when it comes to the provision of a conducive atmosphere for the enforcement of SERs, the South African Constitution stands out unlike the Nigerian and Ghanaian Constitution. What is more, it has severally been opined that that among constitutions

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[368] Under the Ghanaian Constitution, Chapter 4 is on Directive Principles of State Policy while Chapter 6 provides for civil and political rights (referred to as Fundamental Human Right). Also, the Nigerian Constitution under Chapter Two provides for Fundamental Objectives and Directive Principles of State Policy while Chapter Four deals with Fundamental Human Rights, i.e civil and political rights.

[369] Chapter 2 of the South African Constitution.

of the countries of the world, that of South Africa stands out as one of the best in making provision for the protection and enforcement of SERs.[370]

Comparing the three jurisdictions studied in this dissertation with respect to the enforcement of SERs, it is easy to assert that South Africa takes the lead. The number of decided cases involving SERs as seen in Chapter Four is testimony to this. The existence of a specialised constitutional court, a feature unique to South Africa in comparison to the other two countries, has a lot to do with this. On the other hand, Ghana's hybrid constitutional protection of SERs coupled with the readiness shown by the courts in Ghana to adopt flexible and imaginative ways to provide for the enforcement of SERs as seen in Chapter Four makes it comes as a poor second followed by Nigeria. As seen in Chapter Four, SERs have gained little or even no cognizance in the Nigerian courts which is traceable to the passive attitude of the judiciary, which attitude is not unconnected with the provisions of Chapter II of the Constitution of Nigeria which rendered SERs non-justiciable. It is unfortunate that despite being among the first set of common law countries to domesticate SERs, Nigeria is still yet to compare with its contemporaries in Africa with respect to the enforcement of SERs.

Furthermore, this dissertation finds that the idea that SERs are not fit for judicial adjudication is grossly misguided and untrue. There is no doubt that justiciability is not the only means of enforcing SERs, as a great number of tasks required for the full realization of these rights depend on actions by the legislative and executive branches of the state. It is, however, found by this dissertation that denying judicial intervention in this field seriously reduces the remedies victims can claim and also weakens state accountability, erodes deterrence and consequently fosters

[370] See J. C. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta & Co, Cape Town, 2004)

impunity for violation. It is also found that the resource constraint argument for the non-justiciability and reluctant implementation of SERs does not hold water. In fact, it is lack of the political will that works against the enforcement of these rights. In addition to all the above, the research found that corruption and inept leadership immensely contributes to the poor attitude of government towards the enforcement of SERs in Africa.

5.3 Observations

Based on the foregoing analysis in this dissertation, the Researcher puts forward the following observations:

i. All the constitutions of the three selected jurisdictions in this dissertation have provisions relating to SERs. However, it is only the South African constitution that makes SERs justiciable. On the other hand, the constitutions of Nigeria and Ghana have relegated SERs to non-justiciable principles of state policy which means that SERs are constitutionally not enforceable in Nigeria and Ghana.

ii. It has been observed that though the passive attitude of the courts in Nigeria towards the enforcement of SERs is not unconnected to the non-justiciable character of SERs under the Nigerian Constitution, however, the Nigerian courts have not been courageous enough to give expansive definitions to constitutional provisions on SERs as demonstrated in this thesis by the Indian judiciary. On the other hand, the Ghanaian courts are willing and ready to enforce SERs as seen in Chapter Four of this dissertation. However, there are few cases challenging the violation of SERs in the Ghanaian courts making it a slow process towards the realisation of these rights in Ghana.

iii. The Researcher observes that the success recorded by South Africa in the area of enforcement of SERs is not only related to the justiciability of these rights but also due to some other factors such as a creative interpretation of the SERs provisions, particularly Section 7(2) which places the obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights" on the government and the prominence accorded international law by the Constitution which places the Constitutional Court under a strict obligation to consider international law when interpreting the Bill of Rights and to prefer any interpretation that is consistent with international law.

iv. As stated in Chapter Three of this dissertation, Nigeria and Ghana have ratified the African Charter on Human and Peoples' Right as well as the ICESCR which recognizes SERs. Thus, Nigeria and Ghana have an obligation to enforce socio-economic rights that are enshrined in the Charter and the Convention respectively.[371] Additionally, both Nigeria and Ghana have accepted the jurisdiction of the African Court on Human and Peoples' Rights to hear complaints presented by the Commission, African intergovernmental organizations, and States parties to the African Charter.[372] Notwithstanding the provisions for SERs in the African Charter on Human and Peoples'

[371] SERs are given statutory recognition and made justiciable under the African Charter on Human and Peoples Rights as well as the International Covenant on Economic, Social and Cultural Rights. Thus, African Countries that are signatories to the Charter and the Convention have obligation under international law to obey and enforce their provisions.

[372] For instance, in Nigeria, the Commission found that Nigeria's exploitation of oil reserves without regard for its environmental impact or the health of the Ogoni people violated various rights protected by the African Charter. See ACommHPR, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication No. 155/96, 30th Ordinary Session, 27 October 2001. Visit >http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng< (last accessed on 22nd August, 2019). In Ghana, the ACHPR found violations of the rights to liberty and security of person in the case of an individual who was detained for seven years without a trial for allegedly having collaborated with political dissidents. See ACommHPR, Alhassan Abubakar v. Ghana, Communication No. 103/93, 20th Ordinary Session, 31 October 1996. See >https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1996/3< (last accessed on 22nd August, 2019).

Rights and the ICESCR, it is observed that SERs have not been incorporated in Nigerian and Ghanaian constitutions. The negativity of such rights despite the ratification of the African Charter on Human and Peoples' Rights by Nigeria and Ghana is in the fact that they are found in the Directive Principles of State Policy of the Nigerian and Ghanaian constitutions and are constitutionally made non-justiciable. On the other hand, SERs are positive as in the case of South Africa where the rights are not only constitutionalized but also judicialized.

v. This research identified some challenges associated with the enforcement of SERs in Africa. The dissertation observed that even though some of these challenges can be justified, the level of corruption and inept leadership bedeviling African countries takes the center stage in depriving its citizens from the enjoyment of SERs. As earlier noted, the ineptitude and corruption of certain past and present African leaders have worsened the socio-economic woes of the continent. It is observed that resources that should have been utilized to provide basic facilities that would bring about socio-economic wellbeing of the citizens are mismanaged.

5.3 Recommendations

In view of the foregoing observations, the following recommendations are hereby proffered:

i. The constitutions of Nigeria and Ghana should take a hint from the South African constitution by rendering SERs justiciable. This is in consonance with their obligations to enforce SERs as signatories to the African Charter on Human and Peoples' Right as well as the ICESCR. Furthermore, the constitutions of Nigeria, Ghana and South Africa should recognise and provide for the protection and enforcement of all the SERs provided

for and recognized under the ICESCR exhaustively. By so doing, the government will be propelled to come up with policies towards the realisation of socio-economic development.

ii. The Nigerian courts must rise equal to the occasion by adopting a broad and progressive interpretative approach to the Constitution which showcases the complementarity and justiciability of Chapters II and IV of the Constitution. In other words, the courts must begin to interpret the constitution with a view to securing a concrete basis for the justiciability of socio-economic rights. With respect to Ghana, in the wake of the readiness of courts to enforce SERs, the public, members of the legal profession and nongovernmental organizations need to engage in public interest litigation to secure redress for infringed SERs. Also, the use of social movements in Ghana in human rights advocacy is well documented. A well-coordinated and focused social movement, grounded in SERs, can provide in Ghana the drive to compel government action even beyond the mere adoption of policies and legislation to their actualization. As observed by Young,[373] the existence of social movements within the discourse of SERs helps to 'provide new narratives about rights...narratives that will help bridge the gap between the formal recognition of rights and their protection in everyday arrangements'.[374] With respect to South Africa, it is recommended that the courts while adjudicating on cases arising from SERs should adopt the minimum core obligations principle in line with the UN Committee's proposal as against the reasonableness approach as applied in the *Grootboom* and the *TAC* cases as the minimum core obligations principle will give content to the rights being adjudicated upon.

[373] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012).
[374] ibid

iii. Corruption is an impediment to effective and efficient management of a nation's resources and thus a challenge to SERs that must be seriously addressed by all the stakeholders, not only the government. Since resource management and allocation is an important factor in ensuring enforcement of socio-economic rights, any negative action on the resources has negative impact on socio-economic rights. To this end, it is recommended that public officers should be made to give account after vacating office in order to curb the menace of corruption and embezzlement of the public fund. It is further recommended that laws with strict sanctions be enacted in each of the three selected jurisdictions in this dissertation which will serve as deterrent to serving officials who want to follow the footsteps of their predecessors in embezzlement and corrupt practices.

iv. The existence of a specialized court to be saddled solely with the responsibility of entertaining all human rights cases will go a long way towards safeguarding these rights. Thus, it is recommended that such courts be established in each of the three selected jurisdictions in this dissertation in order to ensure speedy dispensation of cases involving human rights violations.

v. It is needless to emphasize that a virile civil society is central to the protection and enforcement of SERs. Non-governmental organisations and the civil society have focused on seeking redress in respect of infringements arising from civil and political rights, paying little attention to SERs. Therefore, it is recommended that more NGOs and civil society organisations in the three selected jurisdictions in this dissertation should turn their attention to this category of rights without which civil and political rights cannot be enjoyed.

5.4 Contribution to Knowledge

The main contribution of this research to knowledge is the detailed insight provided with respect to the constitutional provisions of Nigeria, Ghana and South Africa, the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) Africa on SERs. Although some research studies have been done on the enforcement of SERs, none of them has primarily focused on appraising the enforcement of SERs in Nigeria, Ghana and South Africa on a comparative basis. Therefore, the study has contributed to the understanding of SERs in the three selected jurisdictions and the ways through which these rights can be enforced.

The study also explains in great detail the concept of SERs as well as its origin thereby enhancing our understanding of the concept. Also, the challenges bedevilling the enforcement of SERs in African countries are discussed in this study. As a result, this study could provide a possible solution to the menace of socio-economic development in the three selected jurisdictions in particular and Africa in general.

5.5 Suggested Areas for further Research

The present study on the enforcement of SERs only involved three jurisdictions to wit - Nigeria, Ghana and South Africa. For future research, comparative study of countries in Africa with socio-economic development such as Morocco, Seychelles and Mauritius should also be taken in order to further compare the performance of African countries in enforcement of SERs. Perhaps, the inclusion of other countries might produce more meaningful results. Therefore, it will improve the findings of the research and indirectly improve the socio-economic conditions of the related jurisdictions.

5.6 Conclusion

This dissertation has examined the enforcement of SERs in Nigeria, Ghana and South Africa. In an attempt to provide answers to the questions raised in this research, some findings were made based on which some recommendations were proffered. It is humbly submitted that these findings provide answers to the questions posed by this research at the outset of this study.

As highlighted earlier in this dissertation, each of the constitutions of the three selected jurisdictions in this dissertation has provisions on SERs. The non-recognition of SERs as justiciable rights in the constitutional frameworks of Nigeria and Ghana has negatively affected the enforcement of these rights in the two countries despite their ratification of international and regional instruments on human rights. On the other hand, South Africa provides the most conducive climate for the enforcement of SERs due to its constitutional framework which recognises SERs as justiciable rights. With respect to judicial attitude, it has been revealed in this dissertation that among the three jurisdictions, Nigeria has the weakest approach to the enforcement of SERs and would need to take a bold step by adopting a broad and progressive interpretative approach to the Constitution with a view to securing a concrete basis for the justiciability of socio-economic rights.

This research also exemplified that challenges to the enforcement of SERs abound in the three selected jurisdictions and Africa in general, worthy of mention is corruption and inept leadership which stares at the face of socio-economic development. This research concludes that a combination of constitutional strategies, political will and civil society will go a long way in turning things around as far as SERs is concerned in the three selected jurisdictions. The study further recommends that the three jurisdictions should borrow a leaf from one another to improve

on the areas where they are respectively less endowed. It is hoped that the various suggestions put forward will go a long way towards enhancing the enforcement of SERs in the three selected jurisdictions in this dissertation.

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