1. Introduction

One of the recurrent themes in political and legal discourse in Nigeria is the propriety of the non-constitutionalisation of economic, social and cultural rights (hereafter “ESC Rights”), otherwise referred to in the jurisprudence of human rights as “second generation rights.” In specific terms, Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999, makes provision for so-called first generation rights, which are primarily civil and political in nature, and further provides a redress mechanism for “[a]ny person who alleges that any of the provisions of […] [Chapter IV] has been, is being or likely to be contravened […] in relation to him [or her] […]”.¹ In other words, the civil and political rights provisions of the Nigerian Constitution are justiciable. In contrast, the Nigerian Constitution renders the kinds of standards that usually constitute ESC rights

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provisions non-justiciable, making provision for such rights as mere "Fundamental Objectives and Directive Principles of State Policy.”

The absence of express provision for, and justiciability of, ESC rights under the Nigerian Constitution has been attributed to a number of factors (to be discussed below) which, in the specific context of the Nigerian dispensation, are labelled “fallacies” in this article. Admittedly, some of these fallacies are also present in the discourse in other countries about the constitutionalisation of ESC rights. However, our concern here is with the specific Nigerian milieu.

Thus, this article addresses the fallacies that underpin the opposition to the constitutionalisation of ESC rights in Nigeria and concomitantly makes a case for a constitutionally defensible scheme of justiciable ESC rights in Nigeria. However, the article is equally emphatic that while it is important to articulate a constitutional basis for justiciable ESC Rights in Nigeria, it is imperative to optimize the opportunity that Nigeria’s domestication of the African Charter currently avails, by popularising and invoking the ESC Rights provisions of the African Charter in the domestic context. Yet, in spite of the euphoria that the fact of the inclusion of ESC rights in the African Charter often generates, the article is conscious as well of the limitations of that treaty, as presently couched, and cautions against romanticizing its promise in the area of the advancement of ESC rights. Neither a constitutional prescription of justiciable ESC rights, nor the invocation of the ESC rights provisions of the African Charter (as domesticated) before Nigerian domestic or municipal courts will, without more, lead us to the proverbial Promised Land. Ultimately, human rights successes are the products of struggles whose tentacles transcend the realms of law and officialdom.

\[\text{2} \quad \text{Ibid., Section 6(6)(c).}\]

\[\text{3} \quad \text{Ibid., Chapter II.}\]

As earlier noted, Chapter II of Nigeria’s 1999 Constitution makes provision for “Fundamental Objectives and Directive Principles of State Policy.” Section 14(2)(a) of that Constitution proclaims that “sovereignty belongs to the people of Nigeria from whom government through […] [the] Constitution derives all its powers and authority.” Sections 16 and 17, dealing with economic and social objectives, oblige the State to direct its policy towards ensuring that

“the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group”;
“all citizens… have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment”;
“conditions of work are just and humane”;
“suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.”

Regrettably, although section 13 imposes a “duty and responsibility” on “all organs of government, and […] all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply” the provisions of Chapter II of the Constitution, section 6(6)(c) makes a caricature of this obligation, as it provides that judicial powers

“shall not […] extend to any issue or question as to whether any act or omission by any authority or person […] is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”

What accounts for this absence of an express provision for, and non-justiciability of, ESC rights under the Nigerian Constitution?
(a) The Bifurcation of Obligations: The Negative versus Positive Rights Distinction

Chapter II of the 1999 Constitution is virtually a reproduction of chapter II of the 1979 Constitution. According to the Constitution Drafting Committee (hereafter “CDC”) which drafted the 1979 Constitution, it banished chapter II to the realm of non-justiciability because unlike first generation rights which impose restraints on the State, second generation rights, on which the provisions of chapter are predicated, require positive steps on the part of the State to secure material means for their enjoyment. In the words of the CDC

“all fundamental rights are, in the final analysis, rights which impose limitations on the executive, legislative or judicial powers of the government and are accordingly easily justiciable. By contrast, economic and social ‘rights’ are different. They do not impose any limitations on governmental powers. They impose obligations of a kind which are not justiciable. To insist that the right to freedom of expression is the same kind of ‘right’ as the ‘right’ to free medical facilities and can be treated alike in a constitutional document is [...] basically unsound”.

This is the kind of charge that is typically levelled against ESC rights. However, upon closer scrutiny, this charge is unsustainable on at least two grounds. First, it is not appreciative of the trilogy of obligations that attach to human rights. Thus, *like any other human rights*, and depending on the context, ESC rights entail obligations to (i) respect, (ii) protect, and (iii) fulfil.

Second, one of the most orchestrated civil and political rights, the right to genuine and periodic elections, often requires large scale *positive steps*, in terms of expense and logistics, on the part of the government in order to create an enabling environment for people to exercise their right of franchise. On the other hand, the right to housing, a critical ESC right, does not always require positive steps on the part of the government. In some cases, the right to housing,

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especially in the context of forced evictions, entails the right to be left alone, especially where such evictions are unlawful. Thus, the right to housing “should not be interpreted in a narrow or restrictive sense”\(^5\) and encompasses “a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”.\(^6\) Accordingly,

“all instances of forced eviction are prima facie incompatible with the requirements of the [...] [International Covenant on Economic, Social and Cultural Rights, 1966] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”\(^7\)

Consequently, in *Jaftha v Schoeman & Ors*,\(^8\) the South African Constitutional Court held that the negative obligation under the right to adequate housing is not to prevent or impair existing access to adequate housing and while the positive obligations fall only on the state, the negative obligation applies to everyone, including private persons. Whereas the positive obligations are clearly subject to progressive realization, “it would make no sense to say the same of the negative ones.”\(^9\)

(b) The Resource Constraints Argument

Proceeding from its erroneous negative versus positive rights bifurcation, the CDC posits that

\(^5\) Committee on Economic, Social and Cultural Rights, Sixth Session, *The right to adequate housing* (Art. 11 (1)), 1991, General Comment No. 4, para 7 (on the right to adequate housing as provided for by Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966).

\(^6\) Ibid., para. 8(a).


\(^9\) *Jaftha v Schoeman*, supra note 8, para. 33.
"[b]y their nature, [...] [ESC rights] are rights which can only come into existence after the government has provided facilities for them. Thus, if there are facilities for education or medical services one can speak of the 'right' to such facilities." "On the other hand," the CDC asserted, "it will be ludicrous to refer to the 'right' to education or health where no facilities exist. If one has in mind the right of an individual to insist on the provision of these facilities then it is a 'right' which depends upon the availability of resources and in the final analysis one is really referring to the obligation or duty of the government to provide the facilities."\(^{10}\)

Additionally, the CDC adumbrates the view that

"it is better and more realistic to make provision for economic and social rights in the portion of the Constitution dealing with fundamental objectives and directive principles rather than in the section dealing with fundamental rights".

This, according to the committee, is because

"[m]ost of the fundamental rights are [...] vested in every individual and to which he is entitled without any obligation or duty on the part of the government to provide facilities for their enjoyment. Thus, the rights to freedom of expression or to liberty of a person are rights which do not depend upon the provision of any facilities by the government."\(^{11}\)

*Prima facie*, the resource constraints argument has considerable force. However, its potency is ameliorated by the language of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, 1966, *to which Nigeria is a party*, which contains an undertaking by each State Party to "take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [...] Covenant by all appropriate means, including particularly the adoption of legislative

\(^{10}\) *Supra* note 4, p. xvi.

\(^{11}\) *Supra* note 10.
measures.” However, as the Committee on Economic, Social and Cultural Rights, which monitors compliance with the provisions of the Covenant, has pointed out in General Comment No. 3, the undertaking to “take steps” is, itself, not qualified or limited by other considerations. Thus, while the full realisation of the rights guaranteed under the covenant may be achieved progressively, the steps taken “should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant”, thus imposing an obligation “to move as expeditiously and effectively as possible towards that goal.” In effect, “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party”. Where a State Party attributes its failure to meet its obligations to resource constraints, “it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.” Additionally, “even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.” The Committee further underscores the fact that even in times of severe resource constraint, whether caused by a process of adjustment, of economic recession, or by other factors, “vulnerable members of the society must be protected by the adoption of relatively low-cost targeted programmes.”

In the Nigerian context the resource constraint argument merits further scrutiny. There is no doubt that the scarcity of resources and underdevelopment could inhibit the realisation of ESC rights. However, as Professor Eze rightly argues, more critical is the nature of the political system and the extent to which it is geared towards putting in place the requisite structures for the enjoyment of socio-economic rights. Indeed, as he further submits,

“the need for creating the myth of these political, social and educational objectives in the [...] constitution arises from a need to assuage the
aspirations of the majority which demands them, and so make the right to property secure.”

The CDC further deploys the orchestrated underdevelopment of Nigeria as a cloak and glosses over the question why the country is still groping in the underdevelopment dungeon. Is it not true that besides the suffocating injustices of the international economic system, the domestic terrain is fraught with contradictions? In a country that prides itself as the sixth largest oil producer in the world, is Nigeria’s problem not more of resource mismanagement and less of resource constraints? For instance, according to Nuhu Ribadu, the chairman of one of Nigeria’s anti-corruption agencies, the Economic and Financial Crimes Commission (hereafter “EFCC”), the agency recovered, within a span of just three years, ill-gotten assets in excess of five billion dollars ($5 billion) which, at the prevailing exchange rate, translates into about six hundred and forty billion naira. Yet, Nigeria’s budget for the year 2006 was N1.899 trillion. If, properly utilised, these public funds could have had a positive impact on the socio-economic well being of Nigerians, a staggering majority of whom grapple with the challenges of survival in an oasis of prosperity.

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15 As Justice Chaskalson pointed out, in the context of South Africa’s experience, in the Soobramoney case: “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 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.” Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC), para 8.
(c) The Institutional Illegitimacy/Democracy Deficit Argument

The institutional illegitimacy/democracy deficit argument is predicated on the separation of powers and the fact that, unlike members of the executive and the legislature, Nigerian judges are not elected directly by the people. The typical argument in this respect is that since the separation of powers is cardinal in the Nigerian constitutional scheme, the elected representatives of the people are better poised to deal with socio-economic issues; that it would amount to usurpation of the powers of the other arms of government for the judiciary to exercise the power of judicial review in the socio-economic sphere since, so the argument goes, the judicial enforcement of socio-economic rights would entail review of the decisions of the political branches of the government on the procurement, allocation and expenditure of State resources. As plausible as this argument is, it can be faulted on several grounds.

First, in the Nigerian context as is also the case in several jurisdictions, judges have no competence to enact or amend the constitution. The decision whether to make ESC rights justiciable or not is that of the political branches of government. Once ESC rights are made justiciable under the constitution, judicial review of the actions of the political branches of the government would, itself, be mandated and circumscribed by the constitution.

Second, the separation of powers under the Nigerian constitution is not rigid and admits of checks and balances.

Third, the democracy deficit argument is often made in the context of an amorphous challenge to the general power of judicial review; the argument being that it would engender a regime of government by unelected judges and imperil the province of governance by the political branches of the State. This argument, if tenable, applies with equal force to the exercise of the power of judicial review in the context of civil and political rights. Accordingly, one is unable to fathom out why the Nigerian constitution permits the exercise of the power of judicial review in respect of civil and political rights but expressly precludes the exercise of such power in relation to ESC rights.
Fourth, the spectre of unelected judges going berserk and usurping the province of the political branches of government in the socio-economic sphere is not borne out, for instance, by the South African experience. In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996,* the Constitutional Court of South Africa made it abundantly clear that the socio-economic rights embodied in the South African Constitution are justiciable. Since South Africa is a reference point in the constitutionalisation of ESC rights, the manner in which the South African Constitutional court has addressed the institutional illegitimacy or democracy deficit argument merits consideration. For instance, in *Minister of Health v Treatment Action Campaign (No.2),* counsel for the government contended that under the separation of powers doctrine the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy. Counsel further contended that even if the court were to find that government policies fall short of what the Constitution requires, the only competent order that a court can make is to issue a declaration of rights to that effect. That would provide the government leeway to pay heed to the declaration made and to adapt its policies in so far as that may be necessary to bring them into conformity with the court’s judgment. This, so counsel argued, is what the doctrine of separation of powers demands.

In its response to this argument, the South African Constitutional Court made it clear that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the
domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

The court further emphasized the fact that the primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it finds in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

The court also found no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state, the court stated, can affect their policy and may well have budgetary implications. Government is, consistent with its constitutional obligations, bound to give effect to such orders. This is the case where, for instance, in a typical case involving the civil and political right of franchise, the court, in the case of August, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications, in order to afford prisoners the right to vote.

The court surveyed the jurisprudence of some foreign jurisdictions, such as the United States, Canada, India, Germany and the United Kingdom, on the question of remedies and concluded that in none of those jurisdictions "is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies particularly when the state’s obligations are not performed diligently and without delay.” How the courts

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19 August and Another v Electoral Commission and Others, 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).
exercise their powers, including mandatory and structural interdicts, depends on the circumstances of each particular case, due regard being paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that “when it is appropriate to do so, courts may and if need be must use their wide powers to make orders that affect policy as well as legislation.” One factor that needs to be constantly kept in mind is that

“policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.”

Accordingly, as the court stated in the Hoffmann case, the determination of what constitutes appropriate relief “calls for the balancing of the various interests that may be affected by the remedy.” The South African Constitutional Court is not without its critics. For instance, some commentators have accused the court, in the context of the remedy in the Grootboom case for instance, of leaving a wide margin of discretion to the executive. That notwithstanding, judges from other jurisdictions can learn from, without necessarily kowtowing, the South African experience.

(d) Institutional Incapacity Argument

The institutional incapacity argument proceeds from the premise that judges are ill-equipped or lack the competence to make, as is often the case with ESC rights, polycentric decisions that involve the

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dynamics of resource management. One variant of the argument, as Michelman notes, is that by constitutionalising ESC rights,

"you force the judiciary to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice to debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies an unreviewable privilege of indefinite postponement of a declared constitutional right."\(^{23}\)

In its jurisprudence, the Committee on Economic, Social and Cultural Rights is emphatic that while the respective competence of the various branches of government must be respected, it is appropriate to acknowledge that "courts are generally already involved in a considerable range of matters which have important resource implications." Accordingly, the adoption of a rigid classification of Economic, Social and Cultural rights

"which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the [...] sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."\(^{24}\)

In areas where judges have no expertise, they generally call in aid expert testimony and there is no reason why that cannot be the case in respect of ESC rights litigation. In this respect, one possible resource is the National Human Rights Commission whose mandate includes


monitoring and investigating all alleged cases of human rights violations. Instructively, the Committee on Economic, Social and Cultural Rights notes that

“national [human rights] institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.”

3. Conclusion: An Agenda for Action

Having regard to the foregoing discourse, we propose the following agenda for action:

(a) Constitutional Review/Amendment to Provide for Justiciable ESC Rights in Nigeria

The past is often the key to the future. Accordingly, an understanding of the circumstances under which the 1999 Constitution emerged is critical to a proper appreciation of the absence of express provision for, and non-justiciability of ESC rights under the Nigerian Constitution. It would be recalled that in 1994, the military administration of General Sani Abacha set up and inaugurated a Constitutional Conference and mandated it to produce a constitution for Nigeria. The convening of the conference itself was dogged by controversies and boycotts, a development that put the credibility of the entire process at stake. However, the Conference produced a draft 1995 Constitution that was neither promulgated nor adopted. The death of General Abacha in 1998 saw the emergence of the General Abdulsalami Abubakar regime.

On assumption of office, the Abubakar regime set up a Constitution Debate Co-ordinating Committee, headed by Justice Niki Tobi, to organize nation-wide consultations on the 1995 Draft Constitution. At the end of its assignment, the Committee produced a draft that was predicated, with modifications, on the 1979 Constitution. This draft, with amendments by the military regime, formed the basis of the 1999 Constitution.

In a critique of the circumstances under which the 1999 Constitution emerged, the Presidential Committee on the Review of the 1999 Constitution (set up by the civilian administration of Chief Olusegun Obasanjo in 1999) asserts that the approach of the Tobi-led, Committee “hardly reflected any awareness of strategies of process-led constitution-making”, in consequence of which “the process that culminated in the constitution ignored [...] the structural issues that have bedevilled the country’s ability to enthrone a truly accountable, transparent, and democratic political order”. Chiding the military administration which approved the Draft Constitution for failing to draw lessons from other African experiences (such as those of Eritrea, Ethiopia, South Africa, Uganda, and Ghana), the Presidential Committee was emphatic that it

“sidetracked serious contentious issues in Nigerian politics and did not attempt to encourage Nigerians to see the document as their own constitution, to be owned, studied, defended, and used to defend democracy. The Nigerian experience completely ignored the emerging trend of constitutionalism that now informs the nature of politics and content of political discourse in Africa.”

Given this reality, for the envisaged constitutional review process to achieve the desired goal, it must be “guided by the principles of inclusivity, diversity, participation, transparency and openness,

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28 Ibid.,
29 Ibid.
autonomy, accountability and legitimacy”, failing which “the assertion in the preamble of the Nigerian Constitution to the effect that ‘We the People [...] do hereby make, enact and give to ourselves the following Constitution’ will remain the grand deception that it lamentably is”.

(b) Optimal Utilization of Nigeria’s Domestication of the African Charter and other Domestic Legislation that Impact on ESC Rights

It is instructive that while the Nigerian Constitution does not make express provision for ESC rights, Nigeria has ratified, without reservations, the International Covenant on Economic, Social and Cultural Rights, 1966, as well as the African Charter on Human and Peoples Rights, 1981 which encapsulates the existing generations of human rights. In the case of the latter, and consistent with Article 1 under which the States Parties undertook to “adopt legislative or other measures” to give effect to its provisions, Nigeria, pursuant to section 12 of the Constitution, domesticated it vide the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, 1983. Section 1 of the enabling/domesticating law provides that the provisions of the charter “shall have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial in Nigeria.” In the circumstance, given the non-justiciability of

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Chapter II of the Constitution, Nigeria’s international posture is remarkably at variance with its domestic constitutional scheme of human rights; a paradoxical and hypocritical stance that renders Nigeria vulnerable to charges of engagement in a bogus public relations stunt.

Furthermore, one of the paradoxes of ESC rights discourse and implementation in Nigeria is the fact that in spite of Nigeria’s domestication of the African Charter, the ESC rights provisions of the Charter have rarely been invoked in the context of domestic litigation. While the African Charter has been routinely invoked in the jurisprudence of Nigerian courts and has further impacted on executive and legislative actions, this has largely been in the realm of civil and political rights. With the possible exception of labour rights, the same disposition applies to domestic legislation that impact on ESC rights. This may be due to the fact that, with few exceptions, the focus of Nigerian NGOs revolves around civil and political rights. This is due, in part, to the fact that most of these NGOs emerged when Nigeria was under dictatorial military regimes and the fact that foreign donor inclinations sometimes shape the mandates of these organizations.

Following Nigeria’s transition to civilian – though not necessarily democratic – rule, there is need for a paradigm shift which, while reckoning with the need for continuing engagement with civil and political rights, underscores the strategic significance of Nigeria’s domestication of the African Charter. It is instructive, in this respect, that unlike the provisions of the International Covenant on Economic, Social and Cultural Rights, the ESC rights provisions of the African Charter are not couched in the traditional rendition of “progressive realisation” or the use of such phrases as “to the maximum of available resources. Besides, it is beyond serious disputation that the ESC rights provisions of the African Charter (as domesticated) are not

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inconsistent with the non-justiciable fundamental objectives and directive principles set out in Chapter II of the Constitution.

Admittedly, the ESC rights provisions of the African Charter are not as extensive or elaborate as those of the International Covenant on Economic, Social and Cultural Rights. The African Charter does not, for instance, make express provision for the right to housing and the right to food. Additionally, many of the ESC rights provisions of the African Charter are open-ended and vague. While that would ordinarily pose a constructionist nightmare, there is a sense in which it is both a challenge and an opportunity. Thus, it could enable a creative judge to elaborate on those rights in a manner that draws inspiration from the jurisprudence of international and other regional courts and tribunals, while reckoning with the "the values of [Africa’s] [...] historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples’ rights."  

(c) The Limits of Judicial Enforcement: Sovereignty over ESC Rights Lies with the People

As South African and Indian judges have demonstrated, judges have a crucial role to play in the enforcement of ESC rights. However, no matter their best endeavours, judges remain open to charges of elitism, coupled with the fact that many of them are steeped in the conservative mould that underpins the aristocratic ancestry and culture of the judicial branch in many jurisdictions; Therefore, beyond the realm of judicial enforcement of ESC rights, it is important to underscore the point that, in view of the fact that Section 13 of the

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36 Preamble to the African Charter on Human and Peoples Rights.
37 Thus, for instance, in Olga Tellis v Bombay Municipal Corporation, (1985) 3 SCC 545, the Indian Supreme Court held that the right to life under the Indian constitution, read together with the directives of state policy, means more than the right to bodily being, and includes the right to a decent human existence. Accordingly, pavement dwellers cannot be evicted from rudimentary shelters without compliance with due process of law. See also Jayna Kothari, "Social Rights and the Indian Constitution", Law, Social Justice and Global Development Journal (LGD) 2 (2004), <www.go.warwick.ac.uk/elj/lgd/2004_2/kothari>, 11 October 2007.
constitution charges all organs of government to "conform to, observe and apply" the fundamental objectives and directive principles prescribed in Chapter II of the constitution, infidelity to those objectives and principles is an invitation to impeachment and/or recall from office. It is instructive, in this respect, that Sections 143(11) and 188(11) of the Constitution, define "gross misconduct", the criterion for removal of a president or state governor from office, as "a grave violation or breach of [the] Constitution or a misconduct of such nature as amounts in the opinion of the [National Assembly or the House of Assembly] to gross misconduct". Additionally, Sections 69 and 110 of the constitution empower the electorate, the ultimate repositories of power, to recall a member of the legislative arm in which they have lost confidence. Failing recourse to either the weapon of impeachment or recall, a political office holder who abdicates his/her responsibility to the electorate risks disgrace at the polls in a credible electoral system. That way, Nigerians would send a clear message that while the judicial enforcement of ESC rights is desirable, the ultimate "battle" for the concretization of ESC rights lies beyond the realms of law and officialdom. As section 14(2) of the Nigerian constitution acknowledges, "sovereignty belongs to the people of Nigeria from whom government [...] derives all its powers and authority."

Indeed, as Bhalla observes: "The Fundamental Objectives and Directive Principles are a government's charter over which the government operates for four years. Since the constitution ensures free choice by the people among different candidates with different political programmes, it is logical to conclude that the people will elect those who are likely to transform these principles into reality. These Fundamental Objectives, thus seen, constitute a kind of basic standard of national conscience. Those who violate its dictate do so at the risk of being ousted from ...positions of responsibility [...]. The agents of the state at any given time may not be answerable to a Court of Law for the breach of these principles but they have to stand for judgment, from which they cannot escape, facing a higher and more powerful Court which will at regular intervals (of four years) do the reckoning." See R. S. Bhalla, "Fundamental Objectives and Directive Principles of State Policy under the Constitution of Nigeria", *Nigerian Bar Journal* 18 (1982), pp. 19-20.