TITLE OF THESIS

REALISATION OF SOCIO-ECONOMIC RIGHTS IN NIGERIA: A COMPARATIVE STUDY

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ABSTRACT

This research aims to examine the recognition and enforcement of Socio-Economic Rights (SERs) in Nigeria. Its protection has created debated issues by academics and there are varying discussions regarding its status and these differing views have continued to have a negative impact on its significance, thereby increasing the level of poverty in the Country. Although, several international and regional treaties protect SERs and such instruments have been domesticated by various states, Nigeria inclusive, the picture remains dismal in terms of effective realisation and protection in Nigeria. Studies have shown that the status of SERs in Nigeria is hinged to its history, which has continued to hinder its progress.

With the domestication of the African Charter on Human and Peoples' Rights in Nigeria, there has been an inundation of debates in literature that the effect of incorporation of the treaty into domestic legal framework is to render SERs justiciable. Ironically, the Constitution of the Federal Republic of Nigeria 1999 (as amended) considers SERs as non-justiciable, thus non-enforceable. It is important to note that the realisation of SERs is crucial to overcoming the challenges of abject poverty the country is currently facing. Till date, its enforcement remains a challenge.

This study aims to consider alternative approaches towards its protection. To aid my analysis, this study undertakes a critical evaluation of the status of SERs in Nigeria, as well as the possible challenges that may be faced towards its realisation, in addition, provisions from other national constitutions such as Kenya and South Africa, Regional and International human rights instruments will equally be examined, integrating them with relevant literature on SERs. The aim is to analyse common themes in the various jurisdictions listed above, by seeking the

factors that perhaps may have assisted in adopting approaches towards the protection of SERs and recommending such to the Nigerian Government.

To this end, this study argues for the adoption of a transformative and integrated approach which combines both a progressive aspect of a minimum core and the reasonableness approach in deciding SERs cases. The study equally recommends other approaches that have been effectively adopted in other jurisdictions. The researcher argues that for Nigerians to enjoy their basic rights, the various arms of Government, especially the Judiciary must take the centre stage.

Dedication

This thesis is dedicated to my parents, Professor Paul Obo (SAN) and Mrs Rose Idornigie for their unconditional love, support and most importantly believing in me.

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I would like to thank the Almighty God for seeing me through this journey.

My sincere gratitude goes to my supervisor Dr Chisa Onyejekwe, who nurtured and encouraged me. Her dedication, patience, motivation and guidance helped me all through my research and writing of this thesis. Besides my principal supervisor, I would like to thank the chair of my board, Dr Chrispas Nyombi, whose enlightenment, encouragement, motivation, ideas and insightful comments made me keep a clear vision while on this journey. They were always there for me and selflessly supported me throughout my studies. I would equally like to thank Tom Mortimer, who before he retired, motivated and guided me. I would like to also appreciate Dr Konstantinos Siliafis and Dr Narissa Ramsundar who were equally supportive and encouraged me throughout my programme. Special thanks to my examiners, Dr Laura-Stella Enonchong (external examiner) and Professor Susan Millns (internal examiner) for their continuous support, patience and guidance.

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Abbreviations	
ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACHPR	African Commission
AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
CPRs	Civil and Political Rights
ECOWAS	Economic Community of West African States
ECHR	European Convention on Human Rights and Fundamental Freedom
ECtHR	European Court of Human Rights
FODPSP	Fundamental Objectives of Directive Principles and State Policy
GC	General Comments

HRC	Human Rights Committee
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
NHRI	National Human Rights Institute
NGO	Non-Governmental Organisation
NSAs	Non- state Actors
ICJ	International Court of Justice
OAU	Organization of African Unity
SA	South Africa
SAC	South African Constitution
SACC	South African Constitutional Court
SERs	Socio-economic Rights
SERAP	Socio-Economic Rights and Accountability Project
WHO	World Health Organisation

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CHAPTER ONE: INTRODUCTION TO THESIS

1.1 Introduction

It is commonly acknowledged that the anxiety about human rights is not narrowed to a region or continent. Over the years, mechanisms for its protection and enforcement have evolved globally, regionally and nationally. The African Charter on Human and Peoples' Rights (ACHPR or the African Charter)[1] is a regional mechanism that has been set up for the realisation of Socio-Economic Rights (SERs) in Africa. The debate on human rights reflects on the image of the Continent's political struggle and history. Any argument on human rights must be grounded on Africa's history and development, which encompasses the colonial era. Furthermore, a broad understanding of this area of law within the larger structures of international law and politics is also required. A historical perspective is key to this research, such a perspective is vital, not only because of the nature of human rights but because history has continued to influence its realisation even till date.

The argument in Nigeria is no longer on the desirability or otherwise of the incorporation of SERs in the Constitution of the Federal Republic of Nigeria 1999 (as amended) (herein referred to as the Nigerian Constitution), but rather, towards its enforcement. The fact that the Nigerian Constitution makes this category of rights non-justiciable, by necessary implication, portrays conflicts between principles of international constitutionalism and domestic or national constitutionalism.[2] Nigeria is currently a member of the African Union (AU) and obligated to enforce SERs which are currently enshrined in the African Charter.[3]

[1] The African Charter on Human and Peoples' Rights, which was adopted on the 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (1982) 21 International Law Material 58.
[2] The decision of the ECOWAS court in SERAP v Federal Republic of Nigeria (ECW/CCJ/APP/08/09).
[3] The Schedule to the Ratification Act 2004 which states, "An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights made in Banjul on the 19th day of January 1981 and for purposes connected therewith".

The challenges surrounding human rights in Africa has continued to cause both regional and universal concerns. Nigeria, like other African countries is still struggling to develop and yet to embrace core democratic values. This is clearly expected given the challenges that the Continent currently faces. It is notable that, Nigeria is one of the countries in Africa still having difficulties in achieving sustainable development. After more than sixty years of independence, the scenario in the country remains disappointing. Scholars have long engaged in a vibrant debate around the proper role of enforcing SERs,[4] the debate in respect of which so much intellectual stamina has been applied revolves on the twin questions, which is the status of SERs as rights and its enforcement. This has been ongoing because states have failed to fulfil their obligations.[5]

It can be argued that globally, the realisation of SERs has encountered challenges and setbacks because of its definition, the nature of states' obligations, the various implementation mechanisms and the lack of actual remedies.[6] Nigeria is not alone in this struggle, sadly, the negative reports are never ending on the status of SERs in Nigeria, and the Nigerian Government fail to realise that the enjoyment of SERs will lead to economic development and promote man's dignity.

In different jurisdictions, laws are evolving to accommodate modern day society, such transformations are not essentially innovative and to some extent, can be said to have historical element. What seems to generate this deliberation is the apparent lack of precision with which national and international instruments provide for SERs in relation to Civil and Political rights

[4] Richard Stacey, "Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights", 31Notre Dame Ethics review (2017). Available at: https://scholarship.law.nd.edu/ndjlepp/vol31/iss1/3/?utm_source=scholarship.law.nd.edu%2Fndjlepp%2Fvol31%2Fiss1%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 15th November 2018.

[5] Chidi Anselm Odinkalu, **"**The role of case and complaints procedures in the reform of the African regional human rights system (2001) *2* AHRLJ *225-246*< https://www.ahrlj.up.ac.za/odinkalu-c-a>accessed 14th January 2019.

[6] Nnamdi Aduba. *An Introduction to Human Rights Law in Nigeria* (2016 LAP Lambert Academic Publishing) p.40.

(CPRs), notwithstanding that these rights are interdependent, universal and inalienable.[7] This so-called classification has hindered national courts from enforcing SERs and thereby leaving the most vulnerable in the society unprotected.[8]

This thesis aims to argue for the need for adequate enforcement mechanisms of SERs in Nigeria. It is usually assumed that human rights has no impact on the development of the economy and government is not obligated to fulfil, protect, and promote human rights especially when they are able to prove lack of adequate resources. It is pertinent to note that, if SERs should serve its purpose, several pressing questions may need clarification, questions such as: What is the nature and content of these rights and who has the competency to determine its real content? What is its true nature, scope and to what extent are its obligations on state? How can they be enhanced in practice to improve the standard of living? These issues and more provide the basis and focus of this research.

Accordingly, the thesis aims to respond to the above questions by means of examining the relationship between the African Charter and the Nigerian Constitution, exploring constitutions of some African countries, and comparing them with the international framework. This approach involves relying on the current or even growing awareness and practice of SERs at both the international and national levels.

1.2 Framework for the protection of SERs in Nigeria

The manner adopted for the implementation of all SERs leaves much to be desired. The delay in implementing SERs by the international community clearly has an adverse impact on the protection of SERs at all levels. This impact has equally influenced the way states view such rights. At the universal level, the most significant human rights instrument is the Universal

[7] Paul O'Connell, *Routledge Research in Human Rights Law: Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Taylor & Francis Ltd 2012).
[8] Rolf Kunnemann, "A coherent approach to human rights" (1995) Human Rights Quarterly 323, p332. The author asserted that SERs are the only means impoverished or marginalized individuals can survive.

Declaration of Human Rights (UDHR),[9] which incorporated both CPRs and SERs. The declaration has no binding effect as it was not a treaty. The proclamation for binding instruments was adopted in 1966 with the International Covenant on Civil and Political Rights (ICCPR), incorporating CPRs and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[10] focusing on SERs. The ICESCR is the foundational backbone for the protection and enforcement of SERs. The covenant underscores that parties to the treaty are directed to adopt domestic legislation to give effect to SERs. The progressive realisation principle provided for in Article 2(1) ICESCR identifies that recognition of all SERs will generally not be able to be achieved in a brief period of time.[11] Progressive realisation as expected under the Covenant has in most cases been misinterpreted as mere aspirations and depriving the obligation a meaningful content. As a result, it is important what states do to progressively realise SERs. To Chenwi:

…The progressive realisation qualification requires a state to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints…[12]

Article 2(1) and 11(1) of the ICESCR requires state parties to take appropriate steps, within the limits of available resources, to fully realise SERs. The ICESCR further requires state parties to ensure that everyone is equally entitled to full enjoyment of SERs without any

[9] The Universal Declaration of Human Rights is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, it set out, for the first time, fundamental human rights to be universally protected. The Declaration was adopted by the UN General Assembly in Paris on 10 December 1948 during its 183rd plenary meeting.

[10] Both covenants were adopted in 1996. The two separate treaties covering all the rights enshrined in the Universal Declaration of Human Rights were adopted after approximately 20 years of negotiations: one for civil and political rights, the International Covenant on Civil and Political Rights (ICCPR), and one for economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976

[11] Lilian Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" De Jure (2013) 742-769 744

[12] Ibid p743. Its relation to resources, minimum core and reasonableness and some methodological considerations for assessing compliance'

discrimination. For a state party to be able to attribute its failure to meet its core obligations as provided for in the covenant, such a state must prove that every effort has been made to use all the available resources. Although it is evident from the ICESCR that states are required to take positive steps in complying with all SERs, the covenant is unable to force state parties comply with their imposed obligations especially if they can prove unavailable of resources. Compliance is evident from the approach adopted in South Africa and Kenya, in the way they have interpreted obligations provided for in the covenant. Even though, the various international human rights treaties advocate for state parties to implement the various rights, the covenant fails to deal with compliance.[13] The international monitoring treaty usually evaluates reports which have been submitted by state parties and responds to the progress made.[14]

However, the United Nations Committee on Economic, Social and Cultural Rights has clearly stated that some of the obligations are of immediate effect,[15] that is not to say that states are bound to do the unimaginable. The provision has indeed created a lot of ambiguity and conflicting interpretations because of the language that was used, a situation that has clearly enabled states to rely on at their convenience. This is what is currently applicable in many developing and developed countries today. In addition, the presumption that SERs is purely within the purview of the courts to determine has equally created unrealistic outcomes and perhaps unfortunately taken away the need for the legislative and executive arms of government to make efforts in its realization.

[13] Eric Neumayer "Do international human rights treaties improve respect for human rights?" Journal of Conflict Resolution (2005) vol 49 925-953 p929.
[14] Articles 16(1), 18, 19 and 20 of the ICESCR.
[15] Article 2, Paragraph 1(Nature of State Obligation).

The African Charter on Human and Peoples' Rights,[16] which is a regional instrument incorporates both CPRs and SERs. The African Charter identifies the indivisibility and interdependence of both categories of rights.[17] Even though, the African Charter recognises that CPRs cannot be disconnected from SERs, in practice, the latter rights have been given less priority.[18] Several debates have been put forward to agree with the idea that SERs are not justiciable and should continue to be given less priority. This dismissal seems to be related with the inability to identify issues such as unemployment, poverty, and illiteracy as human rights issues[19]. It has been debated that, unlike CPRs, SERs are not real rights.[20] This is largely due to the misconception that SERs involve enormous resources for its implementation and equally seen as being vague.

Nationally, SERs are provided for in chapter II of The Constitution of the Federal Republic of Nigeria 1999 (as amended), as Fundamental Objectives and Directive Principles of State Policy (FODPSP). The said provisions incorporate SERs. It is generally accepted that the adoption of Fundamental Objectives and Directive Principles of State Policy is one of the greatest innovations of the 1979 and by extension the 1999 Constitution of Nigeria. The Fundamental Objectives and Directive Principles provided in chapter II lay down policies that should be pursued in order to realise the national ideals. In other to enhance the effectiveness and observance of the Fundamental Objectives and Directive Principles as contained in chapter II, section 13 of the Constitution mandates the three arms of government to observe and apply the provisions of chapter II. The section provides that:

[16] Adopted by the Eighteenth Assembly of Heads of State and Government of the OAU at Nairobi in July 1981, entered into force on 21 October 1986.
[17] Provided in paragraph 8 of the African Charter.
[18] Asbjorn Eide, "Economic, social and cultural rights as human rights" in A Asbjorn Eide , Catarina Krause , Allan Rosas (eds) *Economic social and cultural rights*. 9 10 (Brill; 2nd Revised edition 2001).
[19] Peter Baehr *Human rights: Universality in practice* (Palgrave Macmillan 2001).
[20] Maurice Cranston, *What are human rights* (London: Bodley Head 1973).

…It shall be the duty and responsibility of all organs of government and all authorities and persons exercising legislative executive or judicial power to conform to, observe and apply the provisions of this chapter of the Constitution...[21]

Following this provision, the government is obligated to apply and observe these objectives and principles, as this will promote the welfare of the common man and bring changes in the structure of the society.

In addition, item 60(a)[22] of the exclusive list equally gives the National Assembly exclusive legislative power to make laws for the establishment and regulation of authorities that will enforce and promote the observance of chapter II of the Constitution. Notwithstanding these Constitutional provisions, section 6(6)(c) of the Constitution provides that the FODPSP set out in chapter II of the Constitution are non-justiciable.

Human rights are universal and interdependent, a strong debate that has been put forward is that SERs cannot be applied universally.[23] It is important to identify that international law discussions have connected universality with cultural relativity, which takes into consideration various cultures and customs predominant in the different states. Furthermore, this argument is yet to identify that these rights are interdependent and indivisible.[24] Professor Osita Eze, clearly opines that "if socio-economic rights are not guaranteed, then to that extent will civil and political rights remain palliatives for the masses".[25]

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[21] Section 13 of the Constitution of the Federal Republic of Nigeria 1999 (As amended).

[22] In Nigeria, legislative lists provide for the division of powers - the exclusive legislative list, the concurrent legislative list and the residual legislative list. Section 4(1) of the Constitution provides that the legislative powers of the Federal Republic of Nigeria are vested in the National Assembly for the Federation and section 4(6) vests the legislative powers of a state in the House of Assembly of that State.

[23] Craven Matthew "The international Covenant on Economic, Social and Cultural Rights: A perspective on its development" (1995) Netherlands International Law Review Volume 43 Issue 2 p10.

[24] Eide, A. et al. (n18) p16.

[25] Osita Eze, *Human Rights Issues and Violations: The African Experience*, in George W Shepherd Jnr & Mark OC Anikpo, eds, *Emerging Human Rights: The African Political Economy* Context (Westport, Connecticut: Greenwood Press, 1990) 87 at 102 < https://dsc.duq.edu/cgi/viewcontent.cgi?article=1016&context=beth> accessed 23rd March 2019.

In Africa, the historical aspect and the instruments created for the implementation of human rights will be vital to this research as Umozurike rightly opined that, an appreciation of the progress of human rights calls for the study of its history.[26] This research will focus on the historical feature to elucidate the background, nature and alterations that have arisen with the progression of human rights in Africa, specifically in Nigeria, since its legal framework is derived from universal, regional and domestic level.

This thesis equally argues that SERs cannot be separated from CPRs and that economic growth and progress will be hindered except both categories of rights are protected and fulfilled. To this end, there is therefore a need for Nigeria to make more efforts to align with these rights. Interestingly, it has been argued that struggles of some African states with regards to the enforcement of CPRs would not have materialised without the pressures of the international community and civil societies, perhaps this may achieve similar results for SERs.[27]

This thesis has established that the challenge is not the non- justiciability of SERs claims, but the will to implement them, the non-justiciability does not necessarily derogate on their importance. This will be discussed in detail in the next chapter.

1.3 The weak status of Socio-Economic rights in Nigeria

Despite the apparent legal framework, there is little focus on SER's in Nigeria and the realisation of SER's has not truly been achieved as it was never a priority for the State's legislative agenda. In Nigeria, before the 1979 Constitution, CPRs was the major focus and SERs were not accorded any constitutional relevance. Major constitutional developments occurred with the adoption of the 1979 Constitution, most importantly, SERs did gain some

[26] Oji Umozurike, "The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness," Annual Survey of International & Comparative Law: [2007] Vol. 13 issue 1, Article 8. Available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol13/iss1/8> accessed 23rd March 2019.

[27] Joe Oloka-Onyango "Beyond the rhetoric: Reinvigorating the struggle and cultural rights in Africa" (1995) 26(1) California Western International Journal 1< https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1329&context=cwilj> accessed 28 May 2020.

relevance.[28] This key improvement in the country's constitutional progress was significantly caused by an evolving universal development of SERs acknowledgement.[29] Fundamental human rights were contained in chapter IV of the Constitution and justiciable, while SERs were non-justiciable.

However, despite this, the 1999 Constitution emerged and maintained the same practice by reproducing chapter II as FODPSP. Regrettably, the drafting committee of the Nigerian Constitution did place more priority on chapter IV of the Constitution primarily because they were self-executing rights and imposed little or no obligation on the state,[30] in disparity, SERs were perceived as programmatic[31] and positive rights required the state to take immediate considered steps towards its fulfilment.

While it may be acknowledged that during the drafting stage of the Nigerian constitution,[32] there were uncertainties within the state, that affected the provisions of the constitution, thus focusing on CPRs. It is vital to note that SERs cannot be perceived as mere aspirations,[33] left to an unspecified future mainly because a state is unable to fulfil their obligations. FODPSP simply means policies which have been laid down and are expected to be executed by the state.[34] Unfortunately, the rights provided in chapter II are non-justiciable nor enforceable subject to Section 6(6)(c) of the constitution. The section provides that the judicial powers vested accordingly:

[28] Provisions of Chapter II of the 1979 constitution.
[29] Ibid.
[30] Civil and Political rights are negative rights while SERs are positive rights as the require states to take actions.
[31] Goodman, Ryan, Henry J Steiner, and Philip Alston, *International Human Rights in Context,* (3rd edition. Oxford University Press 2007).
[32] 1960, 1965, 1979, 1995 and 1999 Constitutions of the Federal Republic of Nigeria
[33] Eide Asborrjn, Krause Catarina, & Rosas Alan, *Economic, social, and cultural rights: A textbook*. (Dordrecht: M. Nijhoff Publishers 2001).
[34] Vol 1, Page V of the Report of the constitutional drafting committee; Ben Nwabueze, Presidential *Constitution of Nigeria*, (C. Hutst& Company in association with Nwanife Press, Enugu and Lagos, 1982).

…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….[35]

This provision was argued in the case of *Archbishop Anthony Okogie v. AG Lagos State*,[36]where the court held that:

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

This dictum indicates an obvious clash between the contents of section 6(6)(c) and Section 13, which compels all organs of government to adapt to and equally implement the provisions contained in the FODPSP. This confusion seemingly creates an open conflict in the constitution regarding the status of SERs, this in turn has weakened the status of SERs in Nigeria,

The essential aim for including SERs into the constitution was to help guide Government plans and programmes. As previously contended, these rights are central not only to the various organs of Government, but also to the citizenry. Countries that are SERs friendly have indeed made conscious efforts to enforce them[37] or challenged government activities that are contrary

[35]In addition, apart from the courts lacking capacity to make articulated decisions about implementation and enforcement strategies, it is also argued that making socio-economic rights enforceable vitiates the principle of separation of powers in that it allows 'unelected' judicial officers to tinker with the role of legislature to make law and that of executive to execute the law. See also Solomon Ebobrah "The Future of Economic, Social and Cultural Rights Litigation in Nigeria". Review of Nigerian Law and Practice, (2007)1(2), 108-124

[36] (1981) 2 NCLR 337 at 350

[37] Olu Adediran, 'Issue of Non-Justiciability Under the Nigerian Constitution', in Legal Issues for Contemporary Justice in Nigeria, Essays in Honour of Hon. Justice M.O. Onalaja, edited by Adebiyi Olatubosun I., 2007 p.15.

to the Constitution's provisions.[38] Till date, the Nigerian government has obstinately promoted CPRs and given little or no regard to SERs. This discussion will be elaborated in chapter 4.

The classification of human rights has influenced this perception. It has also affected the over-all view on whether SERs are directly or progressively realisable subject to resources. It is for these reasons, and perhaps more, that in the ever-growing debates on human rights law, academics have continued to query the status of SERs, or at best given them less priority. The wide gap[39] between the reception and enforcement of SERs, on the one hand, and CPRs, on the other, ensues that the former is treated less seriously than the latter. Sadly, states fail to realise that SERs have broad implications on its people. The disparity between the two categories of rights was established by the UN Committee on Economic Social and cultural rights in their statement during the Vienna World Conference in 1993, affirming that;

…The shocking reality is that states and the international community continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights…[40]

Through centuries, there have been contradictory political ideologies over which right should have priority. These arguments are unfounded as fulfilling SERs will invariably reflect on peoples' quality of life. These rights are guaranteed in Articles 20-23 of the UDHR,[41] which

[38] Ibid p15
[39] Ryan Goodman, Henry J Steiner & Philip Alston. International Human Rights in Context, (3rd edition. Oxford University Press 2007). <Available at http://www.tinyurl.com/y26op8y7> Accessed 15 July 2018.
[40] Maurice Cranston, What Are Human Rights? In D. D. Raphael(ed), *Political Theory and the Rights of Man*. (London: Macmillan 1967) (pp. pp. 43–52).
[41] The UDHR was adopted by the United Nations General Assembly in 1948.

guarantees that all human beings are entitled to the satisfaction of SERs and states are mandated to fulfil these rights either through national efforts or international cooperation. With Nigeria's colonial heritage, CPRs provisions were adopted entirely rather than SERs.[42] Till date, more attention has been given to the realisation of CPRs, whilst less priority is given to SERs. Professor Osita Eze provided a justifiable reason why SERs appear to be given less priority in African constitutions, the author asserts that;

…The reason for the marked absence of socio-economic rights in African constitutions is often because unlike political and civil rights which attempt to limit the encroachment of states and its instruments on human rights, they require states to provide material means for their enjoyment…. since African countries are undeveloped, it will be futile to encourage litigation on the infraction of socio-economic rights...[43]

Other challenges that have continued to impede the realisation of SERs in Nigeria such as corruption will be discussed in chapter 4 of this research.

1.4 Selected jurisdictions

Nigeria is the central focus of this study, primarily because of the reproach and setbacks the country has received. The goal of this study is to discover the various possibilities towards the protection of SERs, with this in sight, the thesis aims to examine the constitutional provision in Nigeria, comparing its framework with two member states of the African Union, with the aim of adopting best practices towards the protection of SERs in Nigeria. In selecting the countries to compare, South Africa and Kenya were considered mainly because they present suitable models for Nigeria. The South Africa Constitution and the Constitution of Kenya have

[42] Osita Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs & Macmillan Publishers, 1984) at p3.
[43] Ibid p3.

protection mechanisms in place for the realisation of SERs and these rights are placed on equal basis as CPRs, thus enforceable in courts.

In selecting the countries, it was imperative that they were members of the Africa Union (AU), although the AU currently has fifty-five (55) members, two countries stood out, because both states have sufficient literature to enable the researcher respond to the research questions. Secondly, the said countries equally protect and promote SERs adequately in their national laws. While the search was narrowed down to nine countries, another deliberation was that the states selected had to be English speaking countries. Consequently, because the research reflects on the national laws and case laws, the researcher preferred to use countries with relevant case law on SERs.

By analysing the legal recognition of SERs within countries in Africa as well as the comparative status to international human rights law, this study aims to examine how these selected African countries have been able to develop their jurisprudence in human rights in accordance with international law. Most importantly, the study investigates the various approaches the selected states have adopted to improve the status of SERs.

The study equally examines non-African countries as well such as India. India has a hybrid legal system having elements of civil law, common law, equitable law, and customary and religious laws. In its constitution, SERs are provided for as Directive Principles of State Policy,[44] thus non-justiciable. The Indian Supreme Court has made SERs justiciable by expanding them to include the right to life and personal liberty under Article 21 of India's Constitution.[45] Indian and foreign constitutional scholars have generally applauded This

[44] See the Indian Constitution Articles 36–51. Part IV of the Indian Constitution deals with Directive Principles of our State Policy. The provisions contained in this Part cannot be enforced by any court, but these principles are fundamental in the governance of the country, and it shall be the duty of the State to apply these principles in making laws.

[45] See the case of Mullin v. Adm'r, Union Territory of Delhi (1981) 2 S.C.R. 516, 518

judicial innovation alike. This research has demonstrated that the judicial system in India has modified non-justiciable SERs into justiciable rights. In the case of *Paschim Banga Khet Mazdoor Samity v State of West Bengal,*[46] the Supreme Court asserted that financial limitation is a constitutionally unacceptable reason to deny the right to healthcare. The court observed that it was the *"constitutional obligation of the State to provide adequate medical services to the people" and* that *"whatever is necessary for this purpose has to be done".* The language adopted by the Court was noticeably clear and imposed a burden on the state. India and South Africa are most repeatedly referred to as nations with an utmost progressive legal jurisprudence on human rights.[47] For instance, India has largely advanced its SERs through expansion of civil and political rights, while South Africa expressly provides for these group of rights in its Constitution. The Indian Courts have now taken the position that CPRs which are termed fundamental rights and directive principles are interdependent.[48]

The South African Constitution depicts itself as the most progressive regarding judicial enforcement of SERs. This may be due to its progressive Constitution. Aolain and McKeever have described South Africa as being a "*Substantive Model of enforcement*" which gives straight and functional promotion and protection of SERs,[49] compared to Nigeria where these rights are non-justiciable.

Some African countries like Namibia, Ghana and Malawi equally have SERs as Fundamental Objectives and Directive principles of State Polices, it is believed that these principles are there to serve as a guide for its implementation and perhaps aid the courts in its interpretation. There

[46] 1996 SCC (4) 37, JT 1996 (6) 43

[47] South Africa and India are usually cited as countries with the best human rights framework. See Abeyratne, Rehan, Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy (2014). 39 Brooklyn Journal of International Law 1, 2014, Available at: https://ssrn.com/abstract=2189277 ; Goldstone, Richard J. "A South African Perspective on Social and Economic Rights." Human Rights Brief 13, no. 2 (2006): 4-7; Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa" (John M. Olin Program in Law and Economics Working Paper No. 124, 2001).

[48] State of Kerata v N.M. Thomas (1976)2 SCC 310 at 367

[49]McKeever, Grainne & Aolain Ni Fionnuola "Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland". (2004) European Human Rights Law Review, *2*(2), 158-180.

are equally some African Countries who have neither incorporated SERs into domestic law nor included them as directive principles of state policies. Sadly, such actions have made the enforcement of SERs almost impossible. Botswana is a typical example as its constitution contains an extensive list of CPRs and fails to include SERs.[50] Looking at Ghana, the DPSP were not explicitly affirmed as non-justiciable by its constitution. However, the courts have treated them as non-justiciable.[51] This position has changed with a Supreme Court judgement,[52] the Court held that SERs are justiciable as provided for in its Constitution. The initial purpose was to make them non-justiciable, however, the Court provided otherwise.

This research serves as a foundation for additional studies directed at providing alternate platforms towards the protection of SERs protection in Nigeria. Furthermore, examining other African countries, the research demonstrates that without effective mechanisms, SERs will remain mere aspirations. To this end, this research studies various jurisdictions and an appraisal of the practices adopted in enforcing SERs.

1.5 Statement of research problem

Human rights originate on principles that focuses on human dignity, equality and universality. It is pertinent that human rights must be fashioned on constitutional supremacy, the rule of law and Democracy[53] to enable them to have an impact that is beneficial to man. This buttresses the point that the continuous absence of state actions would render the SERs non-justiciable. In Nigeria, CPRs have been given greater priority while SERs are seen as mere aspirations. It is important to close the gap between the rich and poor in Nigeria, as it has adverse effect to the dignity of man. As of 2020, the world poverty index shows Nigeria's poverty level was

[50] Ibid
[51] The New Patriotic Party v. Attorney General (1996-7) SC Chana LR 728 at 745.
[52] Ghana Lotto operators Association v. National Lotteries Authority (2007-8) 2 SCGLR.
[53] Silas Aluku, "Judicial Enforcement of Social Economic and Cultural Rights in Kenya: Health and Housing" (September 15, 2015). Available at SSRN:< https://ssrn.com/abstract=2660810 or http://dx.doi.org/10.2139/ssrn.2660810> accessed 15 November 2018.

amongst the world's highest with eighty-nine million Nigerians living in extreme poverty, this represents nearly 50% of its estimated of over two hundred million population showing very little improvement.[54] Furthermore, the data equally shows South Africa with over eighty-nine million population with 27% of its population living in extreme poverty. Kenya, on the other hand, with a population of over forty-nine million with about 16% of its population living in poverty.[55] This indicates that the poverty level in Nigeria is still extremely high. Nigeria currently has the largest poor population in the whole of Sub-Saharan Africa.[56] With this in view, it is increasingly obvious that the Nigerian Government take steps to promote and fulfil the realization of SERs in Nigeria. Unfortunately, the major problem with the realisation of SERs in Nigeria centres on its status, state's obligation and its enforcement mechanisms. Shehu suggests that the functions of the courts whether at the international, national or regional or sub-regional level should remain the same, the only notable distinction bothers on territorial jurisdiction, however, these courts may have dual competence depending on the state's legal regime.[57]

The preamble of the African Charter identifies that justice, equality, freedom, and dignity are indispensable purposes for the realization of the legitimate aspirations of the African People.[58]Additionally, the Charter does acknowledge that CPRs cannot be disconnected or disassociated from SERs as they are interdependent upon each other.[59] One tends to question what the real reasons are hindering the realization of this category of rights. Could it be that SERs are unreasonable? Or that perhaps the applicable laws are not effective enough to reflect

[54] World Poverty Clock< https://worldpoverty.io/map> Accessed 15th April 2021.
[55] Ibid.
[56] Ibid.
[57] Ajepe Taiwo Shehu, "The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience" Journal of Sustainable Development Law and Policy, vol. 2 (1), (2013) Afe Babalola University, Ado-Ekiti, Nigeria, pp. 97-116
[58] African Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.
[59] Para 8 of the UDHR.

cultural values? Studies have shown that, it may appear to be a combination of the reasons mentioned above, it is then necessary to develop a solid framework in order bring about change.

Aside its non-justiciability, corruption appears to be another challenge in Nigeria. Even though corruption is a global challenge, this problem is more prevalent in third world countries, Nigeria inclusive. The level of corruption in Nigeria has continued to impede the economic development.[60] It is one of the greatest impediments preventing Nigeria from achieving its potential. This demonstrates that the Constitutional recognition of SERs as fundamental rights is not essentially the solution to all the challenges derived from SERs, even though, this recognition does provide adequate room for judicial intervention and the ability to hold the Government accountable, thereby creating a platform for judicial remedies. Unfortunately, advocating for constitutional amendment, important as it is, may not be sufficient.[61] This is because, the approach adopted by states for the protection of SERs must conform with international standards. This further suggests that compliance by state parties will require higher budgetary allocations towards SERs. Unfortunately, this commitment, government officials are not willing to undertake. Shehu rightly opines that the "enforcement of socio-economic rights puts huge financial claims on the state".[62] And this has been aggravated by decades of corrupt leadership and massive theft of state resources thereby depriving Nigerians of access to the necessities of life.[63]

This research therefore argues that the lack of adequate SERs enforcement mechanisms is a threat to economic development in Nigeria. In addition, the research further argues that

[60] Philip Amana Attah, Baba Edna & Haruna, Paul Ogwu, "Corruption and its impact on the socio-economic development of Nigeria" Journal of Good Governance and Sustainable Development in Africa (JGGSDA), Vol. 4, No 4,2019 Available online at http://www.rcmss.com/index.php/jggsda

[61] Oluwafifehan Ogunde, "The Future of Socio-Economic Rights in Nigeria: Beyond COVID-19″, (OxHRH Blog, August 2020), Available at: https://ohrh.law.ox.ac.uk/the-future-of-socio-economic-rights-in-nigeria-beyond-covid-19/ accessed 22 April 2022.

[62] Shehu(n56) p101.

[63] Stanley Ibe 'Expanding the space for economic, social and cultural rights in Nigeria: feature.' (2014) 15 (2) ESR Review: Economic and Social Rights in South Africa 3.

addressing corruption will facilitate economic development and poverty reduction. To this end, the researcher aims to examine the enforcement mechanism for SERs available in Nigeria and suggest alternative enforcement approaches.

1.6 Research Question

As such, this research asks the question "to what extent can an effective SER implementation structure aid the realisation of SERs in Nigeria as well as facilitate economic development and poverty reduction?

To answer this question, an examination into factors that impede its implementation will need to be analysed as well as suggest alternative approaches towards its effective realisation.

1.7 Aim of this study

The central aim of this research is to investigate how and to what extent SERs are protected in Nigeria. The study aims to examine the Nigerian constitution comparing its provisions with other selected African countries with a view to identifying practical SERs enforcement mechanism with the aim of adopting best practices. From the findings, the thesis aims to provide practical recommendations to the Nigerian government which will facilitate economic development and poverty reduction. The study equally aims to expand on existing literature.

While the focus of this research is Nigeria, the constitutional provision of SERs in South Africa and Kenya will be analysed detail.

1.8 Objectives of this study

Primarily, the objective of this study is to reiterate the significance of SERs in Nigeria. At this point, it is important to look at its history which has been clearly extrapolated in literature, to further explain that SERs were included in the Nigerian constitution solely because other

nations were doing or as a token to pacify the international community, this clearly explains why till date, SERs are still given less priority compared to CPRs. Furthermore, because they were not custom-made in other to suit those it seeks to protect, they debatably have not been effective.

Following this argument, South Africa and Kenya have been selected with the intention of studying their constitutional structure and legal provisions on SERs, this will enable the researcher to get a clearer meaning and understanding of SERs in the different jurisdictions.

Following the examination, another objective is to consider how legal provisions concerning SERs are fulfilled by court or other mechanisms. This is necessary as some countries may unambiguously or indirectly state that SERs are not enforceable, it is then justified that alternative approaches may need to be explored for its protection. This theory therefore suggests that judicial and other protection mechanisms may perhaps assist in protecting SERs in Nigeria.

1.9 Significance of the study

Sufficient literature exist that identifies and justifies the standards required to fulfil SERs as provided for by International Human rights Law, the principles set are inspiring models to be guided by. Provisions in the Nigerian constitution has created some discrepancies and confusion regarding its content, it is still not very clear what the initial drafter's intentions were. This study will critically examine the Nigerian constitution with the aim of clarifying the confusion that currently exists.

The research aims to contribute to academic debate on the protection and promotion of SERs in Nigeria. This will be a significant step towards its realization, as the researcher will analyse the obligation of states as provided for in the ICESCR. Additionally, the research will evaluate the strategies adopted by civil societies and human rights institutions towards the fulfilment

of SERs. This area may perhaps instigate further studies. But most importantly, the research will assist in fortifying the framework of Human Rights Law in Nigeria, as the research aims to provide suitable recommendations that will reform the current human rights system in Nigeria. As a contribution to literature, this thesis suggests and recommends alternative approaches to the protection of SERs in Nigeria.

1.9.1 Justification for studying progressive realisation and enforcement

It is known that Human rights has no meaning when they are not enforceable or even recognised. Till date, enforcement of SERs is still a major challenge facing international Human Rights law, and this is principally because of the principle of sovereignty.[64] This is so because, enforcement denotes the determination in ensuring a law and typical policies or court orders are correctly adhered to.[65] Consequently, it is a term that is tantamount to fulfilling rights as emphasized in international law. While ratifying international treaties, state parties, obligate themselves to its full realisation, which very well comprises of obedience with decisions from associated implementation and enforcement bodies.[66] Sadly, this appear to be the greatest challenge facing the 21st-century.[67] Without operational enforcement mechanisms, struggles put forward during negotiation and drafting stages are a total waste of resources and efforts. To attain actual enforcement, international human rights instruments have monitoring and enforcement mechanisms, hence, appreciating actual implementation of the ICESCR to compel state party obedience or the use of domestic courts. To this end, the study will equally examine

[64] Andrew Guzman, "The Consent Problem in International Law" (2011) Berkeley Program in Law and Economics, Work Papers, available at > https://escholarship.org/content/qt04x8x174/qt04x8x174.pdf< accessed 11 December 2018; Anu Bradford and Omri Ben-Shahar, 'Efficient Enforcement in International Law' (2010) Chicago Journal of International Law, 375.

[65] Blacks Law Free Online Dictionary, (2nd edn), Available at <https://thelawdictionary.org/enforcement/ > Accessed 11 December 2018.

[66] Roger-Claude Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies' (2015) 41 Brooklyn Journal of International Law, 99. < https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1413&context=bjil> Accessed 11 December 2018.

[67] Douglas Donoho, "Human Rights Enforcement in the Twenty-First Century" (2006) 35 GA

the role played by institutions such as the courts for the protection of SERs in Nigeria. Aside from the foregoing, this study aims to critically evaluate how the obstacles regarding its recognition may be controlled. The findings will then be integrated in a comparative discourse to South Africa and Kenya.

1.10 Research methodology

This section aims to briefly highlight the research methods used for this study.

1.10.1 Comparative study

Comparative research method has been central to the holistic, critical realist, analysis and interpretation of findings in this research. This method adopted has been applied to explore best practices and approaches that are useful in the understanding, realization, and implementation of SERs in other jurisdictions. Unavoidably, this research also places substantial dependence on associated secondary literature in the field of human rights law. Assumptions derived from the evaluation is then applied towards responding to the research questions. According to Orucu,[68] the field of comparative law is not just about discovering resemblances between similar phenomenon, for it is not similarities, but differences that help to facilitate and enhance the quality of comparative research. Legrand[69] equally supports this position. The author affirms that sameness across different laws eliminates, albeit artificially, epistemological dimensions from the investigative framework of comparative law. He further asserts that sameness has the ability of making comparative law a pseudo-scientific exercise, existing only in a vacuum and has no connection with the country or place of origin the law being compared. This position taken by both authors reinforces the argument often put forward

[68] Esin Orucu, *The Enigma of Comparative Law* (Brill Academic Publishers 2004) p34.
[69] Peter Legrand, 'Comparative Legal Studies and the Matter of Authenticity' (2006) 1(2) Journal of Comparative Law 366.

amongst some experts of comparative law,[70] who strongly suggest that comparative law research can only be achieved effectively between jurisdictions with similar cultures, political and legal systems.

An understanding of how the law works in different jurisdictions is certainly a way to understand the development of its legal system. When comparative law is applied suitably and contextually, it enables one to understand the legal system better, and one of the ways this can take place is through the process of comparing one legal system to another. Zweigert and Kotz[71] affirmed that comparative methods are for information and understanding various methods of deducing and discerning models for preventing and unravelling problems. The authors emphasize that comparative research method "…*dissolves unconsidered national prejudices and helps us to fathom the different societies and cultures of the world and to further understanding*".[72]

In addition, SERs by their nature are essential to the well-being of man and with globalisation and international cooperation, research of this nature concerning the issues involved in the protection and enforcement of SERs in Nigeria is timely. Therefore, this research through the instrumentality of comparative law will provide insights on Nigeria and other selected jurisdictions on the protection of SER and recommend if alternative approaches will need to be adopted in Nigeria. This research does not in any way admit to the superiority of any jurisdiction's law over the other, the aim is solely to establish the link between the selected jurisdictions for the advancement of SERs.

Judging from the foregoing, one can safely argue that the aim of comparative law is not solely to compare the law between jurisdictions, but rather, to study the similarities and differences

[70] Clifford Geertz, *Local Knowledge* (Fontana Press 1983) p218.
[71] Zweigert Konrad & Kotz Heinz. *An Introduction to Comparative Law* 2nd edn (Oxford University Press 1992).
[72] Ibid p.20.

between their various legal systems and use these comparisons to understand the content of the study under observation.

1.10.2 Historical Approach

The need for a historical study is to explain the concerns that correlate with the concept of human rights law in Africa and how it has advanced. The chronological events will be before the colonial era and after. The central justification for this, is that human rights existed in the pre-colonial period despite arguments that human rights did not exist in Africa during this era. Without this point, human rights system in Africa and the struggles made will not be appreciated. Yet again, it must be highlighted that the chronological presentation will be in a constrained form, explicitly fitted for the scope of this study. According to Savigny, the material of law is derived from its entire past and all legal principles have a long past, which means that the only way to "obtain mastery over the internal workings, complexities and nuances of contemporary legal rules", was to examine their past.[73] According to the author, historical research enables a researcher "to trace legal rules, concepts and principles to their roots to locate their 'leading axioms".[74]

This approach will operate based on distinguishing when human rights began in Africa and progressed over time. Furthermore, the approach will provide the foundation for more research in this area.

1.10.3 Doctrinal Approach

This approach will enable the researcher to use domestic constitutions as the most vital framework for SERs. The sole reason for the use of this approach is primarily because all

[73] Von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* (The Lawbook Exchange, Ltd. 1831) p39.
[74] Ibid

constitutions contain the fundamental rights relevant to the state and hence in examining SERs in a state, the initial approach is to examine its constitution. It must be noted that other laws passed may well safeguard SERs, but for the simplicity of studying various states, it is safest and ideal to concentrate on verified information. Furthermore, books, historical data, journal articles, case law analysis on the subject matter of the research will equally be reviewed.

Statutory obligations may provide inadequate information, however, case law may provide better interpretation. While constitutions provide the rights that are obtainable in each state, the (quasi-)judicial mechanisms offer a clearer interpretation of the scope of SERs. Usually in legal research, there appears to be a debate on the appropriate application on applying doctrinal research method as the principal method used as legal research methods are usually divided into non-doctrinal and doctrinal research.[75] Doctrinal legal research encompasses a thorough examination of the legal doctrine with its development process and legal reasoning, on the other hand, non-doctrinal research aims to understand various social facts, the connection of law with those facts, and its impact of law on the society. Doctrinal legal research has remained as prominent research method in law. Doctrinal legal research is, therefore, 'research in law' while non-doctrinal legal research is 'research about law.'[76]

It is vital to understand that even though the study of law is based on logical assumptions, most of these conclusions are not as precise as science. They are usually influenced by numerous factors such as history, politics and economics.[77] However, it is established that this approach is most suitable for research in legal field.

[75] Mike McConville and Hong Wing," *Introduction and overview* in McConville m and Chui WH (eds) *Research Methods for Law* (Edinburgh University Press 2007).
[76] Khushal Vibhute & Filipos Aynalem, "Legal research methods, Teaching Material, Justice and Legal System" Research Institute, Ethiopia, 71 (2009).
[77] Oliver Wendell Holmes Jr, "The Path of the Law" (1897) 10:8 Harv L Rev 457, 465–6

1.10.4 Theoretical framework

In Law, it is important to give an account of a theory or provide a theoretical framework. In its simplest form, a theory can be understood as a rational explanation of a particular trend. Often, a theory identifies certain interactions between elements making up a phenomenon or between a phenomenon and its environment. In the framework of legal scholarship, theoretical frameworks are not usually referred to, and if they are, it is in the context of methodology discussions.[78]

Typically, research is guided by current advances in doctrinal debate or legal practice, and the fact that there is an issue in the current state of positive law is enough justification for doing research. This has motivated several scholars to contend that the theoretical framework for legal scholarship is the current legal system itself.[79] While others are of the opinion that the theoretical framework is broader and must include a perspective on the legal system.[80] On the other hand, Louis Henkin noted that, "*International human rights are not the work of philosophers, but of politicians and citizens, and philosophers have only begun to try to build conceptual justifications for them*".[81]

One of the justifications for discussing the theoretical aspect in legal research is because it provides a clear pathway to which scholarly tradition is connected, they provide a descriptive link or provide explanations. Several theoretical frameworks have been developed by applying specific methods to suggest a link between the theory and the methodological approach adopted. For instance, Rawls,[82] identifies that rights are developed for a variety of reasons, his

[78] Mike McConville and Chui, Wing Hong *Research Methods for Law* (Edinburgh University Press 2007)
[79] Pauline Westerman, 'Open or autonomous? The debate on legal methodology as a reflection of the debate on law'. In Mark Van Hoecke (Ed.), *Methodologies of legal research: Which kind of method for what kind of discipline? (*Oxford: Hart 2011) pp. 87-110.
[80] Ibid p111-121.
[81] Jeremy Sarkin, & Mark Koenig. "Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy." (2011) Human Rights Quarterly, Vol. 33, No 1 pp. 1–42.
[82] John Rawls, "Justice as fairness: Political not Metaphysical." Philosophy and Public Affairs No. 3, (1985). 14 (1985) 225 pp. 223–251

theory discussed that the UDHR served as a hint that the global community had approved logically that SERs were essential. Ultimately, he maintained the view that the synchronized fulfilment of CPRs and SERs are vital to the functional fulfilment of life.

Rights have been recognized as distinct requirements applied in contradiction of the state.[83] John Locke instituted a philosophy of natural rights. The philosopher argued that an "omnipotent and infinitely wise Maker"[84] as the originator "of natural equality".[85] His theory portrayed man being born with a pre-political "state of nature", where each person possesses "picture-perfect freedom".[86] People in this situation are constrained only by the "Law of Nature" which considers all humans as equal and impartial.[87] The Law of Nature suggests that no person can harm the life, wellbeing, freedom, and goods of any other person,[88] by this means, giving individuals specific absolute natural rights. The law of nature is uniformly available to persons because it only can be unearthed out of purpose, granted to all individuals.[89] So far, this transfer of rights to the authority is not absolute; it is established as lawful so far as the government use the authority to protect rights.[90] The philosopher applied the concept of natural rights to communicate "the idea that there were certain moral truths that applied to all people, regardless of the particular place where they lived or the agreements they had made".[91]

Rawls did not believe that a society could pride itself on offering its poorer citizens civil and political rights, in this narrow sense, without paying any attention to their material condition.

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[83] Jeanne M. Woods, "Rights as Slogans: A Theory of Human Rights Based on African Humanism," National Black Law Journal 17 (2002–2004): 52–66, 52.
[84] John Locke," *Oxford Concise Dictionary of Politics*, eds. Iain McLean and Alistair McMillan, 3rd ed. (New York: Oxford University Press, 2009) p 316.
[85]Ibid p72–73.
[86] Ibid.
[87] Ibid.
[88] Ibid
[89] Locke's Political Philosophy," Stanford Encyclopaedia of Philosophy < https://plato.stanford.edu/entries/locke-political/>accessed 29 July 2019.
[90] Patrick Hayden, *The Philosophy of Human Rights* (Paragon House Publishers, 2001) p71
[91] Locke (n83) p75.

This reiterates that human rights should be applied universally without any form of discrimination and the state is expected to protect its citizens and states must be seen both categories of rights as they are interdependent.

This establishes the understanding the theoretical framework is relevant to research design and gives a standpoint to respond to the research questions.

1.11 Expected values and outcomes

Under the ICESCR, Article 2 sets the benchmark to which all state parties to the treaty are instructed to follow progressively. These guidelines may well be referred to as the minimum limit for the fulfilment of SERs at the international levels to which regional instruments are expected to comply with. There is no misgiving that the diverse philosophies, growth in each region or state, and access to justice will hinder these parameters, but these disparities have been emphasised and studied in a manner that will be advantageous to this study.

From a Nigerian perspective, relevant provisions of the 1999 Constitution, the African Charter, the South African Constitution of 1996 and the Constitution of Kenya 2010 will be critically examined. In addition, relevant articles from the African Charter which is the main regional instrument will be examined in relation to SERs practice in Nigeria. Articles 15, 16, 29, 22 and 24 of the African charter will be focused on as these articles amongst other things bear direct importance and relevance to the rights to health, adequate housing, education and work.

Research has shown that, there are more realistic and achievable SERs protection frameworks in other African jurisdictions. This study, consequently, delivers that missing connection which perhaps may provide a reference and a suitable guide to other scholars. To this end, this thesis aims to contribute to the academic debate on the protection of SERs in Nigeria.

Considering the above, the method of this study and its conclusions will assist in identifying and improving alternative measures to the protection of SERs in Nigeria. Even though, the

recommendations may appear unfeasible given the limitations in Nigeria, that notwithstanding, some African countries were able to transform SERs into justiciable rights with similar limitations.

1.12 Contribution to Literature

Regardless of the preceding limitations, the central contribution of this thesis demonstrates a deliberate attempt to suggest approaches that may be adopted towards protecting SERs in Nigeria. This research aimed to develop logically, what should improve the protection of SERs guaranteed in the international and regional instruments. It is across the setup of these human rights instruments that the research questions, aims, and objectives are developed from. This study views that the transformation of the human rights system in Nigeria is a development that requires a progressive recurring review to establish whether improvement is being made. This idea achieves philosophical expression in the notion that human rights are dynamic and should evolve alongside modern-day need of societies. Thus, it is strongly submitted that to ensure the total guarantee and fulfilment of SERs in Nigeria, the government must take the business of governance profoundly serious in such a way that their activities will be more transparent, and the country's resources be well managed.

Additionally, this study has equally proven that the causes of modern-day implementation gaps in the realization of SERs can be because of other factors such as legal, cultural, or even political factors. One factor that needs to improve is the quality of laws and the structures that are mandated for its enforcement. Hence, realising effective implementation of SERs in Nigeria requires improvements to the scope, roles, and function of important entities at the domestic levels. Therefore, this thesis supports the argument for reform to the human rights system in Nigeria.

Beyond academia, it serves as an added voice to the call for reform and an improvement of the system. Undeniably, its findings and recommendations cannot be the end to this debate in Nigeria since human rights are dynamic. Thus, this study has demonstrated that future reforms to the 1999 constitution represents a chance for Nigeria to adapt to its own civilisation as other African countries have been able to do successfully.

1.13 Limitations of the thesis

A major limitation of this study is the application of a library-based research method as opposed to conducting interviews for data gathering. The challenge envisioned is that carrying out interviews would have provided accurate information on government procedural issues. However, this thesis relied on relevant academic literature, reports from NGOs and relevant websites. These methods applied equally aided the thesis to achieve the objectives of this study.

1.14 Overview of Chapters

This research has been structured into seven chapters. Chapter one profiles its aims and objectives, research questions, methodology, a general background of the study and the introductory aspect of the thesis. The chapter equally introduces the challenges hindering the realization of SERs in Nigeria.

It is against the backdrop of the first chapter that chapter two is developed. The second chapter explores the relevant literature in this field focusing on the background context and nature of SERs in Africa. This chapter analyses the efforts made in safeguarding SERs, from the international community right to its domestic protection. This chapter opens with an initial determination of relevant themes such as the universalism and relativism in SERs argument which have been seen to have an impact on the actual practice of SERs. The chapter centres on the various debates on SERs globally.

Chapter three examines the status of SERs in Nigeria, with focus on Nigerian Constitution and the development of regional instruments. The chapter critically scrutinises the nature and scope of human rights in Africa and discusses the development and efficacy of regional mechanism. The chapter equally provides a theoretical structure of SERs by evaluating the philosophical underpinnings of the theory of human rights. It draws in an examination of the theory in the writings of prominent philosophers and how their theories influenced the creation of the African Charter.

Chapter four provides a detailed evaluation and examines state obligation analysing their constitutional and other frameworks for the promotion and protection of SERs in Nigeria and other jurisdictions. Using a few selected African countries, the chapter examines how and to what extent these countries have been able to meet their international obligations to guarantee SERs. The chapter will examine how and to what extent the selected countries have been able to conform to the set standards and parameters set by the ICESCR on the realization of SERs. The set parameters suggest that state parties are obligated to promote, respect, and fulfil SERs.

Chapter five contains a detailed examination of the findings from chapter five case study, the research assesses the selected countries juxtaposing their framework and state mechanisms for the implementation of SERs with the existing framework in Nigeria. The chapter identifies the measures adopted and how the countries have been able to transform SERs from mere aspirations to fundamental human rights. A theme that exists and runs through the discussion found in this chapter are the various approaches the selected countries have applied in the implementation of SERs. South Africa and Kenya have adopted the reasonableness approach, the courts have not failed to acknowledge the minimum core approach which in turn has given rise to state obligations considered in this study. In addition, the thesis argues that a combination of both approaches regarding each SERs can only be implemented in Nigeria through an application of the laid down provisions contained in ICESCR.

Chapter six summarizes the suggestions and recommendations anticipated to the effectual implementation and protection of SERs in Nigeria. In this chapter, the thesis elaborated on the idea of a combination of a reasonableness and minimum core approach in Nigeria, judicial activism as well as efforts from NGOs and Human rights institutions in the protection of SERs. The chapter equally recommends practical reforms to the human rights system in Nigeria and concludes that if the recommended framework is/are applied, SERs would be effectively realised in Nigeria.

Chapter seven is the conclusion of this study. It equally contains a summary of the study undertaken providing details of the various themes and insights that have emerged.

1.15 Conclusion

It is evident from the above that there is still a wide gap between the Nigerian situation on SERs given the position in other jurisdictions. The Nigerian courts, unlike their counterparts in South Africa and Kenya are yet to make considerable efforts to adopt a progressive or activist approach to the question of enforcement of SERs. This study aims to suggest that the approaches that have been adopted in other African countries can equally be adopted in Nigeria and have the same outcome.

To have a clearer view on the issues raised in chapter one and a deeper understanding of this research, the next chapter will discuss the various debates on SERs. The chapter will set out and review studies which have examined the theory of SERs.

CHAPTER TWO: DEBATES ON THE STATUS OF HUMAN RIGHTS

2.1 Introduction

Universal standards of human rights are believed to be applied universally regardless of one's culture, traditions or religion. But if human beings have varying views about interests, ideologies, cultural and religious backgrounds, is it still possible to approach human rights from the perspective of common standards? Or can we argue that human rights can be universal and regional at the same time?

Endeavouring to evaluate the current literature on African Human Rights instruments will be an enormous exercise due to the limitless resources available. However, an additional element of this literature are mass media and reports from Non-governmental Organizations[92] on the apparent state of human rights in Africa. This category of literature is primarily expositive and aims to draw awareness at all levels to the total and other infringements of human rights. This chapter aims to examine some of these literature on the topic, mainly centred on relevant articles in a bid to feature the major elements they contain. In the concluding section of the chapter, there will be a debate on the issues presented as regards the subject that the reviewed literature fails to tackle accurately, and problems that are overlooked entirely, which are important to the subject matter of the present research.

2.2 Main issues reviewed in literature

2.2.1 Human rights in Africa

The initial key element identified as one that would be a beneficial foundation for achieving this study is linked to the conflict amongst academics on the meaning, nature, and scope of human rights especially in relation to African system. One of the complexities with the realization of any right, but particularly with the realisation of the SERs correlates to the

[92] World Reports from Amnesty International, Human Rights. https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf. Accessed 14 February 2021.

exactitude with which such rights can be clearly defined. It is almost impossible to promote or even protect rights if there is indecision about its scope and content.

There are arguments whether human rights existed in Africa in the pre-colonial era or if there was any pre-existent practice of human rights. What is striking is that relevant literature that date from the 1960's and some part of the 1980's are loaded with this sort of debate, which equally triggered resistance between some notable scholars in Africa, though the more recent literature have strikingly diverted from this contentious design and presented their opinions more discerningly than preceding works. Nevertheless, this arrangement may have been fragmented in many ways, there are still academics who share this view, while the others have chosen to accept a somewhat pro-African view on the issue, contending there has constantly existed a practise of human rights in the region even before the pre-colonial era, and therefore the concept of human rights is not unusual in the region.[93]

Authors like Eze have as much as discovered that even in the pre-colonial era, an effective legal system not only existed, but also obligations for human rights promotion.[94] This nature of finding has headed to the disapproval and criticism of the western academics who have neglected to recognize traces of effective human rights traditions in African, thus demonstrating that the concept is unfamiliar to Africans. Other scholars who also contributed to this view, also include Shivji, Conteh, Quasigah, Cobbah, and Hountondji amongst others. Shivji's opinion lies on the theoretical underpinnings of human rights in Africa, contending that what Africans refer to as human rights differs from that of the western regions.[95] His justification rest on the fact that the disparity is evidenced in the manner of thinking by Africans where the individual rights of people are not as highlighted as the communal interest of the

[93] For a proper argument on this debate; Appiagyei-Atua K, "A rights centred critique of African philosophy in the context of development*"* (2005) 5 African Human Rights Law Journal, pp. 335-357.
[94] Osita Eze, *Human rights in Africa: Some selected problems* [Nigerian Institute of International Affairs in cooperation with Macmillan Nigeria Publishers] (1984) p9.
[95] Issa Shivji, *The concept of human rights in Africa* (CODESRIA Book Series 1989) p24-30.

community.[96] Conteh maintained that human rights existed in early state of traditional societies, though in a framework quite unlike that of the West.[97]

The era of colonialism witnessed the most changes in Africa. Ayittey believed that the colonial era saw a methodical suppression and manipulation of the Africans for the gain of the colonial masters and suggested that there was a repudiation of human rights and an effort at total eradication of African customary law.[98] Eze explained that, with colonialism, the law in Africa appropriately transformed, as its advancement was no longer attained by Africans, neither did it continue to progress corresponding to the needs of the African people.[99] It is obvious that most of the colonial policies set up in Africa had the same goals and produced the same results.

On the other hand, Nyerere and Wai's contention was almost like Shivji's when they submitted that in pre-colonial societies, the importance was not on the person, but on his self-respect and disparities between members of the society.[100] Several academics have equally developed similar studies that correspond to this view including Busia and Rattray, but particularly Cobbah who established that:

…Africans do not espouse a philosophy of human dignity that is derived from natural rights and individualistic framework. African societies function within communal structures whereby a person's dignity and honour flow from his or her transcendental role as a cultural being……we should pose the problem in this light, rather than assuming an inevitable progression on non-westerners towards western lifestyle…[101]

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[96] Ibid p26.
[97] Musa Bala Conteh, Human Rights Teaching in Africa: The Socio-Economic and Cultural Context in Eide A. and Theo M. (eds.) *Frontiers of Human Rights Education* (New York: Columbia University Press, 1983) p58.
[98] George Ayittey, *Africa Betrayed* (New York: Transnational Publishers Inc. 1992) p82.
[99] Eze (n94) p14.
[100] Sanga, Fr. Innocent Simon & Pagnucco, Ron "Julius Nyerere's Understanding of African Socialism, Human Rights and Equality," The Journal of Social Encounters: (2020) Vol. 4: Issue 2, 15-33. P33.
Available at: <https://digitalcommons.csbsju.edu/social_encounters/vol4/iss2/2accesed> 10 January 2021
[101] Josiah Cobbah, 'African values and the human rights debate: An African perspective', (1987) 9 Human Rights Quarterly pp.309- 331.

Similarly, Jack Donnelly remarks that Human rights in African societies were allocated based on communal membership, status, or achievements and not as which to one is entitled simply because one is a human being, he further contends that precise knowledge of universal and inalienable rights that one possesses merely for the reason that one is human was not present in traditional African, but also in traditional western societies as well.[102] This is to a large extent an unaccepted truth.

Quashigah in his study focused on the origin of the nature and concept of human rights in the western world albeit using methods of theoretical materialism and idealism.[103] The author acknowledges that both African and western traditions share a particular likeness as of the instinctive paradox on both the reverence for and the infringement of human rights. The euro-centric approach of some academics who perceive African societies as being incompetent and unable to form significant views on issues concerning them, and having no history of human rights systems or even a democratic state, was further criticized by Nzongola Ntalaja who maintained that:

…Such an approach not only glosses over the impact of the Atlantic slave trade on political institutions and practices in west and central Africa, but also minimizes the role of colonial despotism as a school of post-colonial rules…[104]

A non-African author whose study has aided to strengthen the arguments provided by Shivji and other notable authors like Fernyhough, contend that human rights did exist in pre-colonial Africa and prominent events for instance, like the revolutions that happened in America and France may not have happened in Africa and in so doing did not support the development of

[102] Jack Donnelly "The Relative Universality of Human Rights" Human Rights Quarterly, Volume 30, Number 1, February 2008, pp. 194-204 <file:///C:/Users/ep349/Downloads/27-Donnelly.pdf> 10 February 2019.
[103] Kofi Quashigah, "The Philosophical Basic of Human Rights and its Relations to Africa: A Critique" 1992 University of Ghana Digital Collections.
[104] Joseph Richard. "Democratization in Africa after 1989: Comparative and Theoretical Perspectives." Comparative Politics, Vol. 29, No. 3, 1997, pp363–382.

human rights in Africa, but notwithstanding, African cultural background did facilitate the development of human rights in Africa. [105]

The western scholars who contend that human rights did not exist in pre-colonial Africa and consequently is seen as a foreign concept in Africa, are more of imperialist beliefs. This is the because, human rights are inherent to man, therefore, how possible can some scholars contest that human rights did not exist in Africa, which is a region that was occupied by people, is nearly beyond interpretation.[106] An-Na'im and Deng asserted that the inability of the western scholars to comprehend that human rights existed in Africa. might be because of the distinct approaches in which the concept is witnessed and incorporated into the lives of people in the various societies.[107]

Authors like Howard broadened their argument by indicating that the concept of human rights in Africa is being confused with the idea of human dignity, and he suggests that:

…The African concept of human rights is an idea of human dignity, or what defines the inner (moral) nature and worth of a human person and his or her proper (political) relation with the society. Despite the twining of human rights and human dignity in the preamble of the universal declaration of human rights and elsewhere, dignity can be protected in a society not based on rights. The notion of African communalism, which stress the dignity of membership in, and fulfilment of one's prescribed social role in a group (family, kinship group, tribe), still

[105] Makau Mutua, "The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa", 17 MICH. J. INT'L L. 591 (1996). Available at: https://repository.law.umich.edu/mjil/vol17/iss3/2 accessed 18 June 2019.
[106] Vincent Nmehielle "Development of the African Human Rights System in the Last Decade." Human Rights Brief 11, no. 3 (2004): 6-11. < https://core.ac.uk/download/pdf/235404555.pdf> accessed 14 June 2020.
[107] Abdullahi An-Na'im, "Human Rights and the Challenge of Relevance": The Case of Collective Rights. In the Role of the Nation-State in the 21st Century: Human Rights, International Organizations and Foreign Policy, edited by M. Castermans-Holleman, F. v. Hoof and J. Smith. (The Hague: Kluwer Law International.1998)

represent how accurately how many Africans appear to view their personal relationship to society...[108]

It ought to be recalled that human rights are dynamic and adaptable in whatever situation. What is deemed human rights in modern day society might not have been recognized as such in the past. However, looking at Howard's reasoning on the concept of human dignity, which was the only right recognized in Africa, perhaps one can argue that his statement may need to be amended as what he considers to be human dignity is promoted and protected as a core human right today. Owing to the ever-evolving nature of this concept, the protection of man's dignity is what is enjoyed today as human rights. It clearly means that what Howard asserts as human dignity previously could have transformed within the society to include all the categories of rights. Consequently, this would mean that what may have been deemed human dignity before has now evolved to achieve or perhaps attained the position of human rights.

This means that in numerous ways, Africans did have human rights before pre-colonial era. Despite such contentions like those produced by Howard and Donnelly, there still exists evidence to justify the claim that human rights did in fact exist in the pre-colonial African communities. If the argument that European liberalism developed the concept in Africa, then that will weaken the disposition that many academics hold that the concept of human rights is a universal.[109]

Pericles asserted that customs conventions which were applicable to all, even ordinary, mortals.[110] This suggests that human rights did exist for all human beings, regardless of whether they were acknowledged. Other philosophers in Antiquity, such as Socrates and Plato,

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[108] Rhoda Howard., "Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons" (1984). Political Science Faculty Publications.p355 < https://core.ac.uk/reader/143689760> accessed 14 June 2019

[109] Mutua Makau, "'The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties', (1995) 35 Virginia Journal of International Law p.339.

[110] A passage in Protagoras reads as follows: '… by nature …are all constituted alike in all things which are essential by nature to all men …) In these things no barbarian is set apart from us, nor Greek …' Quoted in Jowett B. *The Dialogues of Plato*. 5th ed. (Oxford University Press, 1961) p330

belonged to the school of philosophy which espoused the existence of universal values which were unchanging and eternal, because they resided in the inherent dignity of every member of the human family.[111]

Viljoen did not only identify that human rights did exist prior to the pre-colonial era, but also acknowledges that there is a misunderstanding intrinsic in its definition as well.[112] Several efforts have been made by academics to find a unique definition for the concept of human rights, but this appears to be a difficult one as a consequence of its evolving nature, which had led authors like Laski to pronounce that it should be acknowledged that the human rights cannot be straightforwardly determined.[113] In more ways, Viljoen's depiction of human rights juxtaposes with Howard's view that human dignity and human rights are inter-woven in African communities. The author identified that the similarity is between human rights and human rights law, and not on the concepts of human rights and human dignity as they cannot be viewed as being the same. While Howard described human dignity as an element of the moral nature of people, Viljoen integrates morality into his own explanation by suggesting that the concept "denotes a special kind of moral claim that all humans may invoke."[114]

Academics like Odinkalu agree with a much wider definition since it not only incorporates the regional system, "…but also a pan-continental system and mechanisms necessary to encompass also the domestic legal systems in Africa."[115] There is a general inclination to view the African human rights system in relation or perhaps in contrast with the developed models of the western

[111] Ibid 150-160

[112] Frans Viljoen, "Human rights in Africa: normative, institutional and functional complementarity and distinctiveness, South African Journal of International Affairs, (2011) 18:2, 191-216.

[113] Kim Yŏng-jun, "Political ideas of Harold J. Laski." (1961). Master's Thesis February 2014. 2558. https://scholarworks.umass.edu/theses/2558 >accessed 14 June 2019

[114] Ibid p.4

[115] Chidi Anselm Odinkalu, **"**The role of case and complaints procedures in the reform of the African regional human rights system" (2001) *2* AHRLJ 225-246.

world. This sort of approach has caused the analysis of the African system to be centred not on the distinct dynamics of the region, but on its consistency with other western standards.[116]

The general argument put forward is that no state or region can claim sole authorship of international or regional human rights. Human rights are universal and inherent in nature. Although, the transformations and democratization movements that spurred the evolution of the human rights systems in Europe and other parts of the world also had a major impact in Africa.

2.2.3 The Notion of human rights

Another trend in literature is the comparison between the African human rights instruments with other regional instruments. It is apparent that majority of human rights scholars tend to assess the effectiveness and competence of the African system based on the achievements of the regional systems. Upon investigation, there is sufficient literature that suggests that the long practice of other regional systems like the European and inter-American systems have indeed contributed to their achievement in those regions, but sadly, most of these scholars fail to identify that the development witnessed in those regions was hugely due to political growth, and Africa may not have witnessed such and this has undesirably affected the ability to effectively implement and realize human rights in the region.[117]

Since the level of individual and collective rights recognized in the western states are advanced than in African states, assessing human rights standards will basically highlight the African systems inadequacies, and not mention or even acknowledge the slow progress being made by African states.[118] Other academics have discussed about the strengths of the human rights

[116] André Mbata B Mangu, "Law, Religion and human rights in the Democratic Republic of Congo" (2008) 2 *AHRLJ* 505-525< https://www.ahrlj.up.ac.za/mangu-amb-2008> accessed 19 July 2019

[117] Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa" (John M. Olin Program in Law and Economics Working Paper No. 124, 2001).

[118] Rhoda Howard 'Evaluating human rights in Africa: Some problems of implicit comparisons', (1984) 6 Human Rights Quarterly p. 166.

system in Africa, its weaknesses, and ways to improve it. Murray for example recognizes that the African regional system has attracted many condemnations and contempt from many writers, especially when compared with the other systems in the world.[119] The overall representation of the African human rights system and the opinion of many academics be it African and non-Africans alike, on the beginnings and advancement of human rights in the continent do not present much positivity or even the accurate information about the current state of human rights in the region.

2.3. Universalist or Cultural relativism Approach

Arguments for regionalism have nonetheless persevered, the discussion on the universality of human rights being almost as outdated as the progress toward universalist human rights standards.[120] These debates have varied from making a case for regional bodies as the useful mechanism for implementing universal rights to recommending that regions have sovereignty in formulating their own guidelines of rights. With respect to the former, it has been argued that neither independent states which are autonomous, depend on deliberate forms of compliance with lack of resources nor inadequate enforcement systems can effectively protect human rights.[121] Thus, the case is made for a protective structure which would operate at a transitional level, exerting authority which is wider than the sovereign state yet closer to the concerned societies than a regional human rights system.[122]

Originally, the United Nations' (UN) tactic was to reject regionalism in approval of the Universalist method to human rights. However, given the development of regional instruments, and acknowledgment of their position in overseeing constitutional affairs, the UN eased its

[119] Murray Racheal, 'The African charter on human and peoples' rights 1987-2000: An overview of its progress and problems', (2001) 1 African Human Rights Law Journal, p. 1.
[120] Tracy Higgins, 'Anti-essentialism, Relativism, and Human Rights' (1996) 19 HWLJ 89, 92.
[121] Carol Tucker, 'Regional Human Rights Models in Europe and Africa: A Comparison' (1983) 10 SJILC 135, 139.
[122] Ibid p139.

position for regionalism. Following significant negotiations and pressure from state parties with an interest in enabling regions, the UN Charter adapted the notion of regionalism even though, within an established and lawful order that undoubtedly encouraged universalism.[123] With the African situation and rise of scholars and critics from the region, there was a strong discussion on the definite 'universality' of rights. This was so, because given that Africa had little or no impact in the drafting of the UDHR,[124] there was the issue of whether its obligations, as well as those of international covenants sufficiently embodied Africa's nature and culture.

The apparent imposition of western principles as universal and the demotion of African customs also triggered contentions of Western imperialism.[125] Issues such as this, still emphasize the friction between regional and universal understandings of rights. Universalism of human rights can be argued to be largely based on western philosophy and the value it places on the individual.

According to Donnelly,[126] the fundamental question of if human rights are seen as universal or viewed as relative is the most debated topic in human rights theory. The debate remains a recurring issue even in contemporary human rights discussions. The primary reason for this may be the effect which the international instruments have on state sovereignty and obvious implications perceived from states and its institutions. A conscious study of the various theoretical works of some philosophers and experts in human rights suggests a mixture of conflicting and overlapping ideas and opinions which are reinforced by political, cultural and varying ideologies. Nevertheless, regarding this research and given the varying ideas on this

[123] See chapter VIII of the UN charter which provides for regional arrangements.
[124] At the time of the drafting and adoption of the Universal Declaration, there were only 4 African member states of the UN: Egypt, Ethiopia, Liberia, and South Africa. See Abdullahi An-Na'im (ed*), Human rights under African constitutions: realizing the promise for ourselves* (UPP, 2013) 9.
[125] Makau Mutua, "The ideology of Human of Human Rights*"* (1996) 36 VJIL 58.9
[126] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 281.

debate, it is imperative to rationalize the salient concerns in this debate which are instrumental and relevant to human rights jurisprudence in Africa.

This 'Universalism-Cultural Relativism' debate progresses on the notion that the legitimacy of international human rights law hangs on the reality of fundamental values of justice that surpass culture, society, and politics.[127] Universalists like Howard,[128] argue that the elements of human rights are universal and relate to all regardless of culture. This clearly means that these rights accrue to an individual by virtue of their existence. The UDHR is seen as a model of universal rights. On the opposite side are the cultural relativists who contend that the claimed universal rights are only products of western culture touching primarily on a liberal ideology.[129] They argue that the cultural idiosyncrasies of various regions must be recognized and distinguished. The debates have often seemed strict with the focus often moving to the imperialist connotations of one part of the argument. Mutua who is of the relativist school, contends that human rights and western liberal democracy are virtually repetitious and that the former is, in fact, the universalised side of the other.[130]

The author went on to say that human rights symbolize the attempted diffusion and further development at the international level of the open-minded political tradition.[131] With the African perspective, the most important concern for these authors was if the African Charter was sufficiently appropriate to Africa's peculiar situation. Shivji on his part, condemned the African Charter as displaying the patches of neo-colonialism.[132] The author stated that the

[127] Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 BHRLR 211< https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1168&context=bhrlr> Accessed 14 May 2019.
[128] Howard (n116); Jack Donnelly, *'Human Dignity, Human Rights, and Political Regimes'* (1986) 80(3) AMSR801. Available at: <https://academic.udayton.edu/richardghere/NGO%20Man/Howard%20and%20Donnelly.pdf> Accessed 14 May 2019.
[129] Mutua (n124) p 590
[130] Ibid.
[131] Ibid.
[132] Shivji (n94)

African Charter was a result of a defective 'dominant' philosophy and was simply an effort by African leaders to reclaim their integrity particularly in the sight of the west. He contended instead for a system tailored specifically for Africa rather than "an uncritical acceptance of western liberal conceptions".[133]

Notwithstanding the African Charter's clear position to the UDHR, which in Shivji's point of view represents an uncritical recognition of western liberal perceptions, some authors still view the African Charter as symbolizing African concept of rights. Authors like, Okere observes that despite its universalist preferences, the African Charter has qualities that originate solely from Africa's colonial history and conception of man.[134] The author relates this African concept of man as not that of an isolated and abstract person but an essential component of a group dynamic by a feeling of solidarity.[135] Mbazira,[136] also highlighted a clear longing by the drafters of the African Charter to create an exclusive and distinct African instrument unlike other comparable instruments, not specifically produced subject to the available resources of a member state.

Furthermore, there are authors who contend that, rather than establishing and modifying treaties, the emphasis ought to be on the problem of practice and application of the system. Author's like Odinkalu, maintains that the weaknesses of the regional African system "…. are mostly practical and political matters to which treaties are, to put it bluntly, irrelevant".[137]

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[133] Ibid p20.
[134] Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems" (1984) 2 HRQ 141, 148
[135] Ibid
[136] Christopher Mbazira "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) 6 AHRLJ 333, 342
<http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/4968/nforcing%20the%20economic%2c%20social%20and%20cultural%20rights%20in%20the%20African%20Charter%20on%20Human%20and%20Peoples%27%20Rights.pdf?sequence=1&isAllowed=y> accessed 14 June 2018.
[137] Chidi Odinkalu, 'The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System' (2001) 2 AHRLJ 225, 244.

Equally, Mugwanya asserts that the "most pressing problem is the implementation of these norms at the 'grass roots' and making them meaningful in people's lives".[138]

The UDHR declares itself as "a common standard of achievement for all peoples and nations".[139] This assumes that all countries are to be evaluated centred on how they comply with its provisions. Observers have doubted this thinking which seems to present human rights philosophy as non-ideological, unbiased, and the essence of human goodness.[140] This concept of an almost divine nature of human rights disregards the impact of western history and liberalism. The persistent unwillingness to connect liberal democracy with human rights, he argues, postpones the restoration, modernization and the 'reform of human rights.[141]

Binder's stance is very thought-provoking although it seems to contend only for why human rights founded on western ethos ought to be related in post-colonial countries thus avoiding states like Russia and many Islamic nations who were not subjects to colonialism but continue to remain disposed to heavy criticisms of human rights abuses. It is acceptable to admit that many post-colonial, particularly African countries have been greatly inspired by western civilization, such that current cultural frameworks have omitted most of its customary and traditional touch. This is somewhat exhibited by the African Charter which itemizes several civil and political rights that were questionably non-existent in several African societies.[142] To further buttress this point, some African constitutions, instead of adopting a system tailored to suit the African needs simply transplanted rights and obligations.

The problem with this transplanted system is that these rights, being unfamiliar to the Africans, or even simply recognized as such, not only run the danger of being misunderstood but could

[138] George William Mugwanya, 'Realising International Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (2000) 10 IICLR 35, 39.
[139] Preamble, United Declaration of Human Rights.
[140] Mutua (n 124) 591.
[141] Ibid p592.
[142] Ibid

also be reviled. As a result, there have been demands for a diverse approach to restructure the human rights regime to make it more universal.[143] Schwartz perceives the inevitability of a cross-fertilisation of culture if a universal human rights body is to emerge.[144] With this, every culture would have its unique method of devising and strengthening human rights. Results from these could create justifications for developments to the standards and to the mechanisms enforcing them.

2.3.1 Universalism

The universalism of human rights has been clearly established and recognised in international law, mainly through the work of the UN. Cassese and Dugard, respectively maintained that the post-1945 era saw a dynamic promotion of human rights and, because of this, human rights instruments were codified on a scale never before encountered.[145] The adoption of the UDHR, is a reflection of its intention to protect human rights with the assumption that there exist a common moral standard.[146] Following the principles of the UDHR, it strongly affirms the universality of all human rights. Its fundamental proclamation lies in the following statement: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[147]

Some advocates[148] of the universalist school of thought have argued that human rights are inalienable, interdependent, universal and indivisible, as such, it applies to everyone.[149]

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[143] Mutua (n 104) p591.
[144] Richard Schwartz, Human Rights in an Evolving World Culture, in Abdullahi An-Na'im and Francis Deng (eds) Human Rights in Africa: Cross-cultural perspectives (BIP 1990)
[145] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2004) 350; Dugard John. *International Law* A South African Perspective (Cape Town: Juta Co. 2005) 308-309.
[146] Alan Gewirth "Common Morality and Community Rights" in Outka G. and Reeder J. P. Jr.(eds.) Prospects for a Common Morality (Princeton University Press 1993)1, 2
[147] The preamble of the UDHR
[148] Flávia Kroetz "Between global consensus and local deviation: a critical approach on the universality of human rights, regional human rights systems and cultural diversity" (2016) 3(1) Revista de Investigações Constitucionais, Curitiba.
43<file:///C:/Users/ep349/Downloads/Between_global_consensus_and_local_deviation_A_cri%20(2).pdf > Accessed 15 June 2019.
[149] Jack Donnelly (n125) p10.

However, this view has been strongly criticised for being a western notion of human rights, the notion is still a valid one as it provides a ground breaking foundation for the recognition of human rights especially in regard to SERs discussed in this research.

According to Ghai,[150]

…this centrality of the human being elevates the autonomy of the individual to the highest value; rights become essentially a means of realizing that autonomy. Everyone is, in a certain sense, absolute. He or she is irreducible to another and separated in his or her autonomy…

It must be highlighted that the autonomy Ghai has referred to is seen as a much broader concept of human worth, which must be examined carefully as what applies to human worth for one, may not be the same for another. Some philosophers[151] have contended that the universalism of human rights is indeed a western notion that originated from the liberal political philosophy of natural rights theorist like John Locke.[152] The desire to avoid global human rights violations as well as setting a universal standard for all states was seen as the primary factor in the rise of universalism. It can be argued that the fundamental theme of universalism is the exceptionality of individuals anywhere in the world and their right to be respected regardless of their status. This also extends to certain basic inalienable freedom which include unlawful interference from the state, right to private life amongst other things.

With specific reference to the African context, Howard contended that human rights ought to be universal, although she admits that, seen from an empirical perspective, cultural variations do indeed affect people's perception of human rights.[153]

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[150] Yash Ghai, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims' (2000) 21 Cardozo L. Rev. 1095 - 1096.

[151] Looking at Jack Donnelly, "Human Rights: Both Universal and Relative (A reply to Michael Goodhart)" Human Rights Quarterly, (2008) 30 (1) 194; Michael Goodhart, "Neither Relative nor universal: A response to Donnelly" Human Rights Quarterly (2008) 30 (1) 183.

[152] Lewis Hinchman, "The Origins of Human Rights: A Hegelian Perspective" (1984) 37 (1) The Western Political Quarterly 7.

[153] Rhoda Howard, *Human Rights in Commonwealth Afric*a (Totowa, NJ: Rowman and Littlefield, 1990) p12.

Goodhart[154] had contended that the universalist were of the opinion that there are some moral views which are universally valid, the author went on to suggest that the rights which are guaranteed in the UDHR and other core human rights instruments are seen as universally valid and applies to all regardless of one's status. Goodhart's view does play a vital role on the universal nature of human rights law. For example, when one's right to social security is breached, not only is it morally wrong, but it is also equally legally wrong and such will in turn affect his dignity and deprive the individual of the ability to have access to basic necessities such as food. Donnelly[155] asserts on what he suggests are moral universality of human rights, the author contended that; "If human rights are the rights, one has simply because one is a human being, as they are usually thought to be, then they are held "universally," by all human beings. They also hold "universally" against all other persons and institutions. As the highest moral rights, they regulate the fundamental structures and practices of political life, and in ordinary circumstances, they take priority over other moral, legal, and political claims. These distinctions encompass what I call the moral universality of human rights.

A clear insinuation of Donnelly's stance as captured above, suggests that states ought not to be allowed to use territorial sovereignty as a ploy to cover up human rights violations. As it should not be used especially when human rights are guaranteed under the UDHR and other international human rights instruments. There have been instances when the international community has out rightly condemned states for breaching human rights provisions. It can be argued that this school of thought places individual rights before community rights.[156] Pollis[157]

[154] Michael Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' [2003] 25 Human Rights Quarterly 935- 964.
[155] Ibid p.939.
[156] Ibid p939.
[157] Adamantia Pollis, "A New Universalism" in Pollis A and Schwab P (eds), *Human Rights: New Perspectives, New Realitie*s (Lynne Rienner Publishers 2000) p9.

elaborated on this and suggested that individuals can reason because they are inspired by their own self-centred needs with the clear desire for liberty.

The excessive concern with the universalism of human rights may presume and/or create a certain perspective, which in turn may blind us to seeing the richness of cultural diversity, and how this richness could be used to promote the understanding and realisation of the proposed ideals about human rights.[158] According to Gustafson, while the strong universalism of human rights has certain advantages, the project may be ultimately unrealistic, as it rests too heavily on the congenial premise of an overly facile universalisation of moral discourse.[159]

Some scholars have argued that universalism of human rights must be recognised in the context of the diverse cultures that exist, suggesting adjustments must be made to reflect other cultures. The concept of human rights is not static, as it relates to all people and in different situations.[160] Modern Western philosophers of the Aristotelian and Kantian tradition, such as Rawls has made cross-cultural reasonings in favour of universalism. Rawls suggested that any society can achieve an "overlapping consensus" among the world's comprehensive moral doctrines, and that this overlapping consensus conforms to political liberalism.[161]

The basic assumption is that either human rights are universal, or they are nothing; it makes no sense to speak of human rights if they do not pertain to all humans. The goal of international human rights norms is to establish a standard that disregards national sovereignty in order to protect individuals from abuse. To have human rights at all is to say that there are certain standards below which no State or society can go regardless of its own cultural values.

[158] James Bretzke 'Cultural Particularity and the Globalization of Ethics in the Light of Inculturation' (1996) 9 Pacifica 71,73.
[159] James Gustafson, T*heology and Ethics:* Ethics from a Theocentric Perspective Vol. 1(Chicago: University of Chicago Press, 1981) 126
[160] Clarence Dias "The Universality of Human Rights: A Critique" (1993) 103 Lokayan Bulletin 44, 45.
[161] John Rawls, *Political Liberalism* (Columbia: Columbia Press University, 1996) p133.

2.3.2 Relativism

To understand the African discourse on the cultural relativism of human rights, it is necessary to draw attention to the argument by some scholars that the contemporary concept of human rights is a modern development which has its roots in the Universal Declaration of human rights and was alien to traditional societies in Africa or elsewhere. Similar to other human rights theories, the Universalist school of thought does have counter opinion. The relativist view, comparable to the universalist equally have differing views on human rights. The cultural relativist views human rights within a cultural framework. Even though, moral views differ between cultures, to this end, it is not possible to arrive at an agreement on a commonly acknowledged notion on human rights.[162]

Additionally, debates supporting cultural relativism suggest that viewing human rights as universal is fundamentally western influence imposed on their states, which fails to take into perspective other cultural and political economies. Even though, this view may appear to be valid, it could equally be seen to justify repressive and intolerant customs, with a view of applying human rights within cultural beliefs. Scwab and Polis,[163] have contributed remarkably interesting literature to the ongoing debate and have equally revised relevant contributions from other human rights authors most especially literature focused on Relativism and Universalism. Examining one of their works,[164] the authors argued that UDHR are founded on western philosophy which interpretation may not be applicable to non-western states because of varying cultural beliefs. The authors equally argued that the UDHR was adopted when majority of the third world countries were subject to colonial powers, they contended that the UDHR reflects,

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[162] Elvin Hatch "*Culture and Morality: the relativity of values in anthropology"*. (New York: Columbia University Press 1983) p8. Jack Donnelly contends that culture is, "*constructed through selective appropriations from a diverse and contested past and present. Those appropriations are rarely neutral in process, intent, or consequences. Cultural relativism arguments thus regularly obscure often troubling realities of power and politics"*

[163] Pollis & Schwab (n157) p10.

[164] Ibid p10.

"A moral chauvinism and ethnocentric bias". Analysing the works of Pollis and Schwab, it is incorrect to say that because the third world countries were not part of the drafting process means that the UDHR and some other international treaties like the ICCPRs and ICESCRs are opinionated. It is important to note that the aim for the adoption of these instruments was to end oppressive practices in various states regardless of if they were western or not.

According to Yash Ghai,[165] the author gave the example of some rights that are inherent in human nature, but also suggested that such rights cannot be viewed as being abstract but are seen to be linked to cultures in societies and it is impossible for individuals to separate such ties at the expense of the society. Following Abdullahi An-Na'im work, the author emphasizes that for institutions and norms to be accepted as legitimate and to be effective they must be debated, interpreted, and applied within the concepts and internal logic of local cultures. However, this does not preclude using universal standards as a basis for judging features of a culture or tradition.[166] Similarly, Panikkar[167] contends that it is impossible for everything in the word to be universal, the author was of the view that values and rights differ and are seen to be determined by each society based on their beliefs. The author equally stated that because there is nothing like a universal culture, it is impossible for human rights to be seen as universal.[168]

Welch asserted that human rights did exist in traditional societies in Africa. He went on to identify six major sets of rights in traditional society: the right to life, the right to education, the rights of freedom of movement, the right to receive justice, the rights to work, and the right to participate in the benefits and decision making of the community.[169] He noted that in contrast

[165] Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims" 21Cardozo L. Rev. 1095 (1999-2000).Available at <Human Rights and Social Development: Toward Democratization and Social Justice (unrisd.org)> accessed 4 January 2021
[166] Abdullahi Ahmed An-Na'im, ed., *Human Rights Under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003).
[167] Panikkar Ravi, "Is the Notion of Human Rights a Western Concept? [1982] Vol 30, Issue 120, University of California, Santa Barbara p 2
[168] Ibid p79.
[169] Claude Welch, '*Human Rights as a Problem in Contemporary Africa'* in Welch Jr. C.E. and Meltzer R. (eds.) Human Rights and Development in Africa (Albany: State University of New York Press, 1984) p11

to European conceptions stressing individual protection, African conceptions have emphasised collective expression.[170]

Legesse suggested imposing universal human rights is a violation on its own.[171] The author affirmed that:

…One critical difference between African and Western traditions concerns the importance of the human individual. In the liberal democracies of the Western world, the ultimate repository of rights is the human person. The individual is held in a virtually sacralised position. There is a perpetual, in our view obsessive concern with the dignity of the individual, his worth, personal autonomy, and property… [172]

Mojekwu equally argued that:

…The concept of human rights in Africa was fundamentally based on ascribed status. It was a person's place of birth, his membership or belonging to a locality and within a particular social unit that gave content and meaning to his human rights – social, economic, and political. A person had to be born into a social unit or somehow belong to it in order to have any rights which the law of the land could protect. One who had lost his membership in a social unit or one who did not belong – an outcast or a stranger – lived outside the range of human rights protection by the social unit. Such strangers to the community had no rights except those which they could negotiate their hosts or protectors…[173]

Culture is acknowledged universally and varies from society to society. What may be obtainable or acceptable in one may differ in another. It is obvious that Africans have various

[170] Ibid
[171] Legesse Asmerom, Human Rights in African Political Culture' in Thompson K.W. (ed.) *The Moral Imperatives of Human Rights: A Moral Survey* (Washington, D.C.: University of America Press, 1980) 123,130
[172] Ibid
[173] Christopher Mojekwu, International Human Rights: The African Perspective in Nelson J.L. and Green M. (eds.) *International Human Rights: Contemporary Issues* (New York: Human Rights Publishing Group,1980) p85.

moral and societal values that supports interpersonal relationship and promotes peace in the community. African culture places high importance on the dignity and integrity of man in the community. The bond within communities is intrinsically linked with humanity. Thus, the recognition of man as part of a larger community or society is of immense importance to the African people.

Pityana was able to identify several variants within cultural relativism of human rights. Primarily, the argument put forward, is that civilisations and cultures vary both in time and geographical location, this invariably has an impact on human rights.[174] The author equally asserted that even though some human rights norms have received universal acceptance, it is not possible to attach the same value to them.[175] Mbaya suggested that a genuinely universal concept of human rights requires a multicultural perspective.[176] For Mbaya, this universalism should incorporate conceptions from different regions of the world.[177] Nguema equally rejected the universality of human rights, he is of the opinion that it is imposed, which should not be the case.[178] The author also refuted a universality principle that appears to be a fusion of all diverse human rights conceptions, as they are artificial.[179] The author suggested that what was ideal was a re-evaluation of various human rights conceptions, with the aim of drawing experiences from others.[180] This suggests that comparative studies must be encouraged to promote harmonisation of human rights law.

[174] Pityana Nyameko Barney, "Toward a Theory of Applied Cultural Relativism" in Zeleza and McConnaughay (eds.) *Human Rights, the Rule of Law and Development in Africa* (2004) 40, 42.
[175] Ibid p42
[176] Etienne-Richard Mbaya, 'The Compatibility of Regional Human Systems with International Standards' in Eide E. and Hagvet B. (eds.*) Human Rights in Perspective A Global Assessment* (Bergen: Norwegian Institute of Human Rights, Oslo and Chr. Michelsen Institute, 1992) 65-89. p77.
[177] Ibid
[178] Isaac Nguema, Universalité et spécificité des droits de l'homme en Afrique, Revue de la Commission africaine des droits de l'homme et des peuples, tome 3, No 1-2, 1993, pp. 51-56.3
[179] Ibid
[180] Ibid

Mutua argued that much assertion of African human rights is not necessarily at odds with the principle of universality.[181] The author asserts that rather cultures and traditions must be considered and an agreement must reached as to what constitutes as universal human rights.[182] The author envisages a need for a revaluation of the discourse of human rights, that will provide a platform for participation for the different societies and cultures, this effort will aim to develop a universal principle of human rights .[183] The author was also of the opinion that the universal principle currently professed since the adoption of the UDHR does not in any way put into consideration relativistic intentions.[184]

Furthermore, it is important to be conscious of the fact that the idea of universalism and cultural relativism do not need to be viewed as rivals or perceived to be mutually exclusive, "rather than seeing universalism and cultural relativism as alternatives to which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms".[185]

Studying the views above and based on the views, it appears that there is no such thing as universalism. However, it is interesting that those who have argued against universalism have ignored the fact that impact of human rights as a universal notion has helped to improve the status of human rights globally as it has been able to set a standard which has helped to improve its status globally. One can argue that if cultural tradition alone is said to govern State compliance with international standards, there will obviously be a widespread disregard and abuse of human rights in Africa. The UN human rights instruments do provide some form of

[181] Makau Mutua, 'Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State' (1995) American Society of International Law Proceedings 940.
[182] Ibid
[183] Ibid
[184] Mutua(n105) p646
[185] Jane Cowan, Ambiguities of an Anticipatory discourse: the making of a Macedonian minority in Greece *in Jane Cowan*, Marie-Benedicte Dembour and Richard Wilson (eds) *Culture and rights: Anthropological perspectives* (Cambridge University Press, 2001) p 6.

flexibility which gives room to respect and protect cultural relativism. This is facilitated by the establishment of minimum standards and the incorporation of cultural rights which are provided for in both international and regional instruments. These instruments have been able to establish minimum standards each human rights. Within this framework, States have sufficient opportunity for cultural variation, without compromising the minimum standards of human rights which are already established under international human rights law.

2.3.3 The significance of the universalism and the cultural relativism debate

Donnelly[186] has argued that universal human rights does not exist, the author contended that both the universalistic approach and the cultural relativist approach were established because of preserving man's dignity. The author is of the opinion that human rights is a western notion but is also of the view that dignity is of universal significance which did exist almost every society. The author equally contends that what existed in other societies was not human rights per say, but human dignity that was only enjoyed by being a member of a group.[187] This stance posited by Donnelly can be quite confusing as it creates a shallow difference between human dignity and human rights. In addition, the author failed to suggest standards in ascertaining what human rights consists of, perhaps, the author only provided a geographical test in arriving at his perception. Goodhart[188] contends that Donnelly's idea or views of human rights is very restrictive and misleading on the Lockean philosophy of natural rights. The author equally provides a varying but interesting perspective to the discussion on human rights, where he alleged that human rights are neither universal nor appears to cultural relativist but suggested

[186] Donnelly(n126).
[187] Josiah Cobbah "African Values and the Human Rights Debate: An African Perspective".(1987) *9(3) Human Rights Quarterly*, 314.
[188] Micheal Goodhart, "Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization".(2003) 25 (4) Human Rights Quarterly, p.944.

that its acceptance universally is an element of their appeal which is produced from its legitimacy as an operative reaction to authority. The author affirms that;

…As scholars, we have worried too much that human rights might be relative and strained too hard to prove them universal. Leaving behind universalism and relativism improves the precision of our analysis and advances our theoretical understanding of human rights, emphasizing their global appeal makes clearer the basis of their legitimacy and insulates them from critiques of their misuses while simultaneously making those critiques the impetus for an ongoing reformulation of rights that adds to their inclusiveness and generality. This is a virtuous circle: as human rights become more appealing, they become more effective and vice versa…[189]

This suggests that human rights are always under pressure to either conform with a universalist or relativist approach. Thus, examining human rights too closely and constantly comparing with international human rights system will conceal the full extent of its significance as it relates to states. The pertinent question will be how different societies can be morally bound by universal human rights obligations since they cannot be obligated to respect human rights in the same way, as circumstances vary.

Goodhart and Taninchev[190] explored this advancement in the regularising nature of international human rights regulation and recognized an opposition to the idea with which they refer to as autonomy. The is centred on the contention that the use of international law in countries corrodes the notion of sovereignty and is unconstitutional since such laws are made by entities out of the constitutional framework, whom are not exactly responsible to the citizens

[189] Ibid p.946
[190] Michael Goodhart & Stacy Taninchev "The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty" [2011] 55 International Studies Quarterly 1047, 1049.

of such countries. Yet again, this idea aggregates to distorting the process by which international laws are produced in relation to states.

The position and implementation of treaties in each state's jurisdiction will depend on the state's legal system its method of reception of international law treaties, be it dualism or monism. This may appear immaterial, although with majority of the sources of SERs having their backgrounds in international and regional human rights treaties, this frequently develops into a problem, and in some cases, countries may want to exploit the gap in their legal systems to evade their commitments and obligations under international law. The case of *Abacha v Fawehinmi*[191] offers a timeless example of this. The respondent, a legal practitioner, was arrested without warrant at his residence on Tuesday January 30, 1996, and was detained. At the time of his arrest the respondent was not informed of, nor charged with, any offence. He applied ex-parte through his Counsel, to the Federal High Court, Lagos, pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for the reliefs relating to his detention and claiming breach of his fundamental rights guaranteed under Sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human & Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of Federation of Nigeria 1990 and is therefore illegal and unconstitutional. Part of the issues in this case was the status of the African Charter vis-a-vis the country's municipal laws including the Constitution. The court held amongst other things that the Nigerian Constitution being the grund norm renders void the provisions of any other extant law in Nigeria that is inconsistent it. The Supreme Court held that "*before its enactment into law by National Assembly, an international treaty has no such force of law as to make its provisions justiciable in our courts*".[192] The Supreme Court

[191] Abacha v Fawehinmi [2000] 6 NWLR Part 660. Where the court held that "*No treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly*."
[192] Ibid

quoted with approval, the decision of the *Privy Council in Higgs & Anor. V. Minister of National Security & Ors*,[193] where it was held that:

…In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the Crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic Courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizen' right and duties in common or statute law. They might have an indirect effect upon the construction of statues or might give rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty…

In addition, the Supreme Court in Fawehinmi's case, held that where a treaty is enacted into law by the National Assembly, as was the case with the African Charter, it becomes binding, and the Courts must give effect to it like all other laws falling within the judicial power of the Courts. Because the ACHPR Act was part of the laws of Nigeria, the Supreme Court held that "*like all other laws the Courts must uphold it*."

However, on the question of hierarchy, the Supreme Court held that the African Charter is not superior to the Nigerian Constitution and stated that, whenever there is a conflict between the African Charter and domestic law, its provisions will prevail over those of the other statue for the reason that it is presumed that the legislature does not intend to breach an international obligation. In the dualist legal order, a treaty can have domestic legal effect only where steps prescribed by national law are taken to deliberately infuse the treaty into domestic law, so, for "*international law to be applicable in the national legal order, it must be received through domestic legislative measures*".[194] These domestic measures transform international law into

[193] Higgs & Anor. V. Minister of National Security & Ors. The Times of December 23, 1999
[194] Richard Oppong, "Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa" (2006) 30 Fordham International Law Journal, 2006

national law.[195] Mutua suggests that human rights must reflect societies and cultures. [196] In all, dualism does not recognise that norms and rules of international law can operate directly in the domestic legal system. Rather than operate directly, the norms and rules must be transformed or incorporated into the national legal order before they can confer rights and obligations on persons or entities within the territory of a sovereign State. This should also be the same approach adopted for human rights in Africa. What this suggests is that human rights treaties to which Nigeria is a party are not beneficially to Nigerians and have no effect, except at the instance of the legislature.

Following from the above, this study agrees with scholars who have rejected strong universalism and strong cultural relativism. It concurs with moderate universalism. The moderate universalism embraces pluralism and considers the nature of diverse societies as well as their historical, cultural and political uniqueness. This school of thought considers cultural values, customs or practices accepted by others, this in turn can succeed in attaining the status of universalism as being inclusive and acceptable. Dembour had proposed that a moderate position ought to be adopted that considers local factors in the implementation of international human rights law.[197] An-Na'im saw the importance of cultural legitimacy in international human rights norms, which could only be achieved where other factors where considered.[198] In the same vein, Kanyandago believed that human rights for different people cannot be completely defined in advance. Each group of people needs to do this for itself.[199] In addition,

296 at 298. Available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2041&context=ilj accessed 20th May 2020

[195] Ibid. See also Edwin Egede, "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria". (2007) Journal of African Law, 51, pp 249-284

[196] Mutua(n104) p6

[197] Marie-Bénédicte Dembour, "What Are Human Rights? Four Schools of Thought." Human Rights Quarterly, Vol. 32, No. 1, Johns Hopkins University Press, 2010, po 1–20. http://www.jstor.org/stable/40390000. Accessed 19th August 2020

[198] Abdullahi Ahmed An-Na'im, Problems of Universal Cultural Legitimacy for Human Rights. IN An-Na'im, A. A. & Deng, F. M. (Eds.) *Human Rights in Africa. Cross Cultural Perspectives*. (Washington, D.C., The Brookings Institution 1995).

[199] Peter Kanyandago, The Church's Role Regarding Education for Human Rights in AMECEA Countries' in Kyeyune D. et al (eds.) *New Trends for the Empowerment of the People* (Nairobi: St. Paul Publications, 1997)

Shivji equally suggests that a proper human rights discussion should aim to be historically situated.[200] The author was the opinion that human rights are fundamentally about protecting human dignity, as this is usually provided for within a given cultural and historical context, and not in abstract nature.[201] From this perspective, it can be suggested that individual rights, as well as collective rights, are connected to the method in which people create their history. To this end, the aim is to guarantee that the knowledge and promotion of human rights are contextualised. The advantage of moderate universalism is that a related debate on human rights will take into regard an appropriate understanding of human rights from the onset. This approach sees both universalism and cultural relativism as being relevant.

It is useful to emphasize the significance of the universalism versus cultural relativism argument to this study and human rights practice in Nigeria. The evaluation of the several views point to the fundamental theme of the responsibility of government in any state to protect the rights of citizens. From the nature of the argument, one of the apparent suggestions of the application of international human rights in states is the influence it has on the sovereignty of any nation because of the dynamic nature of human rights. The moderate form of universalism suggested in this research enables culture and traditions to be recognised and seen as partners in promoting greater respect for and observance of human rights. Acknowledging practices and values from other cultures would enhance and advance human rights promotion and protection in Africa. This approach will not only encourage greater tolerance, mutual respect and understanding, but also foster more effective international cooperation between states.

An understanding of the ways in which cultures protect the well-being of their people would illuminate the common foundation of human dignity on which human rights promotion and protection stand. This approach aims to enable human rights promotion to assert the cultural

[200] Shivji (n94) p70
[201] Ibid

relevance, as well as the legal obligation, of the universalism of human rights in diverse cultural contexts. This approach will also recognise the various cultures, but most importantly cultural relativism, without compromising universal human rights standards. Such an approach is essential in order to ensure that the future will be guided above all by the universalism of human rights.

2.4 Indivisibility of human rights

Indivisibility is the notion that all human rights cannot be fully realised without considering all other human rights. With indivisibility, it suggests that countries cannot pick and choose among rights to promote, protect or fulfil. The indivisibility of human rights is seen as an authorised principle of the UN, which is equally supported both by the General Assembly and by the Office of the High Commissioner for Human Rights. This is supported in the 1968 Proclamation of Teheran, which provides that;

…Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible…[202]

This was also reaffirmed in the 1993 Vienna Declaration, which provides that:

…All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis…[203]

The aim of these two resolutions was to defend SERs, especially for countries who had endorsed CPRs, ensuring that they also commit to endorsing SERs. The discussion by

[202] Proclamation of Teheran, International Conference on Human Rights, 22 Apr.–13 May 1968, 13, U.N. Doc. A/CONF.32/41 (1968). Available at http://www.unhchr.ch/html/ menu3/b/b_tehern.htm.
[203] Vienna Declaration and Programme of Action, U.N. GAOR, World Conference on Human rights 48th Session 22d plenary meeting part I, 5, U.N. Doc. A/CONF.157/24 (1993)

indivisibilists focuses on what is believed to be an ill-conceived division of both the ICCPR and ICESCR.[204] They also aim to project indivisibility as a means of expanding human rights debate.[205]Although, the wider importance of indivisibility is usually contested.

Some philosophers have suggested that it is merely rhetorical,[206] some have proposed that it is clearly an indication that both of the categories of rights are valid,[207] others have suggested that its purpose is purely to protect minimum human rights standards.[208] Another school of thought are of the opinion that indivisibility[209] has more fundamental meaning, as it expresses a necessity for the full realisation of rights,[210] and thereby the full realisation of what it is to be human.[211]

Other regional instruments support the notion that CPRs and SERs do have a "*close relationship*".[212] The Council of Europe,[213] the Organization of American States,[214] the League of Arab States,[215] and the independent Asian Human Rights Commission.[216] The African

[204] Robert Howse, and Makau Mutua, 'Protecting Human Rights in a Global Economy - Challenges for the World Trade Organization' (1999/2000) Human Rights in Development Yearbook - The Millennium Edition 51, 76

[205] Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn Sweet & Maxwell 2008) p1414.

[206]Ralph Wilde, "NGO Proposals for an Asia-Pacific Human Rights System" (1998) 1 Yale Human Rights and Development Law Journal 137, 138.

[207]Ali Mohsin Qazilbash, 'NGOs Efforts towards the Creation of a Regional Human Rights Arrangement in the Asia-Pacific Region' (1998) 4(2) ILSA Journal of International and Comparative Law 603, 614.

[208] Mary Robinson, 'Human Rights at the Dawn of the 21st Century' (1993) 15 Human Rights Quarterly 629, 632

[209] James Nickel, "Rethinking Indivisibility: Towards a Theory Supporting Relations Between Human Rights" (2008) 30 Human Rights Quarterly 984, 985

[210] Daniel J. Whelan, *Indivisible Human Rights*: A History (University of Pennsylvania Press 2010) p76

[211] Ibid

[212] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ["Protocol of San Salvador"], Organization of American States, 16 November 1999, A-52, Preamble

[213] Regis Brillat, 'A New Protocol to the European Social Charter Providing for Collective Complaints' (1996) (1) European Human Rights Law Review 52, 52.

[214] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ["Protocol of San Salvador"], above n 32, Preamble

[215] Revised Arab Charter on Human Rights, League of Arab States, adopted 22 May 2004 (entered into force 15 March 2008)

[216] Asian Human Rights Charter, Asian Human Rights Commission, Kwangju, Korea (17 May 1998), art 2.2-2.4.

Union[217] echoes both the Vienna Declaration and the Proclamation of Tehran in its preamble, by providing that:

…Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights...[218]

What the African Charter aims to achieve is not a preference for any category of rights, but rather maintaining the principle of the indivisibility of all human rights.[219] The African Charter recognises the indivisibility of all rights, all "generations" of rights are recognised and SERs are justiciable.

Following the agreement reached at the Vienna Conference, there was a consensus that indivisibility could form part of customary international law.[220] In addition, it was agreed that SERs are increasingly being recognised.[221] However, in practice, it is given less priority with limited implementation as seen in national constitutions.[222] The justifications behind the disconnection between the two categories of rights have been contested. Some have argued that the split is primarily originating from disparities in the political beliefs of the two blocs during

[217] Evadné Grant, "Accountability for Human Rights Abuses: Taking the Universality, Indivisibility, Interdependence and Interrelatedness of Human Rights Seriously" (2007) 32 South African Yearbook of International Law 158, 166.
[218] Para 8 Preamble of the African Charter
[219] Amaechi Uchegbu 'Economic Rights: The African Charter on Human and Peoples Rights' in Omotala J.A. and Adeagun A.A. (eds.) *Law and Development* (Lagos: Lagos University Press, 1987) 169, 170
[220] Robert F. Drinan, "The ABA in Vienna: At the U.N. World Conference on Human Rights" (1993) 20 Human Rights 22, 22-23
[221] Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 Human Rights Law Review 617
[222] Nii Ashie Kotey, "Some Fallacies About Rights: Of Indivisibility, Priorities and Justiciability' in International Commission of Jurists and African Development Bank (ed), Report of a Regional Seminar on Economic, Social and Cultural Rights (1998) 27, 27.

the Cold War. Others are of the opinion that the, CPRs and SERs, vary from each other in terms of enforcement and state obligations.

International human rights law has long declared the link between SERs and CPRs, they are interdependent, universal and indivisible.[223] Being applied, this demonstrates the importance of human rights. Practically, it is obvious that there exists SERs extent in CPRs claims, and vice versa. Repudiating judicial protection towards SERs does not only ignore one category of rights, but it in fact also disregards a central element of all human rights, and this in turn has huge repercussions in the society. Ignoring a category of rights leads to grave disparities in the implementation towards its realisation.

Notwithstanding its categorisation, there has been amplified consideration that has facilitated to elucidate and outline these rights. Relatively, with the adoption of the African Charter regarding the issue of its justiciability, the inclusion of both categories of rights in the African Charter on equal footing ought to have brought an end to the justiciability debate. In Africa, this is primarily the most significant contribution to the argument on the justiciability of SERs.[224] As noted in previous chapters, the first instrument to ever declare the significance and protection of SERs was the UDHR.[225] Similar to the African Charter, the UDHR equally provides for both category of rights without categorising them. Even though, this instrument is not a treaty and has no binding effect or imposes any legal obligation on state parties.[226] The UDHR did provide a foundation for the creation of other human rights instruments. This later led to the enactment of other legally binding human rights instruments.[227] Subsequently, other

[223] Scott Craig, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights." Osgoode Hall Law Journal 27.3 (1989): 769-878.
[224] Viljoen p40
[225] Universal Declaration of Human Rights. For a detailed description of the drafting process of the UDHR See M A Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (Random House, 2001).
[226] It is now universally accepted that the UDHR has acquired the status of customary international law establishing legally binding principles across all fields of international law See, Steiner et al (2000) 227–231.
[227] ICCPRs and ICESCRs were both adopted in 1966

optional protocols to the ICESCR were equally adopted in other to magnify the directive of ICESCRs to accept and deliberate on individual, groups and inter-state communications,[228] which reiterates the basics of human rights.

It can be argued that SERs are the general guide for a state to regulate the welfare and standard of living of citizens.[229] A successful inclusion of SERs[230] is attained where every citizen enjoys a basic standard of living.[231] Accordingly, in, section 14(2) (b) of the Nigerian Constitution provides that "*the security and welfare of the people shall be the primary purpose of government*". It has become evidently clear from the provision of the Constitution, that the maintenance of law and order and protection of life and liberty appear to be major concern of the government. Such a restrictive role of government is no longer valid as a concept. SERs is achieved where every citizen enjoys an adequate standard of living, adequate food, clothing and housing, and a general improvement in living conditions.[232] For example, South Africa's unification of CPR and SERs establishes the state's willingness to guarantee each category of rights.[233]

Ewelukwa contends that the resistance to indivisibility is prevalent, specifically due to the Western notion which it is based on.[234] Furthermore, indivisibility movement gives force to the

[228] Lilian Chenwi, "Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court" (2010) 5, available at <http://www.spii.org.za/agentfiles/434/file/Progressive%20realisation%20Research%20paper1.pdf> Accessed 18 August 2019

[229] See also Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

[230] Frans Viljoen, 'The Justiciability of Socio-Economic and Cultural Rights: Experience and Problems', in Y. Donders and V. Volodin (eds), *Human Rights in Education, Science, and Culture: Legal Developments and Challenges* (Ashgate, 2007), 55; see Nicholas Washonga Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes', 16 (5) PER/PELJ (2013), 178; see also Tsegyaye. Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', 3 (2), Mizan Law Review (2009), 310.

[231] Article 11 of ICESCR, 1996,

[232] Article 11 of ICESCR, 1996, s

[233] Cap. 2 of the South African Constitution

[234] Uche Ewelukwa, "Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers and Breakthroughs" (2006) 9 Yale Human Rights and Development Law Journal 85, 118

demand for the justiciability of SERs, with its interpretation that all rights are equally important and essentially interconnected.[235] The categorisation of human rights has had a negative impact on the justiciability of SERs.

2.4.1 Justiciability Debate

The prolonged argument on the justiciability of SERs is an old one.[236] SERs claims can be litigated either directly or indirectly before regional bodies such as the African Commission on Human Rights,[237] the Inter-American Commission On human rights,[238] the Inter-American Court of Human rights and the European Court on human rights.[239]

Justiciability suggests that individuals in a state can request from the various arms of government, whenever there is a breach of their SERs. It is clear that CPRs are not usually debated upon as they are justiciable, thus enforceable in courts.[240] As Jordan illustrated: ..*Human society's basic principles such as freedom, justice and peace cannot exist without inalienable human rights of all the members of the human family, 'because the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are*

[235] Colin Harvey, "The Politics of Rights and Deliberative Democracy: The Process of Drafting a Northern Irish Bill of Rights" (2001) (1) European Human Rights Law Review 48, 63

[236] Nolan, Aoife and Porter, Bruce and Langford, Malcolm, The Justiciability of Social and Economic Rights: An Updated Appraisal (July 16, 2009). CHRGJ Working Paper No. 15Available at SSRN: https://ssrn.com/abstract=1434944

[237] See Purohit and Moore V Gambia, Communication 241/200 Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII which was decided at the African Commission; Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria Case No.155/96

[238] See the case of Argentina: Jehovah's Witnesses, Case 2137 Inter-Am. CHR 43, OEA/ser. L/V/VII, doc 13 rev 1978 which was about the right to education: See also Jorge Odir Miranda Cortez et al v El Salvador Inter-American Commission on Huma Rights (2000) which dealt with SERs standards that are guaranteed in the OAS Charter

[239] See Austime-Europe v France Complaint No. 13/2002, 7 Nov 2003 which centred on the right to education for persons with autism

[240] General Comment No.9 "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights" Committee on Economic, Social and Cultural Rights. E/C.12/1998/24, par.10.

created whereby everyone may enjoy' his economic, social and cultural rights, as well as his civil and political rights and freedom…[241]

It is significant to highlight that the oppositions and criticisms to its justiciability has equally prohibited several judicial establishments from guaranteeing that individuals who have had their rights violated have access to actual remedies. These preconceptions and misapprehensions about SERs has equally affected the status of these rights lawfulness of judicial and even quasi-judicial bodies from litigating on them.[242] The initial argument contends that SERs are vague, this notion has been basically overcome by advances and implementation domestic human rights standards as well as international standards.[243] The element of SERs is not essentially dissimilar from that of CPRs, as the overall provisions providing human rights in international instruments and in national laws as well do not in fact suggest so. The contents of each right are itemised as well as state's obligation.[244]

In addition, some other debates on the justiciability of SERs are purely political in nature. This may include the applicable laws or powers of the judiciary and of course resource constraints. Even though, the argument about the status of SERs has stirred a lot of debate,[245] this position is gradually transforming through judicial activism.[246] In some states, the general agreement

[241] Philip Faga Hemen, Francis Aloh & Uchechukwu Uguru, "Is the Non-Justiciability of Economic and Socio-Cultural Rights in the Nigerian constitution Unassailable? Re-Examining Judicial Bypass from the Lens of South African and Indian Experiences" Volume 14 Number 3, July-September 2020: pp. 203-220.
[242] International Commission of Jurists, "2.1 Progress towards a global recognition of the justiciability of ESC Rights" in ICJ, Guide: ESCR Litigation Available at:< file:///C:/Users/ep349/Downloads/1801-Article%20Text-6276-2-10-20210412.pdf>
[243] International Commission of Jurists (ICJ), A Guide for the Litigation of Economic, Social and Cultural Rights in Zimbabwe, 15 November 2015, p10 Available at:< https://www.refworld.org/docid/57ee7fe64.html >accessed 14 April 2020
[244] Ibid
[245] Shalom H Schwartz, "Do Economic and Social Rights Belong in a Constitution?" (1995) 10 American University Journal of International Law and Policy 1233; Claude Fabre, Social Rights Under the Constitution (Oxford: Oxford University Press, 2000); Asborjn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asborjn Eide, K. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights*: A Textbook (The Hague: Martinus Nijho¡, 2nd ed, 2001) 9; Michael Dennis & David 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 American Journal of International Law 462; and A. Neier, 'Social and Economic Rights: *A Critique'* (2006) 13(2) Human Rights Brief 1.
[246] Ibid

that has developed over time is that SERs are "real rights" and should be on the same pedestal as CPRs.[247]

Despite the progress being made globally, SERs are still being challenged and reduced to an insignificant status.[248] Regrettably, this is the position in Nigeria. Katarina Tomavevski, who was the first United Nations special Rapporteur on the right to education, affirmed that there was a need to defend all SERs "*against distortions, not only denials and violations*".[249] The former UN Rapporteur equally stated that in this modern-day era, but such alterations can also consist of reorganising SERs into official, bureaucratic rights, rather than "*substantive material entitlements*".[250]

The debate is still ongoing as to whether this group of rights should be justiciable or be left as mere aspirations. Nigeria, known for its continuous reports on the poor standard of living, must adopt methods in protecting these rights. Even though, the researcher encourages this, there are arguably impediments to its realisation.

While notions of justiciability have traditionally centred on CPRs, SERs tend to be usually associated with political commitments and developmental ideals rather than norms which impose determinate obligations on states. Accordingly, these rights have constantly suffered from a lack of judicial and political acceptance. Nonetheless, the traditional tendency to approach these rights, from a thematic perspective and within the domain of public policy, clearly does not automatically suggest that they are not enforceable rights. Indeed, in some

[247] Micheal Langford, T*he Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria: Pretoria University Law Press 2016)
[248] Dennis M. Davis, Socioeconomic rights: Do they deliver the goods? International Journal of Constitutional Law, Volume 6, Issue 3-4, July-October 2008, Pages 687–711, https://doi.org/10.1093/icon/mon014
[249] Katarina Omasevski, "Unasked questions about economic, social, and cultural rights from the experience of the special rapporteur on the right to education (1998-2004): A response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson". Human Rights Quarterly. 2005, 27(2). 709-720.
[250] David Brand, 'The Proceduralisation of South African Socioeconomic Rights Jurisprudence, or ''What are Socio economic Rights For?'' in H. Botha, A. J. Van Der Walt and J. C. Van Der Walt (eds), Rights and Democracy in a Transformative Constitution (Stellenbosch: Sun Press, 2003) p33

jurisdictions, constitutional litigation has resulted in courts concluding that these so-called second-generation rights are, in fact enforceable.

Olademeji rightly affirms that this classification has succeeded in sending out the wrong indicators in regard to the categorised rights.[251] Furthermore, Mbazira highlighted that the opposition to its implementation and realisation has taken two extents, which are; "*the legitimacy dimension and the institutional competence dimension*".[252] For the "legitimacy dimension", the author affirms that "*...it is deeply rooted on the traditional conception of the philosophical understanding of human rights, with the issue being whether or not it will be legitimate to confer constitutional protection on these rights*".[253] On the other hand, the "institutional competence dimension", does not focus on the nature of SERs, rather it pays emphasis on the institutions that are responsible for its enforcement.[254] To this end, it is believed that SERs are not and cannot be justiciable, this is so because unlike CPRs, SERs are not appropriate for judicial enforcement and the judiciary equally lacks the autonomous legality to be involved in the distribution of state resources.[255] Furthermore, it is also believed that its promotion and protection falls within the ambit of the legislative and executive arms of government and not the judiciary.[256]

[251]Oladimeji Okeowo Ademola, 'Economic, Social and Cultural Rights: Rights or Privileges?' http://www.ssrn.com/abstract=1320204, Accessed on 4th March 2019. The most used objections have been summarized in Philip Alston and Gerad Quinn, "The nature of state parties' obligations provided for under the ICESCR", Human Rights Quarterly, 9(1987), 157-229, pp.157-60; see also A. Eide, "The realisation of social and economic rights and the minimum threshold approach", Human rights Law Journal,10 (1989), 35-51.

[252] Christopher Mbazira "Public Interest Litigation and Judicial Activism in Uganda: improving the enforcement of Economic, Social and Cultural Rights" HURIPEC Working Paper NO.24, February 2009, 4.

[253] Ibid

[254] Ibid

[255] Kirsty McLean, *Constitutional Deference, Courts and Socio-economic Rights in South Africa* (Pretoria University Law Press 2009) p 111.

[256] Mbazira (n251)

Advocates for SERs justiciability have unceasingly held that a total dismissal of this category of rights as basic rights is entirely ill-advised mainly because both groups of rights are interdependent. In addition, CPRs can also be viewed as positive rights as well. [257]

Yigen's[258] view on the debate against the enforcement of SERs, was simply that the addition of SERs into a national constitution will only bring the authoritative document into disrepute. He was of the view that SERs are unenforceable, and its inclusion into the most authoritative document in any country clearly weakens the principle that SERs ought to be enforced just because they are rights and have been included in the constitution. The consequence is to weaken the law's obligation to enforcing SERs and subsequently to undermine all other rights in the Constitution and discredit the Bill of Rights. The author equally provided a distinction between fundamental rights and Directive Principles, by suggesting that fundamental rights are typically considered justiciable that is, the question concerning their fulfilment or violation is capable of being decided by a court of law, whereas Directive Principles, a term often used in connection with SERs, suggest that they are unenforceable.[259]

Nonetheless, Yigen suggests that the inability of the courts to enforce SERs does not mean that SERs are not judicially enforceable. Vierdag[260] equally affirms that the implementation of this category of rights is purely a political matter, not a matter for the courts to decide. Mureinik[261] also argues against the enforcement of these rights on the understanding that they are capital intensive and require a lot of resources, the author suggests that courts are not responsible for

[257] Christopher Mbazira, 'Enforcing the economic, social, and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years redundancy, progression and significant strides' African Human Rights Law Journal Volume 6 No. 2 (2006) 340.

[258] Kristen Yigen, "Enforcing Social Justice, Economic and social Rights in South Africa", (2000) Vol.4. No. 2, International Journal of human Rights P 17

[259] Ibid

[260] Vierdag E.W., The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights, (1978), Netherlands Yearbook of International Law. Available at: <www.unhchr.ch/tbs/doc.nsf/0/.../FILE/G0044730.doc>, Accessed on 25th January,2018

[261] Etienne Mureinik, *"*Beyond a charter of luxuries: Economic rights in the Constitution"*:* South African Journal on Human Rights, 8:4, 464-474.

allocating budget. Sunstein[262] observes positive rights are not entirely the same, the author gave an example with the right to education, which he suggests are more readily subject to judicial enforcement compared to others. He further affirms that SERs are unenforceable by the courts because judiciary do not possess the right tools of government and not equipped to review Government budget. Whether or not this is the school of thought that some Nigerian judges hold in their failure to appreciate the concept of progressive realisation is an issue that remains for assessment and scrutiny, which will be done in chapter six of this research.

Looking at the other side of the debate, Mbazira contends that even though there is more promotion for SERs today, the courts are still viewed as a recognised institution for the protection of SERs.[263] The author also argues that though litigation has been deliberated as the weakest link in the fulfilment of SERs, it is evident that court action still plays a very significant role in delivering social justice and realizing SERs.[264] According to the author, court action can hasten policy formulation, increase to political utilisation and realise enforcement of legal standards[265]. Though, Mbazira contends that a major impediment in SERs litigation is the fact that there have been several SERs cases, the decisions have made little impact in the lives of the poor, this is so, because majority of the judgements given by the court are not observed with and the remedies given not executed.[266] Roach's view was that the reparation of past wrongs is not adequate to effectively enforce SERs, as Government has not engaged in reforms that will avoid future violations and ensure justice for people not before the court.[267] Pieterse

[262] Cass Roberts Sustein, "Against Positive Rights" (1993) East Europe Constitutional Review, p.35< https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12187&context=journal_articles&httpsredir=1&referer=> Accessed 14 May 2019.
[263] Christopher Mbazira, "You are the "weakest link" in realising socio-economic rights: Goodbye Strategies for effective implementation of court orders in South Africa" (2008) 5 **Error! Hyperlink reference not valid.**> Accessed 14 May 2019.
[264] Ibid p18.
[265] Ibid p19.
[266] Ibid p19.
[267] Roach Kent, *The Challenges of crafting remedies for violations of socio-economic rights* (Cambridge University Press 1976].

further stated that SERs litigation seems to pay more emphasis on the fulfilment of individual rights at the expense of paying more attention to addressing the fundamental structural factors that continuously cause the violations.[268] Gloppen examines the settings that are apt for litigation as a policy shaping approach for the advancement of social rights.[269]The author argues that the elements that make for an effective public interest litigation in social rights cases are actual asserting of social rights complaints, receptiveness of courts to social rights entitlements, judges "capability to find appropriate remedies, authorities" compliance with court orders and proper implementation through social policies.[270]

Chenwi[271] affirms that the progressive realisation entails that state's endeavour towards SERs fulfilment and further improvement to the maximum extent possible, despite resource constraints. The author referred to South Africa, indicating that a deliberation of the progressive realisation approach to SERs is reasonable on the foundation that the concept of "desperate need" has not been seen to support the enforcement of these rights, as the courts tend to focus more on "access" than on "improvements in access".

Fabre[272] argues that progressive realisation of SERs affords the judiciary with two paths of action. The author contends that a path for action could be to suggest to the government to device welfare policies or to allocate resources to fulfil these rights, or the second cause of action for the courts is to suggest policies on how resources should be allocated. Agbakwa[273]

[268] Pieterse Marius, "The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in South African prisons" (2006) 50 Journal of African Law 2 118 – 119.
[269] Gloppen Siri, "Public interest litigation, social rights and social policy", A conference paper delivered in Arusha (2005) http://www.derechoycambiosocial.pbworks.com/f/gloppen.rev.3%5B1%5D.pdf Accessed 19 October 2019
[270] Ibid.
[271] Lilian Chenwi, "Socio-economic Gains and Losses: The South African Constitutional Court and Social Change". https://journals.sagepub.com/doi/abs/10.1177/004908571104100306 Accessed 19 March 2019
[272] Fabre Cecile, "An Introduction to Rights" Journal of Moral Philosophy 3 (1) 2006:108-109.
[273] Shedrack Agbakwa, "Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights". Yale Human Rights Development Law Journal YHRDLJ > Vol. 5 (2002) > Issue. 1 Available at: https://digitalcommons.law.yale.edu/yhrdlj/vol5/iss1/5/ Accessed 6th of November 2019

argues that SERs are significant to effectively realising human rights in Africa as these rights promote the dignity of man. He contends that human rights debates on the indivisibility and interdependence of rights must be put into practice, as they are people's primary means of self-defence. Agbakwa contrasts many academics and observers who have continuously highlighted that the under-development and economic situation in African societies is the cause of SERs being non-justiciable.[274] He then scrutinises the inseparable link between these group of rights and economic development, arguing that there is no justification for inequitable enforcement of human rights. Furthermore, the author argues that fulfilment of these rights serves as a catalyst to development. Any mission for meaningful development ought to be based on the effective protection, enforcement, and realization of SERs.[275]

Agbakwa is also of the opinion that human rights in Africa should be an embodiment of Africa's effort to regain humanity following its depreciation by the most unpleasant abuses. In addition, Pierre deVos[276] argues on the indivisibility and interdependence of SERs from other human rights. He maintained that international human rights instruments are clear on the basics of the rights and obligation on state parties.

Kofi Anan, the former UN secretary general had criticised this relativist impression of human rights being applied regionally ascertaining human rights as "*Fundamental to humankind itself that belongs to no government and are limited to no continent*".[277] A view that was also constructively agreed on by his predecessor Boutros-Ghali.[278]

[274] Ibid
[275] Ibid
[276] Pierre de Vos, *"*Human Rights Commission and Accountability in East Africa": Kampala P. 1 Development Law Journal, 2008 Vol. 5 P.179 http://www. fountainpublishers.co.ug,> Accessed 6th of November 2019.
[277] Felice Gaer, 'Human rights: What role in U.S foreign policy?', Great decisions, Special issue, (1998), p. 33
[278] See Ghali's sentiments quoted in Acheampong Kenneth, 'Reforming the substance of the African charter on human and peoples' rights: Civil and political rights and socio-economic rights', (2001) 2 African Human Rights Law Journal, p. 188.

Clearly then, if we argue that human rights are those rights one possesses by virtue of being human. This suggests that man does not require any qualification to be able to enjoy human rights. One can infer those human rights must be enjoyed by all. It must be first acknowledged, however, that any categorisation of human rights inevitably leads to challenges especially regarding its protection, which is currently what is applicable now. Classifying rights into various generations has created a wrong impression which implies that some rights appear to be available and, in some cases, exclusive to category of people. This implies that human rights are not universal. Several approaches to the adjudication of SERs have advanced out of jurisprudential and doctrinal debates around its justiciability. This suggests that a further development of its jurisprudence based on the assessment of competing approaches to its justiciability perhaps can further advance its legal value regarding its implementation.

2.5 Issues not addressed in the Literature review

The literature reviewed for this research failed to identify, or when they were identified, the thesis did not fully address the contribution that Africa has made in the field of international human rights law. This question has been systematically avoided by numerous authors and not just the ones that have been reviewed. The reason being that the region is particularly linked with negative features of human rights protection, and the weaknesses are idealised to the level that it diminishes some of the positive achievements especially with the African regional human rights system, as well as contribution made by states. For example, the criticism of the African Charter has highlighted the poor records and inefficiency of the African system in enforcing human rights in Africa. Viljoen rightly asserts that:

…Africa is associated more with human rights problems and humanitarian crisis than with their solutions, and…. if Pliny had the opportunity of writing today, he would probably have coined the phrase; 'out of Africa, always something terrible…[279]

One cannot disregard the fact that the African human rights system is in desperate need of reform, however like Acheampong affirms, the struggles that have been made in Africa ought to be appreciated.[280] The author equally argues that it is essential that Africa aims to change the opinion westerners already have about the protection of human rights in the continent.[281]

It must be noted that not all the issues can be addressed due to space, as well as contrasts to the aims of the study.

Nonetheless, Nigeria has been positively influenced by the African Charter.[282] The author is of the opinion that the African Charter is beneficial to litigation in Nigeria.[283] The adoption of the African Charter is a regional response to human rights concerns and to a large measure reflects the realities of Africa, it is imperative for Nigeria to draw inspiration from African states that have put in place mechanisms to advance the protection of human rights.

2.7 Conclusion

Numerous factors are said to be responsible for Africa's current status. These range from historical colonial experience, political instability, and the persistent lack of commitment to focused development strategies.[284] However, in order to achieve accelerated progress on the

[279] Viljoen(n228) p 18
[280] Kenneth Asamoa Acheampong, "Human Rights and The African Renaissance." *African Journal of Political Science / Revue Africaine de Science Politique* 5, no. 1 (2000): 105–23. http://www.jstor.org/stable/23489906.pp.63 accessed 14 May 2020
[281] Ibid.
[282] Eghosa Osa Ekhator, "The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria" (2015) Commonwealth Law Bulletin.
[283] Ibid p.21.
[284] Oluwole Ojo, Aworawo Friday & Ifedayo Tolu, "Governance and the challenges of Socio-economic development in Nigeria" Available at: file:///C:/Users/ep349/Desktop/for%20my%20phd/PatrickOluwoleOjoFridayAw.pdf Accessed 21st of February 2019.

realisation of human rights especially SERs, a new approach to the question of justiciability is necessary and desirable, the courts should pursue a development-oriented approach to SERs claims. The chapter has demonstrated that indivisibility of human rights generally recommends that both SERs and CPRs are of equal importance, should complement each other and must be placed on equal footing. Chapter three aims to examine SERs in Nigeria and the place of international law as it continues to impact on SERs. The chapter will also examine regional mechanisms that have been established for its realisation.

CHAPTER THREE: OVERVIEW OF HUMAN RIGHTS

3.1 Introduction

This chapter aims to examine the nature and scope of human rights, seeking to reveal and understand its philosophical origin and analyse how its instruments for protection influenced the development of the African Charter. The aim is to enable the researcher to trace the historical nature of human rights, albeit in a limited capacity, to ascertain its origin especially in Africa, and how it has evolved to what it is today. The chapter aims to justify that even though the notion of dignity does not often play a substantive role in the outcome of decisions, however understanding its concept does matter. The African Charter demonstrates that the understanding of dignity protects the equal intrinsic worth of all human beings. Hence, the explicit link between human dignity and the development of human rights in Africa represents the focal point of interest in this chapter. The chapter begins by discussing the theoretical nature of human rights and its influence on the establishment of African Charter.

3.2 Nature of human rights

It can be said that Human rights is as old as man. The originator of rights was manifested in the philosophy and literatures from the naturalist school of thought. In the opinion of these philosophers, every human being is entitled to individual rights inherent within the society and does not need permission from any authority in the enjoyment of such rights.[285] Individuals choose to form governmental authority mainly to protect these rights and improve their progress and enjoyment. Therefore, the social contract theory can be traced to the beginning of early society which is founded on the theory of natural law. The natural law affirms that some

[285] Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009). What we are calling the Naturalistic Conception has also been called the "orthodox" view; Charles Beitz, 'Human Rights and the Law of Peoples,' in The Ethics of Assistance: Morality and the Distant Needy, ed. Deen Chatterjee (Cambridge: Cambridge University Press, 2004); John Tasioulas, 'Taking Rights out of Human Rights,' Ethics 120 (2010)); and the "traditionalist" account (Joseph Raz, 'Human Rights without Foundations,' in The Philosophy of International Law, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010)

ideologies of fairness are natural, rational and unalterable and that rights bestowed by natural law are inherent to man. It is upon this premise that men have struggled overtime for or perhaps the understanding of them. Griffins suggests that[286]:

…The term "human right" is nearly "criterionless". There are unusually few criteria for determining when the term is used correctly and when incorrectly—and not just among politicians, but among philosophers, political theories, and jurisprudents as well. The language of human rights has, in this way, become debased…[287]

Brown[288] equally emphasises that:

…Virtually everything encompassed by the notion of "human rights" is the subject of controversy… the idea that individuals have, or should have, "rights" is by itself contentious, and the idea that rights could be attached to individuals by virtue solely of their common humanity is particularly subject to penetrating criticism…[289]

There is a need to understand the nature of human rights as knowledge and understanding of human rights is a pertinent part of our individual status as human beings and one's collective status as members of the global community. Although, there exist varying perceptions regarding its nature, what is evident is the general acceptance of the importance of human rights.

Cassese defines human rights as generally "…*based on an expansive desire to unify the world by drawing up a list of guidelines for all governments…an attempt by the contemporary world*

[286] James Griffin, *On Human Rights* (Oxford University Press 2008).
[287] Ibid p40.
[288] Chris Brown "Universal human rights: A critique" The International Journal of Human Rights (1997), 41-65, p.103.
[289] Ibid p104.

to introduce a measure of reason into its history".[290] The author perceives that human rights can therefore not be claimed to be intrinsic in man but are seen to be deliberated on the leaders on behalf of its citizens. This invariably suggests that world leaders are primarily responsible for evaluating whether these rights are applicable to their citizens. Cranston affirmed that this reflection is myopic, and at worst weakens the universal understanding that human rights are inherent rights to all, which cannot be deprived of or even approved of as we are born with them.[291] It is obvious that Cassese's thoughts met with criticism from other academics who consider that the realization of human rights goes beyond the simple need to unite the world, but can be regarded for preservation of justice as well as the ideologies of equality and the rule of law.

Furthermore, the definition provided by Brendalyn is completely opposite from Cassese's. The author affirms that human rights are those individual rights that all human beings possess by virtue of just being human.[292] The definition has an irrefutable insinuation that all human beings are seen to be equal and possess equal rights regardless of sex, age, social class, race, culture or religion.[293] In addition, Henkin equally provides a similar definition stating that "*Human rights cannot be forfeited, waived or transferred, but are universal rights that all human being have which are fundamental to the existence of human kind*".[294]

Eze suggests that human rights are "*demands or claims which individuals or groups make on society, some of which become part of ex lata while others remain aspirations to be attained in the future*".[295] The author's definition is restricted in its scope, this is because, Eze's

[290] Anthonio Cassese, *Human rights in a changing world* Polity Press, (1990) p3.
[291] Maurice Cranston, Human rights: Real or supposed', in Raphael D (ed), *Political and the rights of man*, (1967) p52.
[292] Ambrose Brendalyn, *Democratization and the protection of human rights in Africa* (*ABC-CLIO* 1995) p29
[293] Ibid p30.
[294] Louis Henkin, *The Age of rights (*2nd *edn Columbia University press* 1990) p2.
[295] Osita Eze, *Human rights in Africa: Some selected problems* (Nigerian Institute of International Affairs in cooperation with Macmillan Nigeria Publishers 1984) p5.

understanding is that human rights are known standards which should be recognized and protected by law, although some human rights are yet to be recognized in some legal systems but are seen as central to some persons.

The state should be viewed as the 'protector' and not a 'guarantor' of rights and must protect all rights inherent to man regardless of if they are recognized by law or otherwise. To this end, in the definition of human rights, it has been established that it is a momentary task owing to the endless progression of the concept but, nevertheless, it cannot be repudiated that human rights are inherent to every human being.

Having looked at various definitions of human rights, the definition that best suits this study is that provided by Laski, who suggested that human rights are claims that are made by groups or individuals that are deemed necessary to promote their wellbeing, fulfilment and dignity rights.[296] Humana equally provided a similar definition which supports that these rights are inherent to man. The author's definition interprets that this category of rights are "those laws and practices that protect the ordinary people, groups, races and minorities from oppressive governments".[297] The realisation of human rights is now reflected as the verification mark of an urbane and modern society. The average nature of human rights has also progressed and has evolved with social changes. So, what really is Human Rights? The most straightforward answer is the one proposed by the human rights theorist, Jack Donnelly, who suggests that human rights are plainly rights that are inherent to man simply because one is a human being.[298]

Ever since the end of the cold war, several human rights norms have gained dedicated support most especially in terms of their further codification in international frameworks. Indeed, these norms have appeared prominently as aspirational goals in several countries' national

[296] Harold Laski, *A grammar in politics* (Harper Collins Publishers Ltd 5th edn 1967) pp.91-92.
[297] Charles Humana, *World human rights guide* (Oxford University Press 1983) p7.
[298] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press, 2003)

constitutions. Human rights have been generally divided into three generations. The major focus of this research will be on the second generation of rights.

3.2.1. Scope of human rights

Human rights can either be identified internationally, regionally and domestically. With the aftermath of the Second World War, the international community saw a need to embrace peace and avoid further conflict, this led to the adoption of the UDHR, with this declaration, human rights metamorphosed from national concerns to international concerns, to what it is known today.[299] Although it was specified in the preamble of the UDHR that all state parties to the instrument shall reaffirm their faith in fundamental human rights and the dignity and worth of the human person,[300] Article 1(3) goes on to reiterate their commitment to the promotion and protection of human rights and fundamental freedoms.[301] With this declaration, the UN guaranteed that the realisation of human rights becomes the obligation of all states.[302] There have been various determinations and efforts at the regional level to promote and protect human rights. Regional mechanisms have equally been put in place to ensure that the violations of human rights in various regions are to an extent prohibited and those seen to infringe or violate rights are brought to justice.

The position of International human rights law was strengthened by the adoption of the UDHR, which reiterated the pledge of states towards the promotion and protection of human rights, this in turn has helped to evolve its status. Unfortunately, this area of law faces an ethical challenge in most African countries, Kantian understanding of human dignity has enabled

[299] Mary Ann Glendon, The Rule of Law in the Universal Declaration of Human Rights, 2 Nw. J. Human Rights. 1 (2004). https://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/5> Accessed 23 April 2019
[300] Preamble of the Universal Declaration of Human Rights 1948.
[301] Ibid.
[302] Glendon (n297).

different societies have a "common language" as human dignity constitutes a useful concept which is diverse and comprehensive enough to support both universalism and cultural relativism. The African Charter recognises dignity in its Preamble providing that "…*fundamental human rights stem from the attributes of human beings, which justifies their national and international protection . . .*"[303] In a similar context, Jacques Maritain, who was an advocate of the concept of human rights, affirms that "*the dignity of the human person*" is worthless, if man's rights are not respected just for the fact that he or she is a human being.[304] The common language of humanity has enabled the African Charter develop a unique approach regarding the protection of SERs. The core value of the African Charter lies in its ability to reflect history, values, traditions, and development of Africa and most importantly align its African values with human dignity and the universality principle of human rights which are indeed the cornerstone of international human rights law. By recognising the universality, interdependence and indivisibility of human rights and making clear that freedom, equality, justice and dignity are essential for all, the African Charter makes a substantial contribution to the body of international human rights.

Human dignity has continued to remain at the forefront of international human rights law, it equally has a common presence in regional instruments such as the African Charter. The African Charter has adopted a unique approach regarding protection of several rights. "Peoples'" rather than the individuals are seen as beneficiaries of human rights.[305] Although the concept of "peoples" is increasingly being recognised and appreciated, the dynamic use made by the African Charter of this term has propelled it into greater pre-eminence within

[303] See preamble of the African Charter.
[304] Jacques Maritain, *The rights of man and natural law* (trans D Anson) (1943) p65.
[305] Julia Swanson, "The Emergence of New Rights in the African Charter" (1991) 12 NYL Sch J Int'l & Comp L 307, 322

international human rights law.[306] This demonstrates that the framers of the African Charter were of the opinion that peoples' rights was critical to achieving its objectives, hence the term was incorporated in the title of the treaty to emphasize this point.

The respect for human rights has continued to affect the relationship amongst countries, and equally has an unlimited bearing of the connection that states promote with each other.[307] Umozurike opined that human rights has now become "*a potent instrument of diplomacy to which has been added democracy*".[308] This is evident especially with countries that have low standards for human rights protection, other states will withdraw from engaging in diplomatic dealings. Although the idea about the nature and scope of Human rights are seen to be consistent only with a restricted notion of what freedom entails and this freedom is seen as the absence of interference as suggested by Berlin, who affirmed that;

…But whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility, or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty from, absence of interference beyond the shifting, but always recognisable, frontier…[309]

The synchronised recognition of SERs and CPRs is vital to a functional fulfilment of both categories of rights as they are interdependent upon each other. Sandra Fredman asserts that,

…Without basic socio-economic entitlements, civil and political rights cannot be fully exercised. Freedom of speech or assembly are of little use to a starving or homeless person.

[306] Ibid 323
[307] Ibid.
[308] Oji Umozurike, "The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness"(2007) Annual Survey of International & Comparative Law*:* Vol. 13: Issue. 1, Article 8. Available at: https://digitalcommons.law.ggu.edu/annlsurvey/vol13/iss1/8, p. 7.
[309] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978).

Equally problematically, those without resources will find it hard to access the legal system to redress breaches of their rights. The interaction also works in the other direction… As Sen has argued freedom of the press, a free opposition, and freedom of information spread the penalty of famine to the ruling groups....[310]

The major obligation of any state and a key measure of its legality, is the improvement of the over-all welfare and the standard of living of its citizens.[311] This is attainable by respecting, protecting and fulfilling of human rights, most particularly socio-economic rights.[312] Regardless of the close connection between the fulfilment of SERs and the enhancement of standard of living, till date, there has customarily been either an over-all unwillingness to implement or lack of political will at both national and regional levels.[313] This hesitancy has largely been due to the perceived vagueness of this category of rights, unclearness and its lack of precision as well as how and to what extent are States' obligations.[314]

The entire research is founded upon the appropriate knowledge of this concept, but most specifically on SERs. The non-recognition of SERs in Nigeria affects the realisation of CPRs and vice versa. Promoting a category of rights and giving less priority to the other will have a direct impact of citizens of any state, this is because SERS and CPRs must be realised concurrently. Sadly, government who should be responsible for promoting and protecting human rights or are seen to be the main protectors of human rights, most times are the worst

[310] Sandra Fredman, *Human Rights Transformed.* (Oxford University Press 2008)
[311] Udombana Nsongurua "Social Rights Are Human Rights: Actualizing the Rights to Work and Social Security in Africa," Cornell International Law Journal (2006) Vol. 39: Issue. 2, Article 1. Available at: http://scholarship.law.cornell.edu/cilj/vol39/iss2/1>accessed 4th May 2019.
[312] Shedrack Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 Yale Human Rights and Development Law Journal 177, at 179.
[313] Philip Alston, 'International law and the human right to food' in Philip Alston & Katarina Tomasveski, The right to food (1984) p54. See also The South African Human Rights Commission (SAHRC), '7th Report on Economic and Social Rights: Millennium Development Goals and the progressive realisation of economic and social rights in South Africa - 2006-2009' (2010)9.
[314] Jeremy Waldron, 'Socio-economic rights and theories of justice' New York University School of Law Public Law and Legal Theories Research Paper Series, No. 10-79 (November 2010) 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699898 Accessed 23 April 2019, who argues that SERs are formulated at the wrong level of generality or abstraction.

violators.[315] Repeatedly, the obligation placed on the Nigerian government by various human rights instruments especially the ICESCR is not being fulfilled.

3.3 Theoretical framework of human rights

This section aims to examine the various theories of rights to generate a deeper understanding into the standards that support human rights reasoning.

The process of justifying human rights theory is difficult as they are like, "runaway guns".[316] This is because, there is always a disparity between what exists in theory and practice.[317] Regardless of the various criticisms, human rights theories are fundamental to the general understanding of SERs. It has been established that these theories in human rights law have helped to justify the existence of SERs at all levels and facilitating its effectiveness. Even though the various theories are to some extent identified in vague terms,[318] it can be argued that it has indeed provided a foundation.[319]

Tracing the historical foundation of SERs may be difficult, although various traditions expressed that individuals who are unable to fend for themselves should be taken care of.[320] Scholars like Karl Marx and Immanuel Kant equally have similar philosophies.[321] During and after the wars, following the great depression in 1930, it became clear that there was a need to protect those who were unable to care for themselves.[322] During the cold war, immediately after the second world war, western governments advocated for civil and political rights, while

[315] Obi Okongwu, 'The OAU charter and the principles of domestic jurisdiction in inter-African affairs', (1973) 13 Indiana Journal of International Law p589.
[316] There have been various definitions of the concept of human rights, majority of these decisions are influenced by various theories. Tom Lowenthal, 'The Role of Dignity in Human Rights Theory: Constituent or Teleological?' (2015) 18 Trinity College Law Review 56.
[317] Fortman Bas de Gaay, Political *Economy of Human Rights.* (Routledge 2011) p.32
[318] Ibid p.33
[319] Chris Brown, "Universal Human Rights: A critique'." Wheeler, Tim Dunne & Nicholas. *Human Rights in Global Politics.* (Cambridge: Cambridge University Press, 1999) p.104
[320] Ryan Goodman, Henry J Steiner, and Philip Alston. 2007. International Human Rights in Context, (3rd edition. Oxford University Press) p.242
[321] Ibid p.242
[322] Scholars such as Milton Keynes advocated for better employment policies

the eastern bloc (the communist) stressed on the importance of SERs. As things began to progress, several academics in either the moral or political schools of thought restated conceptual oppositions to social rights. These criticisms usually include the constructive positioning of social rights and concerns of its certainty limitation of resources, and of course its justiciability. Nevertheless, it shall be argued that both ideologies regarding SERs validate that these concerns are not justified.

The expression "Law is politics" which was created by supporters of the Critical Legal Studies (CLS) have separated both political and legal intellectuals into various categories.[323] The author, evaluating this expression, categorised its protestors into two separate groups. On one hand, the author suggests that the fundamentalists or traditionalist who perceive the law as being pure, unbiased and a natural structure with the ability of discovering the precise explanation of legal standards and relating them objectively to explicit evidence or facts.[324] On the opposite end, are the extremists who are of the opinion that law has a universal and limiting impact on politics, in their opinion, law ought to be kept separate from politics.[325]

The relationship between law and politics is precisely significant regarding constitutional law, as the growth, understanding, application and enforcement of a constitution stimulate arguments on the link between politics and law.[326] The Nigerian Constitution is not any way dissimilar, having passed through an intricate development of negotiation and consideration almost surpassing a generation to enable it to capture the aspirations of her people. A theory

[323] Dale Snauwaert, "The Dialogical Turn in Normative Political Theory and the Pedagogy of Human Rights Education". *Educ. Sci.*2019, *9*, 52. < https://doi.org/10.3390/educsci9010052> accessed 12 December 2019
[324] Ibid p54. The traditionalists argue that the capacity of law to yield right answers depends on it being kept separate from politics, guaranteeing its protection from the despotism of men. See also Peter Goodrich, Costas Douzinas, Yifat Hachamovitch 'Introduction: Politics, ethics and the legality of the contingent' in P Goodrich et al (eds.) Politics, post-modernity and critical legal studies: The legality of the contingent (1994) 17 who contend that 'any contamination of law by value will compromise its ability to turn social and political conflict into manageable disputes about the meaning and applicability of pre-existing public rules
[325] Peter Andrew, "Taking Dialogue Theory Much too seriously (or Perhaps Charter Dialogue Isn't Such a Good Thing after all)." *Osgoode Hall Law Journal* 45.1 (2007): 147-167. https://digitalcommons.osgoode.yorku.ca/ohlj/vol45/iss1/7Accesed 10 June 2019
[326] Ibid p149

on its understanding and implementation must adopt a sound legitimate interpretation as a value loaded societal principles focusing on its constitutional requirements.[327] A question that still requires clarity is if the interpretation of the provisions guaranteed in the constitution should be by the courts or other actors should be solely responsible for its interpretation? In response to this enquiry, Waldron suggests that;[328]

…Men and women who struggled and died to establish the new constitutional dispensation were looking for far more than a voice on interstitial issues of policy… They fought for the Constitution because they believed that controversies over the fundamental ordering of the society …were controversies for them to sort out…because they were the people who would be affected by the outcome. Moreover, they did not fight for [the Constitution] on the assumption that they would then all agree about [the meaning of Constitutional provisions] … But they fought for the [Constitution] anyway on the ground that the existence of such principled disagreements was the essence of politics, not that it should be regarded as a signal to transfer the important issues they disagreed about to some other forum altogether, which will privilege the opinions and purses of a few…

Examining the above quote, one can immediately envisage an inherent link between law and politics in the growth of any constitution. This relationship anticipates the role of all communal actors who are engaged in a co-operative advancement through a process of purposeful discourse.[329] The relationship that exists between politics and law is explicitly distinct in the

[327] Johnsen Dawn, "Functional Departmentalism and Non judicial Interpretation: Who Determines Constitutional Meaning?" (2004). Articles by Maurer Faculty. Paper 332. <http://www.repository.law.indiana.edu/facpub/332>accessed 12 December 2019

[328] David Bilchitz, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights, Oxford University Press, 2007; see also Onyeka Osuji & Ugochukwu L. Obibuaku Rights and Corporate Social Responsibility: Competing or Complementary Approaches to Poverty Reduction and Socioeconomic Rights? - 2016 - *Journal of Business Ethics* 136 (2):329-347.who have argued that decision making should be handled by experienced judges in constitutional courts. The philosophy of dialogical constitutionalism is different from the model developed by Bilchitz. Even though it allocates decision-making obligations to the courts.

[329] Du Plessis "Constitutional dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue)' (2010) 25 South African Public Law 683, at 686ff

understanding and interpretation of provisions of SERs due to their apparent strategy and nature.[330]

Law and politics create their own specific pictures and equally create a peculiar bond as well, which is beyond our human comprehension. However, both pictures are of utmost importance for our societal life.

3.3.1 Moral Theories

The moral theories of human rights are naturally founded on the characteristic scope of a person. Endogenous social relationships and socio-political background are linked in the "search for moral standards of political organization and behaviour that is independent of the contemporary society".[331] The researcher begins with a review from John Locke theory.

Being one of the 17th century main philosophers, the theory of natural rights originated from him. He relied on the Almighty and considerably wise maker[332] as the originator of natural law. For this philosopher, man is born into an already set pre-political state of nature, where everyone enjoys their picture-perfect liberty.[333] The philosopher went on to state that man in this natural state is only limited by this law of nature which is seen to treat all individuals as equal and independent.[334] This law of nature suggests that no one is permitted to harm another nor their liberty or possession, [335] thus giving individuals definite absolute natural rights.

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[330] Sarah Verstraelen, "Constitutional Dialogue in the Case of Legislative Omissions: Who Fills the Legislative Gap?" (February 9, 2018). Utrecht Law Review, Vol. 14, No. 1, p. 61-81, 2018, Available at < https://ssrn.com/abstract=3128772>, ;see also Katharine G. Young, A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review, International Journal of Constitutional Law, Volume 8, Issue 3, July 2010, Pages 385–420, The author had acknowledged that rift that exists between constitutionalism and democracy is usually highlighted in regard to SERs

[331] Andrew Heard, "Human Rights: Chimeras in Sheep's Clothing?" An Introduction to Human Rights Theory Simon Fraser University Online 1997 <https://www.academia.edu/11431763/human_rights_chimeras_in_sheeps_clothing?auto=download>

[332] John Locke, Two *Treatises of Government*, (London Thomas Tegg 1823)

[333] Ibid p72

[334] Ibid p72-73

[335] Ibid p72

To this end, the law is also easily accessible to all as it can only be revealed and determined through reason, inherent to all humans.[336] Because of chaos and disorder in the state of nature, individuals have now formed a social contract agreeing to assign their rights and liberty to authority to reciprocally protect their lives, property and liberty.[337] Yet this transfer of control to the authority is not absolute; it is acknowledged as lawful only if the government is able to use their authority to protect individuals and their rights.[338]

According to Locke,[339] he described rights as those primary goods which can be reasonable in any state of nature. The "goods" referred to here are "perfect freedom" or "liberty," such that persons can "order their actions, and dispose of their possessions and persons as they consider fit, free from the will of any other man".[340] Nonetheless, this justification relies heavily on several expectations. Of importance, is that the state of nature commences with "perfect equality". In addition, the philosopher suggests that "*All the power and jurisdiction is reciprocal, no one having more than another*" which is obvious since man is "born to all the same advantages in a state of nature".[341] Linking this important circumstance with the search for liberty, Locke works out at a mutual obligation of non-interference for ones limited set of rights, by suggesting that no individual ought to harm another individual's life, freedom or even possessions.

Remarkably, the philosopher was not particularly interested, perhaps openly or directly with the issue of SERs. As he applied the idea of natural rights to prompt the indication that there were ethical facts that applied to all irrespective of where there were situated or the contracts

[336] William Uzgalis, "John Locke", *The Stanford Encyclopaedia of Philosophy* (2020 edn), Edward N. Zalta (ed.) Available at: <https://plato.stanford.edu/archives/spr2020/entries/locke/>.Accessed 12 January 2021
[337] Ibid p 75
[338] Ibid 76
[339] Ibid p72-73
[340] Ibid p74
[341] Ibid p74

made.[342] This method aimed to accept diversity by demanding states to acknowledge freedom of conscience, which included religious forbearance.[343] Conversely, Locke's notion of liberty had attracted several criticisms on the impression of rights. For example, Cranston[344] argued that only a restricted number of rights are "sacred", and that the non-inclusion of SERs signifies no "grave affront to justice". This also leads in a comparable path, with a denial of positive obligations on states which can amount to hunger and starvation.[345] As it is, freedom from hunger and starvation is associated with the right to life.[346]

As can be established, the supposition of "perfect equality" may appear to be problematic to bear outside the experiential state of nature. Capital is limited in any state and there will always be conflict over ownership.[347] Furthermore, inadequate access to expertise, information, and resources will affect the equal circulation of capital and property. These characteristics provide an advantage to some individuals in the determination of rights over liberty and property. John Locke's illustrations are pierced with a lack of direct acceptance of the economic status of a state. The philosopher's idea of labour disregards the realism of resources and technology, which evidently represents the link between determination and outcome, but it must be noted that it cannot be equally circulated. It is problematic to identify how Locke could validate disparity in the access to capital and technology as dependable with his theory.

Pervasive disparities undermine the assumption of equality of power. Undeniably, if Locke's expectations in the law of nature are to be applied, one might need a rather fundamental form of social rights with which to use.

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[342] John Locke & Joseph Brook, *A Letter Concerning Toleration* (Huddersfield 1796)
[343] Ibid.
[344] Maurice Cranston, What *Are Human Rights*? (London: Bodley Head 1973).
[345] Robert Nozick, Anarchy, *State and Utopi*a (Blackwell publishers limited 1974)
[346] Vizard Polly, *Poverty and Human Rights: Sen's Capability Perspective Explored,* (Oxford University Press 2006)
[347] Ibid. He assumes that "*No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part*." Land and other resources are presumed bountiful.

It can be argued that the moral impression of human rights has progressed from the very idea of what it used to be. In the past, human rights were used mainly as a manifestation of indignation of acts against persons who collectively were interested in accepting basic humanity.[348] Interestingly, the notion has evolved exponentially, partially because the idea of the rights has broadened. Consequently, as shall be expounded in this section, some academics recreated the notion of liberty, others deposed of the perception. It is important to note that the prior belief of equality amongst man is not usually applied in recent philosophies of rights. This is because, modern theories have accepted that recognition of freedom and enjoyment of rights may be uncertain if not enjoyed alongside SERs.

Going back to the 18th century, philosophers like David Hume portrayed a more positive interpretation of what human nature is. The philosopher acknowledged an ordinary ethical sense which was appropriately perceived than criticized as the essential requirement of morality.[349] As the Enlightenment spread across Europe to some parts of America, the significance of liberty or freedom of conscience an essential characteristic in Locke‘s thinking was expanded.[350] The Enlightenment interpretation was that if individuals were permitted to apply their own reasoning, they in turn would logically respect welfare of others, as they are originally moral and rational in their ways.[351] Additionally, man already possess exceptional intrinsic potentials and capabilities.[352]Therefore, moral behaviour requires freedom from unnecessary limitations.[353] Because man’s unique qualities is reliant on ethical sense and balanced thought, an essential feature of liberty is vital for its realization. Equally, if liberty and autonomy are taken away from man, individuals will be unable to flourish; thus, state

[348] Hunt Lynn, *Inventing Human Rights* (W. W. Norton & Company 2007)
[349] David Hume, *A Treatise of Human Nature, ed.* L.A. Selby-Bigge, vol. III (Oxford: Clarendon Press, 1888) p 470.
[350] Paul Gingrich, “Notes on the Enlightenment and Liberalism,” University of Regina Department of Sociology and Social Studies. [2019].
[351] Ibid
[352] Ibid
[353] Ibid

authority ought to be restricted to guarantee freedom to enable individuals to prosper and enjoy their rights. This central positivity regarding human nature was echoed in the thought of notable Americans like Thomas Jefferson and George Mason,[354] and subsequently in its Bill of Rights.[355]

For moral theorists, human rights are inherent to man by virtue of our common humanity. According to this approach, what constitutes a human right is not determined by a positive legal instrument or institution. They argue that Human rights did exist prior to any legal framework. This equally suggests that because a human right has not received any international or domestic legal protection does not make it less of a right. SERs are human rights and must be given equal importance to CPRs.

The existence or non-existence of a human right rests on abstract features of what it means to be human and the obligations to which these features give rise. Human rights do protect important characteristics shared by all regardless of man's unique features or ways. They also give rise to specific duties that man owe each other. A unique characteristic of the African Charter is its introduction of the notion of "peoples' rights" to human rights language, this appears to be significant to African social philosophies which centres on man's dignity and the community.

Human dignity is usually associated with Immanuel Kant's writings. Understanding the concept of dignity and its meaning for human rights, Kantian philosophy is a prerequisite to what it entails. The Kantian literature provides that dignity is a certain type of value attached to human beings. The philosopher's reasoning on human dignity is based on the moral self-determination of the human being, on his moral autonomy. Providing a humanist basis on the

[354] Charles B. Sanford, "*The Religious Life of Thomas Jefferson*" (Charlottesville: University of Virginia Press, 1984) 20–21.
[355] See the US. Declaration of Independence.

notion of dignity, Kant has been regarded as the "father of the human concept of human dignity".[356] The Kantian account on human dignity presents a particular interest to this study, mainly because it represents perhaps the most vibrant way of conveying the undeniable connection between human dignity and human rights, this suggests the powerful influence of the Kantian philosophy in respect to the notion of dignity as we know it today.

In the Groundwork of the Metaphysics of Morals, Kant had made the famous distinction between price and dignity, asserting that human beings should not be treated only as means but always also as end. The philosopher was the opinion that:

...For, nothing can have a worth other than that which the law determines for it. But the law giving itself, which determines all worth, must for that very reason have a dignity, that is an unconditional, incomparable worth; and the word respect alone provides a becoming expression for the estimate of it that a rational being must give. Autonomy is therefore the ground of the dignity of human nature and of every rational nature...[357]

Dignity is the term Kant uses to describe this unconditional worth that is grounded in autonomy. Affixing a price to something suggests its value to us, on the other hand, dignity expresses our own value. Priced items are only of relative worth because their assigned value arises from the very possibility of an end.[358] In other words, all things that are not ends derive their relative value from the ends, and without ends there can be no value in the world. Dignity therefore represents uniqueness, a quality that is irreplaceable because it "*admits no equivalence*".[359] Kant's notion of equal dignity as denoting status points to respect as the

[356] Giovanni Bognetti, "The Concept of Human Dignity in European and US Constitutionalism," in European and US Constitutionalism, ed. G. Nolte (Cambridge: Cambridge University Press, 2005) p89.
[357] Christine Marion Korsgaard, "Introduction to Groundwork of the Metaphysics of Morals". *In Groundwork of the Metaphysics of Morals*, M. Gregore. Ed and Trans. (G 4: 436)
[358] Ibid 4:435.
[359] The ability to assert that something is valuable is central of the ability to be able to distinguish between that which a price has been affixed on it and that which has dignity.

appropriate attitude upon recognizing dignity. If the ability to give man universal law is the ground for dignity, what kind of respect does it provoke?

Kant's explanation of dignity appears to be explicit in the sense that an attitude of respect is unnecessary as metaphysically, dignity exists, whether it is positively recognised by empirical human beings or not. The theoretical basis of dignity can be linked to Kant's moral and legal theories, which provide a legal framework to constitute human dignity as a priori constitutional value and the basis for human rights. Kant's claim of equal inherent dignity is regarded as the basis of human rights.[360]

Kantian principle, which relates to this research, is what Kant refers to the principle of humanity, which suggests that "*So act that you use humanity, whether in your person or the person of any other, always at the same time as an end, never merely as a means*". [361] This clearly affirms that Human dignity, as Kant observed, is universal and belongs to every human being. In this sense, Kantian understanding of human dignity is not rooted in God but expressed through the inner worth of every human being, representing a universal value that has no price.[362] For this reason, the Kantian account on dignity is helpful for the comprehension of human rights mainly because of its unique theoretical substance and how it influenced the Universal Declaration.

3.3.2 Political theories

Universal standards afford both a "starting point" and a "considered opportunity" for evolving philosophies of human rights. To explain this further, Beitz[363] relates to the post-1945 universal

[360] Beyleveld Deryck and Roger Brownsword, "Human Dignity, Human Rights, and Human Genetics." The Modern Law Review, vol. 61, no. 5, Modern Law Review, Wiley 1998, pp. 661–80
[361] Korsgaard(n307) 4:429
[362] Timofte Anca-Giorgiana, "Human dignity- a useful concept for the language of human rights? The Kantian and the Christian understanding of human dignity in relation to human rights" (2020) Unpublished paper, University of South-Eastern Norway
[363] Charles Beitz, "*The Idea of Human Rights*" (Oxford University Press 2009)

human rights era and the argument of a global community. The theorist guards his selection by indicating that the astounding application of an international human rights structure "…*seeks to protect important human rights interests against threats of state-sponsored neglect or oppression which we know from historical experience are real and can be devastating when realised*."

Beitz further suggests that a "practice" whereby its members "recognise the practice's norms as reason-giving and use them in deliberating and arguing about how to act." Nevertheless, he equally identifies some relevant standards within this practice which he promotes to a normative point. The theorist suggests that Human rights are "*requirements whose object is to protect urgent individual interests against certain predictable dangers ... under typical circumstances of life in a modern world order composed of states*" to which "political institutions" must respond.[364]This interpretation is principally founded on the idea of human rights permitting him to lessen the firm necessities of authority and the development of human nature. For the theorist, "*an urgent interest is not necessarily an interest possessed by everyone*".[365] It is adequate if the concern is substantial to be acknowledged over "*a wide range of possible lives*" and absent protections for the right institutions will act in ways that "endanger this interest".[366] In addition, Beitz approves the awareness of social rights, classifying them "anti-poverty rights". With such a description, it is not shocking that he agrees that the key obligation is to protect individuals.[367]

Other theorists have scrutinized this lack of neutral ethical basis in several ways. For example, John Rawls agrees that as a concrete political subject, no overall moral notion can offer the

[364] Ibid p12
[365] Ibid
[366] Ibid
[367] Ibid p112

foundation for a communal idea of justice in a contemporary autonomous society.[368] The philosopher suggested that instead of applying a neutral moral foundation, what may appear to be useful, in his opinion, is a liberal democracy.[369] The philosopher is of the view that this approach most importantly evades discrepancies concerning religion and philosophy by developing an agreement between diverse individuals on essential obligations. Accordingly, the philosopher is of the opinion that, multicultural communities can find practical explanations to differences; rather than focusing on its validations, the validation merely develops into their consensus. Furthermore, Rawls has identified that rights have become instrumentally imperative for several reasons. He argued that the UDHR provided a foundation that the international community had agreed realistically that SERs were central to man. Under the modern interpretation, a common objective is pointless; the UDHR indicates an agreement that dissimilar people, irrespective of their ethical obligations and their social framework, have been able to agree that SERs are essential enough, to be labelled as fundamental political obligations.

Lastly, in relation to rational justifications, the simultaneous realisation of both CPRs and SERs is vital to the purposeful realisation of both category of rights because they are primarily interdependent upon each other. As early as 1948, both category of rights were acknowledged as interdependent and indivisible. Sandra Fredman affirms that:

…Without basic socio-economic entitlements, civil and political rights cannot be fully exercised. Freedom of speech or assembly are of little use to a starving or homeless person. Equally problematically, those without resources will find it hard to access the legal system to redress breaches of their rights. The interaction also works in the other direction As Sen has

[368] John Rawls, "Justice as Fairness: Political not Metaphysical," Philosophy and Public Affairs Vol. 14, No. 3 1985), pp. 223-251
[369] Ibid pp 225–226.

argued, freedom of the press, a free opposition, and freedom of information spread the penalty of famine to the ruling groups…[370]

Political theorists have adopted a distinct account of the nature and role of human rights. Dissimilar from moral theories, which appear to centre on universal characteristics, political approaches do not necessarily relate to the requirements of moral theory. In their view, states have a primary obligation to protect the rights of people. One important contribution from this theory especially for Africa is that it has provided normative perspectives and standards to assess the current international human rights regimes. The continent has evolved and consolidated on its system of political and social institutions regarding human rights, adapting some practices as are necessary for an integration into the globalized world.

3.3.3 Compliance Theories

A common reason cited by African philosophers for rejecting western conceptions of Human Rights is that they are grounded in an individualistic concept of personhood that does not suit Africans. The issue of compliance is important in international law, as for all legal and regulatory systems, and several scholars have examined it, producing theories suggesting why actors comply with international law.[371] This section examines various theories of compliance and the necessary requirements in international human rights law.

Realism predicts compliance with international standards where it is in the state's best interest to comply with the set-out guidelines. For states, the interest is observed by complying with relevant international instruments.[372] The stronger states are usually not seen to comply with international standards, but where compliance supports other states, stronger states make effort

[370] Sandra Fredman, *Human Rights Transformed* (Oxford University Press 2008) p67
[371] Andrew Guzman, *How International Law Works* (Oxford University Press, 2007)
[372] Charlie Chinkin, Regulatory frameworks in international Law. (2000) Western Reserve Journal of International Law, p.387.

to adhere to international standards. For example, sanctions are usually applied when states continuously infringe human rights, this is usually controversial with varying views as to its efficiency[373] and concerns on the impact of sanctions.[374] The states that are sanctioned usually go through both a reputational and economic cost.[375]

In most situations, the sanctioned states are seen to subsequently comply with international standards when they have been sanctioned. The reason for this is that realism theory is primarily concerned with compliance especially at the international level as the international platform is where states interact.[376] Although, realism theory does have analytical powers where compliance is reported by interest groups at either the national or international levels. It is in the interest of states to ensure and adhere to compliance with human rights standards, as most times the cost of non-compliance exceeds the benefits of compliance.[377]

The realist theory of compliance clearly identifies that individual preference is not important,[378] even though, this is not necessarily the case. As the interest of an individual comes together to make up a society and then a state. A state's interest is set regarding compliance in international standard, invariably, the way states conduct themselves becomes an important requirement for its compliance. In summing up the argument for compliance with international standards, it is evident that compliance with international standards is in the best interest of the state

The institutionalism theory on the other hand, developed from the regime theory which identified that international rules, principles and norms are able to sustain and promote

[373] Oona Hathaway, "Do human Rights treaties make a difference?" 111 Yale Law review Journal (2002) p.1946.States usually adopt a realist approach in their obligation rather than sanctions
[374] For example, CESCR General Comment 8 E/C.12/1997/8. 12 December 1997.
[375] Robert O. Keohane, "International Relations and International Law. Two Optics. 38 Harvard International Law 487(1997) p.48.
[376] Oona Hathaway (n373) p.1945.
[377] This is very much different to other regulatory structures. For example, with a company, where a regulatory fine is low, the company will be less likely to maintain compliance.
[378] Anne-Marie Slaughter, *A new world order* (Princeton University Press 2004). p.36

compliance with international law.[379] This is because, they are able to facilitate and enhance international cooperation of states by curbing ambiguity amongst state parties.[380] States are able to counter anarchy that may occur between states by providing a sure means for the exchange of information allowing for transparency.[381] Similar to realism, this theory is focused on international associations amongst member states in pursing self-interests.[382] These interest may include tackling common challenges at the international level.[383] The interactions can lead to internalisation of norms and consequently construct identities.[384]

Liberalism theory to an extent departs from the institutionalism and realism theories by neglecting the idea that a state is a unitary entity .Even though the theory focuses on explaining compliance of states, it seeks to explain compliance by examining other internal factors or elements.[385] By examining other elements such as societal interest or institutions which can influence behaviour.[386] Similar to institutionalism and realism, this theory still concerns itself with the interests of the states, the major difference is that liberalism takes a step further to examine internal state factors. This theory equally focuses on international standards but to the extent as it affects domestic factors or interests.[387] The theory heavily relies on domestic politics as the illustrative requirement for state behaviour by asserting that democratic countries are perhaps more likely to adhere to international obligations.[388] Irrespective of the varying ideas caused by the liberalism theory, the theory does facilitate compliance by examining the

[379] Ibid p.25
[380] Robert O. Keohane, After Hegemony; Cooperation and Discord in the world political economy, 1984 p.244
[381] Anne-Marie Slaughter (n378) p27
[382] Ibid p.26
[383] Kal Raustiala and Anne-Marie Slaughter," International Law, International Relations and compliance" in Wlater Carlnaes, Thomas Risse and Beth A Simmons, "Handbook *of International Relations*" (Sage publication 2002). pp538-558 at p. 540
[384] Oona (n 373) p.1952
[385] Ibid p.1952
[386] Andrew Noravcisk," Taking Preferences Seriously: A liberal Theory of international politics", International Organizations, 513(1997), p.513
[387] Xinyuan Dai, Why Comply? The Domestic Constituency Mechanism', 59 International Organizations 2005, pp363-398.
[388] Oona (n373) p.1953.

role of domestic factors in a bid to encourage state compliance, as liberalism focuses on the internal characteristic of a state.

Managerialism seeks to explain compliance with multilateral agreements that focus on international cooperation amongst states, focusing on issues like human rights, trade, security and environment.[389] This theory is usually seen as an alternative to the "enforcement model" which focuses on the application of economic or military sanctions to ensure compliance, this theory is reliant on a cooperative means to ensuring compliance.[390]

This theory explains that "*treaty compliance on the basis of their propensity to comply with their treaty obligations*."[391] The clear perception that states are seen to comply with international treaty obligations is usually based on certain factors like interest, norms and efficiency. With the efficiency debates, it is evident that when states become state parties to a treaty, they usually aim to comply with these internal commitments.[392] The usual "interest" factor acknowledges that when a state signs and ratifies a treaty, it often suggests that commitment which are unlikely to change.[393] For example, a state is obligated in Article 6(2) of the ICESCR of having to provide the "*technical and vocational guidance and training programmes*". There may be legislative, administrative, financial and technical measures the state would have to take to comply with this obligation. But there is also a need to think through how these measures systematically and validly would have to be coordinated to produce the result required of the obligation, or in other words, for the state's conduct to conform to that required by the obligation.

[389] Abram Chayes and Antonia Handler Chayes, "*The new Sovereignty: compliance with international regulatory agreements,* (Harvard University press 1995) p.3.
[390] Ibid p.3
[391] Ibid p8.
[392] Oran Young, "*International Cooperation: Building Regimes for Natural resources and the environment,* (Cornell University Press 1989). Pp78-79.
[393] Chayes & Chayes (n389) p3.

Human rights obligations and commitments have various expectations but can be summarised as an obligation to ensure the realisation of human rights and to ensure those rights and respected and protected from being infringed by third parties,[394] and state actors.[395] Although requiring full consistency, political methods to philosophies of rights are usually more grounded especially as they establish what is practicable in law and applicable in any institution. What has been established as relevant to SERs is that political approaches are less restrained than moral rights. With political approaches, there is an inclination to apply a more forceful notion of social rights, nationally and perhaps internationally. Even though, there will be limits.

It must be noted that the superiority in any of the theories is not necessarily about how well the advocates of the various theories are able to justify their philosophies, but instead the ability to justify its fitness for each purpose. And to be able to suit a purpose, any philosophy on human rights must be able to justify its reasoning. Even though this research is not intended to support or criticize any theoretical opinion of rights because it focus is on the protection of SERs, it is grounded upon this foundation that the research is of the opinion that all categories of rights are important and applying attainable methods of real-world realisation is important for all states. No single theory can categorically explain state obligations or commitments in relation to international law, in addition, the various compliance theories suggest different instances for its compliance under international law, which is to say, no single theory is able to explain or predict the reason for compliance or lack of it.

As evidenced in this chapter, it is apparent that there are a countless of philosophies of rights. However, in identifying the appropriate and valid course of conduct for a state to adopt to comply with obligations in connection with applicable human rights treaties, state can have

[394] See discussion of the obligations of states parties to the ICESCR.
[395] Ibid

recourse to the respective human rights treaty bodies. With this in place, compliance requirements can be put in place prior to any violation, this will give rise to international responsibility. The obligations to respect, protect and fulfil have been analysed by the UN's Office of the High Commissioner for Human Rights and other human rights treaty bodies.[396] An institutional approach such as this aims to determine effective promotion human rights mechanisms.[397] By this reasoning, each right requires its own "institutional machinery" for its realisation and though the specific nature of that machinery may vary according to the duties and obligations attached to it.[398] With the role of institutions understood, it becomes necessary to study the various dimensions of institutional frameworks that ought to be set up to ensure compliance, such as setting out the powers of the various arms of government. Thus, the aspect of compliance requirements is whether the appropriate laws and policies are in place to function as intended and if not functioning properly, the state can then consider an approach to adopt to comply with international standard.

These theories are essential to the nature of human rights as they have become known over the years in international human rights jurisprudence. They equally aim to justify the relevance and instrumental nature of SERs in international law, and by implication regional mechanisms which are crucial to the realisation of these rights. The most important lesson which was learnt because of the second world war was the realisation by the Governments of various countries that human dignity needs to be protected. It is for this reason that in the United Nations Charter 1945, which was adopted immediately after the second world war, human dignity was mentioned as a core value. The UDHR equally echoed same sentiments. Human dignity is

[396] See for instance, CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), (20th session, 1999), UN Doc. E/C.12/1999/5 (1999), paras. 15-20. There are several developments of the respect, protect and fulfil typology, see Maria Magdalena Sepulveda, The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights¸ Intersentia, 2003, pp. 157-248

[397] Henry Shue, 'Afterword', in Basic Rights, (Princeton University Press 1996)

[398] Ryan Goodman, Henry J Steiner, and Philip Alston International Human Rights in Context, (3rd edition. Oxford University Press 2007) p.182

implicitly attached to the language in the African Charter and constitutes its foundational dimension, this suggests that human rights is a focal point in the discourse of human rights in Africa.

3.4. Human Rights in Africa

After the second world war, new legal bodies established aimed at protecting Human rights globally[399] with the aim of stopping human rights violations. There were improvements at the international,[400] regional[401] and in some states, national levels.[402] At the international level, the UN aimed to promote and protect these rights as one of its core objectives,[403] subsequently, this led to the expansion of other international instruments (Bill of Rights) majority of African States signed and ratified these covenants which are fundamental advances concerning the recognition of SERs in Africa. It should be noted that the UDHR is not a legally binding instrument but a declaration as it serves as a guide in instituting shared obligations for states to fulfil, respect, and promote human rights. This important human rights instrument does not differentiate or classify which rights that ought to be fulfilled, respected and protected.[404]

The adoption of the ICCPRs and the ICESCRs allowed for progressive improvement of a universal structure for the protection of human rights which is grounded on dignity, freedom and equality. Additionally, treaty committees were equally created in accordance with the

[399] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2003) p54.
[400] For a detailed analysis of the justiciability of SERs both at the national and international level, see Martin Scheinin, Justiciability and the indivisibility of human rights in John Squires, Macdonald Langford & Brett Thiele (eds.), The road to a remedy: Current issues in the litigation of economic, social and cultural rights (2005) 17-20.
[401] Ibid
[402] Sandra Liebenberg, "The domestic protection of economic and social rights in domestic legal systems" in Aide Eide et al (eds.) *Economic, social and cultural rights*, (2nd edn 2001) 55, 57. See also; Katharine Young, Constituting economic and social rights (Oxford University Press 2012) 5-6.
[403] Among other things, the UN Charter was guided by the objective: "To reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" (UN Charter, preamble, paragraph 2).
[404] Article 1 UN Charter UNTS XVI. Available at: http://www.refworld.org/docid/3ae6b3930.html [Accessed 9 November 2019].

provisions of the treaty.[405] The CESCR is vested with the power to monitor the operation and implementation of the SERs providing a precise content to these which have been guaranteed under the covenant.

Sadly, it should be established at this point, that the realisation of SERs in Africa has been hindered by poverty, illiteracy and hunger that are prevalent on the continent. If these challenges are not addressed, the protection of SERs will continue to remain a worthless struggle. Some member states to the African Charter such as Algeria, South Africa, Kenya, Nigeria, Namibia and Uganda have incorporated provisions pertaining to SERs in their domestic laws, some of these rights are contained in their bills of rights or left as Fundamental Objectives and Directive Principles of State Policy.[406] Certainly, international human rights law has progressively strengthened the view that human rights are interdependent and indivisible and that SERs cannot be given less priority. Although the preambles of the ICESCR and the ICCPRs have identified the interdependence and indivisibility of all human rights, the African Charter emphasises the indivisibility of all human rights by integrating both SERs with CPRs in one instrument without classifying them, which is commendable and has led to effectiveness. In addition, the General Comments of the CESCRs on the implementation of SERs regionally have facilitated in expounding these rights in relation to its technical assistance measures[407] and obligations of the States.[408]

[405]The Committee on Economic, Social and Cultural Rights (CESCR) is a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

[406] Chirwa Danwood, "An overview of the impact of the International Covenant on Economic, Social and Cultural Rights in Africa" (2001) 7-10, available at http://www.communitylawcentre.org.za/clc-projects/socio-economic rights Accessed on 4 June 2019

[407] International technical assistance measures, UN Committee on ESCR General Comment 2. (Fourth session, 90) UN doc. E/1990/23.

[408] The Nature of States Parties" Obligations, UN Committee on ESCR General Comment 3. (Fifth session, 1990) UN doc. E/1991/23.

Furthermore, regional instruments appear to enhance human rights system in numerous unique approaches, it has been argued that regional instruments are likely to offer better implementation and enforcement structure than the international mechanisms.[409] Additionally, it has been acknowledged that countries are politically motivated to obey decisions or judgements of regional instruments compared to domestic mechanisms.[410] Looking at the African Charter for instance it has been lauded for its advanced provisions.[411]

3.4.1 The Development of the African Charter

The use of dignity appears not to be restricted to just international human rights law. Increasingly, dignity has also been included in regional instruments as well, which demonstrates that its application should be universal.[412] In Africa, human dignity can then be understood through the lenses of a Kantian perspective because it is understood as being inherent. The African Charter also affirms that human rights are not simply an embodiment of a concept, but products of specific historical experiences and civilizations. Yechiel asserts that the concept of human dignity does not originate in legal texts. It is a value, which has deep roots in theological and philosophical thought about human life and relationships in society.[413] This demonstrates that dignity has indeed played a significant role in enabling different states, with varying views and ideologies to focus on the concept and understanding the need for its

[409]The Inter-American system has now adopted a procedure that accepts online applications. This helps to combat the impact of distance; The African Charter is the first legal instrument to lift the veil of sovereignty that excluded any scrutiny of how independent African states treated people under their jurisdiction. See Rhona K, M Smith, International Human Rights (Oxford University Press 2014) p85.

[410] The cases of the three Peruvian judges who were dismissed from their offices after filing against a law that allowed the president to run for a second consecutive time., See C. M. Cerna, *The inter-American System for the protection of human rights*, 16 Florida Journal of International Law 195, 205 (2004).

[411]Obiora Okafor, *The African Human Rights System and International Institutions* (Cambridge University Press 2007) Professor Okafor observes that the impact of the African Charter has been modest but significant.

[412] Preambles to the principal Inter-American, Arab, African, and (some) European human rights instruments do use the word dignity.

[413] Yechiel Michael Barilan *Human Dignity, Human Rights, and Responsibility: The New Language of Global Bioethics and Biolaw* (Cambridge: MIT Press 2012) p5

protection. The African Charter does have an advantage over other regional instruments because it accords equal status to SERs and civil and political rights. It also reflects the peculiar socio-cultural climate of Africa in its recognition of individual and communal rights, duties, and obligations. This regional instrument has also been domesticated and can be applied in any court in Nigeria.

Consequently, dignity has also been described as "a loose cannon, open to abuse and misinterpretation."[414] The Constitutional Court of South Africa refers to dignity as "a notoriously difficult concept … It needs precision and elaboration".[415] In the South African context, Davis J warned that the Court "…..has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer".[416] Notwithstanding, the understanding of human dignity as expressed by Kant contributes to a common understanding of what it means to be treated with dignity, regardless of its interpretation. Kant's philosophy that human beings should never be used to achieve an end, suggests that everyone must be accorded equal human dignity and respect. The UDHR was the first international document to enact Kant's categorical imperative, this approach has equally been adopted by the African Charter.

From the foregoing, human rights as promoted by the African Charter was basically a mixture of diverse ideas and origins of rights. This is because, there was the commitment of the drafters to produce a charter motivated especially by African legal philosophy and receptive to African requirements.[417] This intention was clearly identified in the Charter's Preamble,[418] and

[414] Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press 2004).
[415] Harksen v Lane 1998 1 SA 300 (CC) para 50, quoting the Canadian Court in Egan v Canada 1995 29 CRR (2d) 79 106.
[416] Ibid
[417] Ibid p669
[418]The preamble of the African Charter clearly notes that the drafters took into consideration the historical tradition of Africa.

confirmed by the presence of the notions of duties. The preamble of the African Charter provides that,

…convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights…"[419]

Regarding the above quote, the African Charter did set the foundation for the importance of SERs in Africa. Furthermore, the provisions of the African Charter reflects on the African culture, while being guided by international human rights instruments.[420] This method seems to adapt to the modest form of relativism applied by Pityana whereby international standards are viewed as minimum principles or a structure that allows additional self-motivated expressions.[421] For example, Baderin noted that, while attempting to equate international human rights standards, the African human rights system appears "….*to be sensitive to African cultural norms, as portrayed by its approach to polygamous relationships under the African Women's Protocol*".[422] In addition, Okere suggests that, in framing definite rights and duties, the African Charter is visibly dynamic by its universalist and naturalist ideologies which motivate human rights.[423] The author affirms that the African Charter possesses features solely derived from Africa's colonial history. The Kantian or the rational understanding of human

[419] Ibid. As provided in the preamble of the African Charter
[420] Okere (n330) p145
[421] Pityana Nyameko Barney, "Reflections on the Afri8can court on human and people's rights" African Human Rights Law Journal, 2004 vol. 4, pp. 121-129.
[422] Baderin Mashood, 'Recent Developments in the African Regional Human Rights System*'* (2005) 5(1) HRLR 117, 148. Here, Baderin is referring to Article 6 of the Women's Protocol which, rather than prohibit polygamy as is done at the international level, provides that the rights of women should be protected in these relationships.
[423] Okere (n 330) p144

dignity is perhaps one of the most prominent and vibrant ways of comprehending the philosophical roots of the concept of human dignity.

The previous chapter established that human rights existed in pre-colonial Africa and Africans lived under diverse political structures which were immensely dissimilar from the arrangements prevalent in other parts of the world as at the time. Notwithstanding these varying socio-political structures, it is evident that promotion and protection of rights was a priority in the legal systems in the various African communities, even though priority was not given to social and political issues.[424] The concept of "man" in African communities as perceived by Okere was "…*not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity*".[425] Mutua emphasised this point by suggesting that due to the similarity of pre-colonial African communities in regards to language, culture and ethnicity, each community acknowledged each other, bringing about unity amongst the diverse societies.[426]

Developing from these interpretations, Mbiti equally created an image of how the people in pre-colonial Africa existed, which clearly sums up what other academics have stated. The author's summary of African Society is "*I am because we are, and because we are, therefore I am",*[427] giving credibility to the debate that in pre-colonial African communities, the individual was seen to be part of a group or society and therefore promoting and protecting the rights and liberty of the entire group or society was seen to also be protecting that of the individual. Because of these communal opinions, the rights and liberty of persons are seen to be intertwined with that of the community and vice versa.[428]

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[424] Eze (n293) p5
[425] Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems." Human Rights Quarterly, vol. 6, No. 2, Johns Hopkins University Press, 1984, pp. 141–59, p141
[426] Mutua(n104)
[427] John Mbiti, *The African religions and philosophy* (Heinemann; 1970) p141
[428] Mutua(n104) p349

With the creation of the League of Nations in 1919 and the UN in 1945, most nations were keen on preserving their national peace and security, which led to the creation of institutions. Even though such efforts were mainly directed to interstate conflict management. [429] With the abrupt outcome of the colonial era, African states were more anxious about guarding their territories than the growth of a regional human rights system. As at that time, the Organisation of African Unity (OAU)[430] accepted human rights as a means of promoting African Unity and focused on peoples' right to self-determination.[431] The crucial areas of interest were their political unity, non-interference especially in their internal affairs, and the liberty of African regions that were still under colonial power.[432] The OAU was founded in 1963 in order to facilitate the decolonisation process and strengthen Africa's territorial sovereignty.[433] In the early state of its establishment, OAU was able to provide a platform for dialogue between African leaders, this supported many African states to gain their independence.

As pointed out by Okere, the emphasis on sovereignty unvaryingly weakened human rights struggles.[434] The consequence of these requirements was clearly because the OAU had assumed the role of a guardian of states even when these systems were tyrannical to their own citizens. Furthermore, state sovereignty also made it difficult to deal practically with various regimes and their struggles for example Biafra, Eritrea or Somaliland.[435] Lives were lost in those struggles for autonomy. In addition, Okere has described the persons of these African states as

[429] This led to the creation of agencies such as the Organisation of American States, OAS (1948), the Arab league (1949), the North Atlantic Treaty Organisation, NATO (1949), the Warsaw Treaty Organization (1955), the Organization for Economic Co-operation and Development, OECD (1961) the Organization of African Unity, OAU (1963), and the Association of Southeast Asian Nations, ASEAN, (1967), the European Union, EU (1957) were created.

[430]This is the charter establishing the OAU and should be distinguished from the African Charter on Human and Peoples' Right referred to as the African Charter in this work

[431] Okere(n425) p142

[432] The First paragraph of the Charter's Preamble reads: 'It is the inalienable right of all people to control their own destiny.'

[433] See Article 11 of the OAU charter, available at: http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf accessed 12th November 2021

[434] Okere (n 424) p143

[435] Bjorn Moller, *'The African Union as a Security Actor: African Solutions to African Problem*s?' (CSRC 2009) Available at http://eprints.lse.ac.uk/28485/ accessed 9 January 2019

"…*dissolved in the mass of collectively while despotic regimes, protected by the shield of territorial integrity and non-interference, unleashed barbarous repressions against their subjects...*[436]

The failure of the OAU, UN and the international community to prevent or intervene following the genocide in Rwanda[437] and other African countries were significant factors that motivated the African leaders to consider creating an institution capable for promoting peace and security in the region. It should be noted that the limitations of the OAU distressed African people who instigated a chain of meetings and sessions with the aim of creating a unified Africa.[438] OAU had issued clear resolutions urging the severance of any diplomatic ties with colonialist,[439] but ignored violations in independent African states.[440] One of the major justifications for this silence had been the principle found in the OAU Charter, that promoted non-interference in the internal affairs of member states. [441] The ineffectiveness of the OAU was largely as a result to the fact, that the institution was primarily established to facilitate decolonization, therefore, the institution's aim was to achieve this goal and neglected other issues which led to its failure in managing conflict. [442]

It was however with the second phase of decolonisation in the mid-1970s that the process of the African Charter become apparent. By 1979, the Assembly of Heads of States and Governments had invited the Secretary-General of the OAU to plan a controlled assembly of highly competent specialists to formulate an initial draft of an African Charter on Human and

[436] Okere(n425) p144.
[437] With the Rwandan genocide, in almost four months up to one million Tutsis and moderate Hutus were slaughtered. See, the Report of the OAU's International Panel of Eminent Personalities to investigate the 1994 Genocide in Rwanda and the Surrounding Events (2001), Cambridge University Press on behalf of the School of Oriental and African Studies, 45:1, pp 123-142.
[438] Ibid p145.
[439] For example, OAU resolutions was issued condemning South Africa's apartheid policy
[440] The OAU failed to take steps in response to human rights violations in Rwanda and Burundi. Even though some members heavily criticized the Ugandan government, Idi Amin was never tried for his atrocities in Uganda
[441] See OAU charter and rules of procedure, art. 3, para. 2
[442] Kays Mathews, "The Organization of African Unity." India Quarterly (1997), vol. 33, No. 3 pp. 308–324.

Peoples' Rights to specifically promote and protect human rights in Africa.[443] A draft was ready and deliberated by an assembly of government authorities before being ratified in 1981 during the OAU summit.[444] During the drafting process, the drafters of the African Union Constitutive Act, were keen not to repeat the mistakes made by the drafters of the OAU Charter, by adopting new principles and adequate mechanism.[445] The drafters ensured that the Union had the right to intervene in order to stop acts like genocide, war crimes , crimes against humanity and in addition, prohibit any acts that were seen to be unconstitutional within state members.

As stated in this research, the human rights system in Africa was established during the era of substantial human rights violations and national crisis in some African states. With the adoption of the African Charter, the leaders in Africa anticipated to create shared regional standard of rights. To an extent, there was a general acceptance of the African Charter as the importance of human rights was placed over state sovereignty.

Several arguments have been out forward as to what created the context for African states to adopt an African Human Rights Charter. One of the first issues that has been contested relates to when the process itself began. Some authors have pointed out that the process began in January 1961 with the African Conference on the Rule of Law (Lagos Conference),[446] others have challenged this.[447] Several other conferences and meetings organised by the UN and the International Commission of Jurists equally took place between 1961 and 1979, which

[443] Okere (n425) p145.
[444] Ibid
[445]Timothy Murithi, *The African Union: Pan-Africanism, peace building and development* (Ashgate Publishing Limited 2005).
[446] Richard Gittleman. 'The African Charter on Human and Peoples' Rights: A Legal Analysis'. Virginia Journal of International Law 22(4) (1982), 667–714, 670
[447] Nathaniel Rubner, 'An Historical Investigation of the Origins of the African Charter on Human and Peoples' Rights' (Cambridge: University of Cambridge 2008) p.901 Available at: http://archives.au.int/handle/123456789/2566 (accessed on 20th of October 2021).

consecutively led to the Law of Lagos,[448] the UN Proposal,[449] and the Monrovia Proposal.[450] These historical events formed a push for human rights on the continent.[451] It must be added that these events did not necessarily build on each other resulting to the creation of the African Charter. It is safe to say that, claims as to what led to the development of the African Charter remain open to numerous interpretations. Examining the several events in the 1960s to 1980s reveal the tension that existed between individuals, states, organisations, and other factors with varying visions of what human rights in Africa should entail.[452] For example, some actors like Nnamdi Azikiwe, who was Nigeria's first president after independence, was more interested with the idea of an African conception of human rights. A study of the documents that came out of the meetings between 1961 and 1981 shows that there were numerous attempts at addressing human rights in Africa in different ways.

Another issue that had been contested, were factors that led to its drafting process in 1979. Edward Kannyo identified numerous factors such as the continuous occurrence of gross human rights violations on the African continent; the debate about the Uganda-Tanzania war in 1978–1979; the encouragement by UN bodies to establish a specific and regional human rights system in Africa; and an increased interest in and receptivity of human rights issues amongst African and international leaders, media, scholars, and public debates in the 1970s.[453] Rubner

[448] African Conference on the Rule of Law, January 3–7, 1961, 'A Report on the Proceedings of the Conference'. Journal of the ICJ 3 (Geneva, 1961), 11. The main conclusion that emerged from the Lagos Conference was that the dignity of the human person is a universal concept, regardless of the different forms it may assume in one or another cultural environment. African lawyers emphatically rejected any notion of a purely African juridical system, as distinct from other systems, constructed solely based on native custom. https://www.icj.org/conferencia-africana-sobre-el-imperio-de-la-ley-lagos-nigeria-3-7-de-enero-de-1961-informe-sobre-los-trabajos-de-la-conferencia/ (accessed on 12th of October 2021).

[449] Seminar on the Establishment of Regional Commission on Human Rights with Special Reference to Africa, Cairo, 2–15 September 1969, UN Doc ST/TAO/HR/38 (1969). This seminar dealt directly with a regional commission of human rights.

[450] Monrovia Proposal for Setting-up an African Commission on Human Rights, UNGA A/34/359/Add. 1 (5 November 1979). https://www.un.org/sites/un2.un.org/files/a34_1.pdf

[451] Gittleman (n446) p670–73

[452] Nathaniel Rubner, *Origins of the African Charter* (Cambridge University 2008) p925-926

[453] Edward Kannyo, "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background, in *Human Rights and Development in Africa*, ed. Meltzer Welch (University of New York Press, 1984), 128–151

on the other hand, suggested that the adoption of the African Charter had very little to do with political actors, but should be perceived almost a miraculous moment in history.[454] Kufuor affirmed that the factors that led to the political setting in which an African human rights charter could be adopted was as a result of an interest in self-preservation.[455]

The various factors highlighted above by different scholars identifying factors surrounding the origin of the African human rights system, does not provide the major reason for its creation, nevertheless, the varying factors focus on the political will to adopt an African regional system.

It has been established that the African Charter is a creation or product of the Cold War and replicating a negotiation between the ideological and belief systems represented at its debates.[456] With this in view, the question that arises is if the African Charter truly reflects traditional African standards? It is obvious that the posed question does have its own challenges given the size of the Continent and the diverse reasons for a unified regional system.

It can be argued that the existence of a varied philosophy in the African Charter can be credited to the requirement to pacify and get the signatures of member states with variable rigid and philosophical views. The mixture of varying philosophies and the requisite need to create a level playing field can to an extent account for the presence of SERs in the African Charter.[457] Gittleman suggested that that it was the desire to ensure the ultimate adoption of the African Charter by all states that led initial drafters to suggest that if an individual has rights acknowledged and provided for by the state, the state must also have obligations following back.[458]

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[454] Rubner (n452) p1087–1096.
[455] Kufuor Kofi Oteng, *The African Human Rights System: Origin and Evolution* (London: Palgrave Macmillan, 2010).
[456] Chidi Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights, in Malcolm Evans and Rachel Murray (eds) *The African Charter on Human and People's Rights*: The System in Practice, 1986–2000 (CUP 2002) 181
[457] Odinkalu (n455) p 182
[458] Gittleman(n446)676-677

Evidently, it may be construed that the African Charter embraced both a regional and universal perspective, which is commendable. In addition, a distinctive feature of the African Charter is its idea towards the protection SERs. This is because, regardless of committees such as CESCR that have clearly related that these rights must be progressively realized, the African Charter makes no such concerns. Mbazira affirms that this variance replicates the aspiration by the initial drafters to create a completely unique African instrument.[459]

Notwithstanding, the African Charter has been applauded for making provision for the fulfilment of these rights. Beyani, nevertheless, is of the opinion that the concept of duties originated from the UDHR and not from the African Charter as many presume.[460] The author affirms that in relation to duties, obligations, peoples' rights and progressive realization, all these concepts were derived from the UDHR. The author was equally of the opinion that, if the requirements for duties, obligations and peoples' rights are reflected as not being specific to the African Charter, then the Charter's '*Africanness*' can also be called into question.[461]

Nonetheless, it seems as though the initial drafters of the African Charter regarded the Bill of Rights as setting the common universal criteria of human rights which other countries or regions had to adopt as well. Consequently, the African Charter has been perceived to being an "*enhancement to UN treaties*" which has primarily been established to change the apparent segregation of Africa from the initial UN drafting process.[462]

Furthermore, experts like Shivji, have critiqued this method suggesting for a structure suitable to Africa's history instead of "…*an uncritical acceptance of western liberal conceptions*".[463] As it stands, it may not be the best approach by criticising the African Charter for implementing

[459] Mbazira (n135)
[460] Beyani Chaloka, "Recent developments: the elaboration of a legal framework for the protection of internally displaced persons in Africa". Journal of African Law, 2006 50 (2). pp. 187-197.
[461] Ibid p190
[462] Frans Viljoen, *International human rights law in Africa* (2nd edn, Oxford University Press)
[463] Shivji(n94) p20

what is questionably referred to as western values. Regardless of the imperialist traces that obviously complement such steps, it can be argued that Africa is able to choose any set of standards assumed to be essential for the alteration and general wellbeing of the African population irrespective of whether they are western, standards or not. It is pertinent to note that the adoption was essential at the time especially with the tyrannical nature of many post-colonial African administrations and most importantly, the progressing system of African states. Therefore, the debate against the universality of human rights does not undermine its adoption by a particular region. Reasonably, cultural variances are formed and succeed within communal associations and not in isolation.[464]

Perhaps, it may not be difficult to accept Shivji's position as he suggests that the advent of the African Charter was relatively in a reaction tyrannical brutal African government. What is most important, is that the result was that Africa produced a set of requirements intended to promote and protect human rights for Africans. It can be argued that the African Charter was a mutual stance against oppression. There were instances when state agencies were unsuccessful and domestic legislations were ineffective, regional instruments provided a structure to address human rights infringements.[465] This also helped to promote the status of SERs. Notwithstanding being somewhat confident, it also echoed the desires of Africans.

Impressively, some African states have taken further steps by incorporating the provisions of the African Charter's into national laws.[466] The status and enforcement of such treaties in each national jurisdiction depends on a country's legal system, in particular, its mode of reception of international law treaties whether it be dualism or monism.[467] This may, at first sight, seem

[464] Ibid p31.

[466] For example, the African Charter has been incorporated into domestic law in Nigeria.

insignificant, but with most of the sources of SER having their origins in international and regional human rights treaties, this often becomes an issue, and at times nations may want to exploit this lacuna in their laws to shirk their obligations under international law.

Even though the position of the African Charter can be further strengthened,[468] its status can hardly be denied. Given that the Charter professes to set out the African standard which has been accepted and ratified by a significant number of African states, it is argued that it should necessarily form the basis for any critique on the theory and practice of human rights on the continent especially in the light of arguments on the role of culture and regionalism in the definition and interpretation of human rights. Consequently, despite criticisms of the African Charter,[469] the leeway given by the African Commission to extend these rights evidently covers the gaps the regional instrument may have created.[470]

Claw-back clauses have been regarded as the major problem of the African Charter. They are provisions in the African Charter that have permitted state parties to limit their obligations by setting conditions for the fulfilment of human rights.[471] Even though, the African Charter contains duties and obligations provided for its state parties, because of the claw-back clauses, it means that under certain situations, the rights of individuals can be infringed.[472] These clauses are essentially an attempt to limit the broad nature of human rights guaranteed in the African Charter permitting African states to limit the rights contained in the Charter.[473] It is not

[468] For instance, by legislative adoptions in every member state.

[469] Joe Oloka-Onyago, Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa, 26 Cal, W. Intl. L. J. 42, 48 (1995).

[470] Chidi Anselm Odinkalu, Analysis of Paralysis or Paralysis by Analysis - Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples' Rights (2001), 23 Human Rights. Q. 327, 341.

[471] Celestina Martorana, "The new African Union; Will it promote enforcement of the decisions of the African court on Human and Peoples' Rights? (2009)40 George Washington Law Review, 583 at 596.

[472] For example, Article 6 of the African Charter provides for the liberty of all persons, but the provision equally contains the phrase, "except for reason and conditions previously laid down by law". In addition, Article 8 of the African charter equally guarantees the right to exercise one's religion freely, however, it is "subject to law and order".; Article 9 of the African charter equally provides for the freedom of expression, but this can only be enjoyed or exercised "within the law".

[473] Mutua (108) p.362

uncommon for laws in various states globally to have exceptions or limitations. Even though these fears are valid, it is important to note that the African Union monitors the activities of the states through the African Commission.[474] Furthermore, the African Commission has clearly established that the claw-back clause contained in the African Charter are unable to restrict the obligations of state parties.[475]

Even though the preceding criticism against the African Charter is justified, its limitation does have a negative impact. Nevertheless, the scope and the significance of the approaches adopted by the African Commission has considerably curtailed the impact of the clauses.

3.4.2 The African Commission on Human and Peoples' Rights

The success of any human rights system is based on its institutional, normative and jurisprudential framework. The African Commission was established in 1987 following the entry into force of the African Charter in 1986.[476] As noted in the previous section, the framework of human rights protection in Africa is the African Union.[477] In its Constitutive Act, the African Union engages heads of State Parties to promote and protect human and peoples' rights as provided for in the African Charter.[478] The Commission's function includes promoting human rights through research "*on African problems in the field of human and peoples' rights", dissemination of information, and co-operation with "other African and international institutions concerned with the promotion and protection of human and peoples'*

[474] See the case of Scalen & Holderness v Zimbabwe (2009) AHRLR 289, where the commission stated that the phrase "within the law" did require a consideration of if the limitations met the necessary interests requirements needed for a democratic society and the phrase "within the law" should not be interpreted from the main concept already expressed in the charter.
[475] Ibid para 12
[476] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).
[477] Christoffel Hendri Heynes "African Regional Human Rights System" 2003-04 Pennsylvania State Law Review 681.
[478] Constitutive Act of the African Union adopted by the OAU in Sirte, Libya, on 2000-07-11 and entered into force 2001-05-26, para 9 of the Preamble and arts 3(h) and 4(m). https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf

rights".[479] The Commission is equally empowered to "*ensure the protection of human and peoples' rights' under conditions laid down by the African Charter*".[480] Furthermore, the Commission equally has the mandate to "interpret" all the provisions of the African Charter at the request of a State party, an institution of the AU or an African Organisation recognised by the AU.[481]

As a treaty-monitoring body, the Commission is charged with broad promotional, protective and interpretive responsibilities, including the examination of states parties' reports,[482] and consideration of interstate,[483] individual and NGO communications. As part of the measures established in fulfilling its mandate, the African Commission has developed a system of "special measures" which consists of special Rapporteurs to whom specific allegations of human rights violations in precise areas may be brought, and working groups that monitor and investigate specific questions linked to the commission's work.[484] This approach has demonstrated to be an exceptional tool that enables the commission to have a clearer understanding on how human rights are protected in Africa.[485]

The role of the Commission in human rights enforcement in Africa is inviolable and cannot be undermined. Consequently, in line with the provisions of the Charter, the Commission enforces all categories of rights guaranteed in the African Charter. In the case of *John K Modise v.*

[479] See Article 45(1) AU Commission. BC/OLC/66/Vol XVIII (5 April 2005), The AU Commission provided guidelines to AU member States that excluded senior civil servants and diplomatic representatives from being elected to new appointments to the Commission.
[480] Ibid 45(2).
[481] Ibid 45(3).
[482] Article 62 of the African Charter
[483] Article 47-54 of the African Charter
[484] The Commission has also developed a system of "Special Measures," consisting of: (1) Special Rapporteurs to whom specific allegations of human rights violations in specific areas may be brought, and (2) Working Groups that monitor and investigate specific questions linked to the Commission's work. https://www.achpr.org/specialmechanisms
[485] Dupe Atoki, Protecting Vulnerable Groups in Africa Through Prison Visits, Presentation by the Commissioner and Special Rapporteur on Prisons and Places of Detention in Africa, at a Conference organized by the University of Washington College of Law and the Association for the Prevention of Torture in Washington DC, Available at http://www.achpr.org/english/special%20Mechanisms/Robben%20Islaand %20Guidelines/paper/presentation_prison_washington_visits.pdf, assessed 10th October 2021

Botswana[486], where the complainant was rendered homeless by a denial of nationality of both South Africa and Botswana, the Commission held based on Article 5 of the African Charter that such enforced homelessness was inhuman and degrading treatment that offended the dignity of man.

Although the African Charter does not contain any provision for enforcement of the Commission's findings and recommendations, which of course are not formally binding on AU Member States, the Chairman however, publishes a record of the Commission's activities, including its views which are then submitted to the Assembly (Activity Reports).[487] The African Charter empowers the Commission to make any recommendations it considers "useful" in each case.[488] The Commission has been known for subtly but increasingly 'bending the arm' of oppressive African states through its protective and interpretive authority. This was demonstrated in the cases of *Centre for Minority Rights Development v Kenya*,[489] *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria*[490] *and Socio-Economic Rights Action Centre (SERAC) v Nigeria.*[491] The African Commission had noted in *Article 19 v Eritrea,*[492] that the African Charter would be rendered meaningless, if states were permitted to interpret its provisions in a manner that limits its provisions.

In the Centre for Minority case, the Complainants allege that the Kenyan Government was in violation the African Charter, the Constitution of Kenya and international law, when there were forcibly removed from their ancestral land without proper prior consultations, adequate and

[486] ACHPR 2000 Communication 97/93, decided at the 28th Ordinary Session, 14th Annual Activity Report
[487] The most recent activity report is the 48th and 49th. https://www.achpr.org/activityreports
[488] Such recommendations have included publishing the Commission's decision locally, the protection of natural resources, urging the withdrawal of troops, urging changes in a State Party's law, and urging the release of detainee. The Commission has also recommended provision of compensation to the victims of the violations; however, when it does so it does not specify the sum to be paid, but rather recommends that the State provide "adequate compensation".
[489] AHRLR 75 (ACHPR 2009)
[490] (2000) AHRLR 212 (ACHPR 1998)
[491] (2001) AHRLR 60 (ACHPR 2001) paras 57-58, 61-63.
[492] (2007) AHRLR 73 (ACHPR 2007) paras 105 & 108.

effective compensation. In a landmark decision adopted by the African Union on the 2nd of February 2010, the African Commission declared the expulsion of Endorois from their ancestral land was illegal. The Commission equally established that the Kenyan Government had failed to recognise or even protect Endorois' ancestral land rights and failed to adequately compensate or provide an alternative grazing land following their eviction and similarly failed to include the community within the relevant development processes. The Commission also made several wide-reaching recommendations for the Kenyan Government to follow.

In SERAC's case, the applicant claimed that the Nigerian government was responsible for contaminating their environment by disposing hazardous wastes. Their water, soil and air were contaminated and was causing health problems among the Ogoni people. The applicant claimed that the government neglected to require standard safety measures of the oil companies. The applicant claimed that the act by the Nigerian Government was a violation of the African Charter on Human and Peoples' Rights such as the rights to life, health and to a clean environment. The Commission concluded that Articles 4 (right to life), 16 (right to health) and 24 (right to a clean environment) had been violated as the Nigerian government had failed to prevent widespread killings of the Ogoni people, as well as environmental pollution and degradation. The Commission also held that Nigeria systematically violated the right to adequate housing, which is not itself contained in the Charter, but is derived from a combination of the rights to health, family and property. Furthermore, the Commission held that the Nigerian Government failing to prevent the oil companies from contaminating and destroying food sources of the Ogoni, the right to food and health was equally violated.

Unfortunately, the African Commission has not been able to develop a strategic mechanism to ensure implementation of its recommendations. Which has been unsatisfying, most especially for the victims who have been left to pursue the execution of their decisions. The Commission

is not pressurized to monitor enforcement, and states have been known to disregard recommendations from the Commission.[493] Human rights provisions that are enshrined in various human rights instruments have often been argued as ratified by various states only in principle, which opinion is based on the view that human rights protection and implementation appear to differ in states.

From the foregoing, it is obvious that the commission has no enforcement powers and its recommendations unless agreed upon by the state, are not capable of being executed in the national jurisdiction.[494] Furthermore, the Commission has been known to deal mainly with CPRs.[495] For instance, in Nigeria, with the danger of the Boko Haram sect that has led to loss of lives and the incessant kidnapping of school girls, the Commission only issued press statements through its Nigerian special rapporteur on the rights of women in Africa, Honourable Commissioner Lucy Asuagbor, advocating for and applauding the Nigerian government for its steadfast efforts and determination to secure the release of the kidnapped school girls.[496] It is safe to say that lack of enforcement standard of human rights in Africa, remains the biggest impediment to its fulfilment. The Commission will need to promote collaboration with states and civil society groups to ensure proper implementation of its norms and standards at the national level Therefore, it is imperative for states to take effective actions regarding their commitments to promote and respect human rights provisions.

[493] Eno Robert, The Place of the African Commission in the New African Dispensation, (11 African Security Studies Rev. edn. 2002)
[494] Chidi Odinkalu, Proposals for review of the Rules of Procedure of the African Commission on Human & Peoples' Rights, (1992) 21/2 Human Rights Quarterly, p.543.
[495] Decisions of the African Commission are reported in the Activity Reports of the African Commission for Human and Peoples' Rights, available at: www. interights.org/ACHPR_reports/index.htm
[496] https://achpr.org/pressrelease/detail?id=495

Another institutional framework that complements that mandate of the African Commission is the African Court of Human Rights.[497] In its interpretation and application of the African Charter, it uses decisions of the African Commission and other relevant human rights instruments that will fall within its jurisdiction.[498] In addition, Human Rights Institutions established in line with the United Nations General Assembly Resolution 48/138 of December 1993, enjoins member states to establish and strengthen National Human Rights Institutions for the promotion, protection and enforcement of human rights.[499] They play a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level.

Furthermore, various UN agencies and programmes play a significant role towards the protection of SERs in Africa. They include the Office of the High Commissioner for Human Rights (hereinafter OHCHR) – which is at the forefront of protecting and promoting human rights in the African continent; the Secretariat from where the UN's human rights efforts are coordinated; International Labour Organization (ILO); the Food and Agriculture Organization (FAO); the UN Educational, Scientific and Cultural Organization (UNESCO); and the World Health Organization (WHO).[500] These agencies and programmes were considered due to their "*clear 'legal' mandate with respect to human rights, either in setting norms or its implementation*",[501] but most importantly, they function under the UN.

Regional human rights mechanism have been able to strengthen the protection and enjoyment of human rights by considering regional considerations, such as shared regional customs,

[497] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (Protocol) adopted by the OAU in Ouagadougou, Burkina Faso on 1998-06-09 and entered into force on 2004-01-25
[498] Article 3(1) ACHPR. Karen Stefiszyn "The African Union; challenges and opportunities for women" 2005 *AHRLJ* 382.
[499] The Paris Principles Available at: https://www.un.org/ruleoflaw/files/PRINCI~5.PDF
[500] Viljoen(n504)
[501] Ibid p.47

values, culture, and practices. They play a critical role especially when domestic institutions fail to uphold the law or are violators.

3.4.3 Status of Socio-Economic Rights in the African Charter

The previous section identified that SERs are protected and guaranteed under the African Charter, an imperative issue, is determining its level of implementation given that they are positive rights. Can it be argued that the initial drafters of the African Charter intended SERs to be justiciable? The drafters of the African Charter anticipated for them to be justiciable, two explanations justify this stance. Primarily, the African Charter does not categorize human rights. The drafters of the African Charter had discarded the initial draft that separated SERs from other rights.[502] There were varying views on which human rights should be prioritised.[503] This impacted the negotiation process that followed and the various drafts that was created between 1979 and 81.[504]

Fundamentally, the drafters were not only keen in striking a balance between "*principles of human rights which had found universal acceptance*" and the need for an African perception of human rights,[505] but also between a focus on both categories of rights. This was done, in part, through the inclusion of duties and collective rights.[506] This demonstrates a strong intention against any categorisations. Additionally, the African Charter affirms in its preamble that civil and political rights cannot be disconnected from socio-economic rights as the latter are essential for the realisation of the former.

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[502] Ibid
[503] Rubner Nathaniel. 'An Historical Investigation of the Origins of the African Charter on Human and Peoples' Rights' (Cambridge: University of Cambridge, PhD Thesis, 2008), available at: http://archives.au.int/handle/123456789/2566 Accessed on 20 September 2021)
[504] Ibid
[505] Frans Viljoen, 'The African Charter on Human and Peoples' Rights: The Travaux Préparatoires in the Light of Subsequent Practice.' *Human Rights Law Journal* 25(9–12) (2004), 313–326, 313, 315 and 325.
[506] Ibid p35

While the African Charter has been applauded for its approach given the devastating position of living in African states, there have been hesitations about the enforcement in practice. Consequently, while commenting the advantages of this position, it has been often pronounced that given the realities of economic advancement in most African countries, SERs may be regarded as merely transplanted.[507] Conversely, it has been argued that SERs are as explicitly justiciable as any other rights in the Charter.[508] Viljoen affirms that the Charter's stance is a reaction to the prevalent African situation.[509] He argues that its justiciability is an acknowledgement of solving Africa's problems.[510] Mbazira contends that, "*Africa's trademark as a continent is punctuated by poverty, ignorance, diseases and a high level of underdevelopment not comparable to other continents*".[511] Extreme poverty is undeniably a human rights issue. But interestingly, one wonders why African states fail to conform to the provisions of the African Charter despite its acceptance and ratification by African states.

Hansungle made a valid point about this, the author argued that the OAU created an "open door policy" which generally permitted any African state to be part of the African Charter without questioning prospective members on the status of human rights or level of democracy in their various states, the African charter was the, "*only human rights instrument in the world to win near universal endorsement of the potential state parties in a record time*"[512],unlike the European Convention on Human Rights (ECHR) that had a restricted selection process that expected members to adhere to the rule of law and have a democratic government put in place.[513]The author was of the opinion that the wordings of the African charter equally encouraged its consent even by most unacceptable African leaders. This is also because,

[507] Okere (n424) p15
[508] Viljoen (n505)
[509] Viljoen (n353)
[510] Ibid
[511] Mbazira (n365) p334
[512] Michelo Hansungule, "The African Charter on Human and Peoples Rights: A Critical Review".(2000) 8 AYBIL, p265.
[513] Ibid p266

creating a weak instrument equally ensured its incompetence in curbing human rights violations.

Following the statement above, Hansungule affirms that the African Charter's framework has equally established with a weak structure.[514] The author suggests that African states have failed to adhere to the provisions of the Africa Charter because in the first instance, there was never an intention to be bound by them. Similarly, Shivji[515] saw the reason behind the establishment of the African Charter as deceitful, the author was of the opinion that because of the gross human rights violations in Africa, African leaders knew that it was in their best interest to improve their image before the international community to enable member states' to be eligible for foreign aid and quickly put together the African Charter to achieve its aims.[516]

Regardless of their various positions, the African Charter was indeed a step towards the right direction, as it exposed some human rights violations perpetrated by some African leaders. Furthermore, the additional protocols gradually showed a willingness to be bound by its provisions. The African Charter was established specifically to deal with the human rights issues on the African continent and to promote and protect human rights and basic freedoms for all African citizens. As Donnelly asserts, even though the implementation of human rights through which human dignity is recognised and realised subject to the availability or resources, the author contends that, "…every state, no matter how poor, can and must respect all internationally recognized human rights". [517] Understanding the influence on the content of the African Charter is of particular interest to this research, as the Charter does provide a unique approach to protecting several rights in Nigeria. It is obvious that human rights and human dignity can be examined independently, however, their inseparable link appears to always

[514] Ibid p278
[515] Shivji(n93) p94.
[516] Ibid p5
[517] *Jack Donnelly, Universal Human Rights in Theory and Practice*, (2013 Cornwell University Press) p39.

prevail in Africa, this is so, because human dignity constitutes the moral foundation that underpins human rights.

3.5 Conclusion

This chapter has been able to provide the chronological and philosophical foundation of human rights. Human rights are given a universal validity based on human dignity and contingent human nature. Kant's moral writings link dignity, equality, and autonomy intimately.[518]This suggests that a rational being can act morally and act in a manner that will not affect another. This capacity to act morally confers a worth on the rational being that is beyond price.[519] This chapter has demonstrated that philosophical and historical understanding of what a human life in dignity means does give human rights their content and direction as reflected in the African Charter. For Kant, this "*Autonomy is therefore the ground of dignity of human nature*."[520] This further demonstrates that philosophically viewed, the concept of human rights has been enhanced by the contribution of several philosophers. Unfortunately, human rights are far more complicated than that. It will also appear that the philosophical understanding or perspective of human rights is not necessary to defend the concept of human rights, instead, the unique role of philosophy is to deepen our understanding which has been demonstrated with the development of the African Charter. Despite the inspirational norms and sophisticated architecture of the international human rights system and its influence on regional mechanisms, this chapter has demonstrated human rights abuses are still prevalent in Africa.

The following chapter will compare various jurisdictions to critically analyse SERs in Africa.

[518] Immanuel Kant, *The moral law: groundwork of the metaphysics of morals* 434 – 440 (Hutchinson 1948) (1785).
[519] Ibid p436
[520] Ibid

CHAPTER FOUR: CASE STUDY OF NIGERIA, SOUTH AFRICA AND KENYA

4.1 Introduction

The protection of SERs is indeed incredibly significant especially through its constitution, this is because in most states, the constitution is the ground norm. In Africa, there is growing recognition of SERs, they are gradually becoming justiciable. This chapter aims to evaluate how and to what extent SERs are protected in Nigeria. In addition, some selected African countries have equally been examined to identify how SERs have been incorporated in their constitutions, the mechanisms through which they are realised, and any challenges faced. The chapter aims to assess in a comparative way, the approach adopted by the courts and other human rights institutions towards its realisation and enforcement. South Africa and Kenya have been selected for this purpose. For ease of argument and analysis, the chapter is structured into interlinking sections.

4.2 Socio-Economic Rights in Nigeria

In Nigeria, the SERs are provided for in Sections 14-24 of the Constitution under the FODPSP. These sections reinforce the duties of the various arms of government to ensure conformity and application of the rights stated therein which is largely centred on SERs. The justiciability of SERs in Nigeria is a subject that has continued to raise a lot of controversy in Nigeria, this is because its provisions are geared towards improving the status of the ordinary Nigerian. The argument continues to focus on sustainable approaches that are in line with international standards. Robert Larsson refers to SERs as the "underdeveloped stepchild of the human rights family",[521] this is rightly so, as they are usually treated as mere aspirations.

The African Charter has been domesticated and can be applied in any court in Nigeria. Section 12(1) of the 1999 Constitution (as amended) provides that, "*No treaty between the Federation*

[521] Robert Larsson "The Justiciability of Socio-Economic Rights – Courts as Protectors of Economic and Social Rights: The Case of South Africa", Lund University, 2009

and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".[522]

This is a demonstration of dualist legal tradition which indicates that national and international law operate separately. In this tradition, it is taken that international law can only operate in domestic matters after a domestic process has brought international law into the national legal order. This constitutional provision was considered by the court in the case of *Abacha v Fawhinmi*.[523] On the 28th of April 2000, Nigerian Supreme Court ruled on the application of the African Charter at the domestic legal system. The case is related to a detention of a human rights activist who was held in solitary confinement. His claim was centred on the violation of Articles 4, 5, 6 and 12 of the African Charter. The Supreme Court affirmed that the African Charter was an instrument for protecting human rights, its provisions could be referred to before Nigerian courts. To affirm its case, the Court relied directly on the articles of the Charter which provide that person whose rights have been violated are entitled to legal remedy to have their rights recognized. The Supreme Court further held that, the fact that no specific remedy was provided in legislation did not prevent citizens from availing themselves of rights established in the Charter. The Supreme Court's decision demonstrates that the various arms of Government have obligations as provided for by the African Charter, pursuant to the Ratification Act, unless the provisions have been expressly suspended or repealed. This essentially means that in Nigeria, the African Charter only applies subject to the extent permitted,[524] and since the courts do not have the judicial powers to hear SERs claims, then this position of the law in Nigeria constitutes a serious impediment to the status of SERs claims.

[522] Section 12(1) Constitution of the Federal Republic of Nigeria
[523] [2001] AHRLR 172
[524] Attorney General of Ondo v Attorney General of the Federation (2002) 9 NWLR (Pt.772) 222.

Regardless, the status of international and regional instruments, treaty norms only have an impact when they have been made part of domestic law.[525] However provides 6(6)(c) of the 1999 Constitution provides that:

…. 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… [526]

Based on this ouster clause provided for in section 6(6)(c)[527] of the Constitution in relation to domestic law, the courts have as a matter of practice refrained from exercising jurisdiction in matters relating to the justiciability or enforcement of SER.[528] The principle of law in relation to the powers of the court provides that courts can only invoke their judicial powers under the constitution where a matter is justiciable and lack competency where a matter is not justiciable.[529]

In the constitution, the laid down provisions that address issues such as economic matters are not very explicit, as they do not demonstrate if these rights are either negative or positive rights. As FOSPDP, these provisions are provided for as minimum standard that appear to be mere aspirations.

Section 16(2) of the 1999 Constitution provides that:

[525] Christoffel Hendri Heynes & Francs Viljoen, 'The impact of the United Nations treaties on the domestic level', 23 Human Rights Quarterly (2001), pp. 483-535, at pp. 487-8; C. Onyemelukwe 'Access to antiretroviral drugs as a component of the human right to health in international law: examining the application of the right in Nigerian Jurisprudence', 7 AHRLI (2007) pp. 446-74, at p. 462.
[526] 1999 Constitution (as amended)
[527] Ibid. This section is therefore an aberration which in a constitutional provision rocks the root of its constitutionality and runs contrary to the preceding provisions of section 6 (a) (b) and indeed against public policy whereby a fundamental policy that cuts across economic rights purports to be created.
[528] Okogie(p35).
[529] Nigercare Development Company Ltd. v. Adamawa S.W.B. (2008) WRN (Vol. 20) 166, 176

…The State shall direct its policy towards ensuring: (a) the promotion of a planned and balanced economic development; (b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good; (c) 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; and (d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens...[530]

On the other hand, the provisions on social rights are provided for in a similar manner as above. Section 17(3) of the 1999 Constitution provides that:

…The State shall direct its policy towards ensuring that- (a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; (b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life; (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; (d) there are adequate medical and health facilities for all persons; (e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever; (f) children, young persons and the age are protected against any exploitation whatsoever, and against moral and material neglect; (g) provision is made for public assistance in deserving cases or other conditions of need; and (h) the evolution and promotion of family life is encouraged….[531]

Regardless of the provisions adopted in Section 16 and 17, the principal provision on the directive principles is contained in section 13 of the constitution which places obligation on the

[530] Section 16(2) of the 1999 Constitution.
[531] Section 17(3) of the 1999 Constitution

various arms of government regarding the protection of SERs. The inclusion of SERs in any constitution is fundamentally linked to the notion of justice. One can argue that justice cannot exist without respect for human rights. This is also reflected in the preamble of the UDHR which provides that "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*." [532]

The provision on the non-justiciability of FODPSP is contained in Section 6 (6) (C) of the 1999 Constitution, while Section 13 of the 1999 Constitution mandates all organs of Government to observe and apply the provisions of Chapter II.

Examining both sections seem to generate contradictory explanations, although the courts have appeared to rely more on the provisions of section 6(6)(c) only, as that section specifically refers to the court in deciding cases generated from the constitution. Nonetheless, even if the courts were to evaluate these provisions concurrently especially with the status of these rights under the African Charter, perhaps, this may positively influence their thinking. This is because, these rights should not be perceived as mere aspirations.[533]Examining section 6(6)(c) of the constitution, the ouster clause specifically relates to SERs as provided for under the constitution and makes no reference to any other law ratified in Nigeria.

Quite unfortunately, the Supreme Court gave judicial imprimatur to this view in the case of *Archbishop Olubunmi Okogie & Ors v. Attorney General of Lagos State*, [534] where the Court held that whilst section 13 of the Constitution makes it the duty and responsibility of the judiciary amongst 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

[532] Human Rights Watch Report 2004, quoted by Ramatu Umar-Bako, The Language of Terror, The Capital Territory Law Review, Issue Vol. 1(2012) p. 29.
[533] Eide(n33) p37
[534] Okojie (n35) p350.

to pronounce any decision as to whether any organ of the government has acted or is acting in conformity with the fundamental objectives and directive principles of the state policy. It is clear therefore that section 13 has not made chapter II of the constitution justiciable. However, in the case of *Attorney General of Ondo State v. Attorney General of the Federation*[535] where the Supreme Court stated that the Federal Government and State Government have legislative powers over some matters spelt out in Chapter II and thus have constitutional powers to make them enforceable by legislation. The court held that all these rights are enforceable in instances where the government has enacted statutes meant for their actualisation. This was, indeed, a leeway.

Subsequent to this Supreme Court decision, the ECOWAS Court had also held that the right to free basic education is justiciable under the African Charter, in the case of Registered Trustees of the *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Universal Basic Education Commission.*[536] The Court leaned towards the direction of an expansive interpretation, the ECOWAS Court held that in terms of Article 17 of the African Charter, everyone has the right to free basic education.

The decision of the court in Okogie's case is still relevant regarding the justiciability of SERs in Nigeria. Indeed, the decision continues to fuel even more sinister misconceptions about its adjudication in Nigeria.[537] Supporters of the current status of SERs have continued to contend that the courts lack the requisite tools necessary to handle resource allocation as it is the function of either the legislature or executive.[538] They have also argued that the courts do not

[535] (2002) 27 WRN 1 SC
[536] (Suit No ECW/CCJ/APP/12/07). Judgment No: ECW/CCJ/JUD/07/10, delivered at Abuja, Nigeria on 30 November 2010, para 26.
[537] Solomon Ebobrah, "The Future of Economic, Social and Cultural Rights Litigation in Nigeria", CALS, Review of Nigeria Law and Practice 1, No. 2 (2007), 108.
[538] Lord Lester of Herne Hill QC & ColmO'Cinneide, The Effective Protection of Socioeconomic Rights, in Y. Ghai and J. Cottrell (eds.), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights,* (London: Interights 2004).

have the capacity to represent common choice of the people.[539] The decision in Okogie's case liberated the court from further SER litigation thus generating questions as to whether indeed section 6(6)(c) forbids Nigerian courts from actually hearing claims on SERs and if at all, claiming such rights by applying other provisions in other legislation will be inconsistent with the constitution. The Supreme Court expressly held that provisions of the African Charter can be enforced in the Nigerian Courts applying regular court rules.[540] Some human rights experts have suggested maintaining the view that the African Charter does not have the capacity to introduce justiciable rights, implying that the rights that have been guaranteed in the African Charter conflicts with the Constitution.[541]

It is commonplace in law that to every general rule, there are some exceptions. Therefore, following the provisions of the constitution, chapter II may appear to be non-justiciable. However, there are exceptions, the first is provided for under item 60(a) of the Exclusive Legislative List of the Constitution. Commenting on that section, Justice Mohammed L. Uwais, CJN (as he then was), affirmed that:

…Item 60 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria specifically empowers the National Assembly to establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles, and to prescribe minimum standards of education at all levels, amongst others. The breath-taking possibilities created by this provision have sadly been obscured and

[539] Ibid p10

[540] Ogugu v. State (1996) 6 NWLR [Pt. 316] 1, 30–31. In that case, the court held that "the provision of section 42 of the Constitution for the enforcement of fundamental human rights enshrined in chapter IV of the Constitution is only permissive and does not constitute a monopoly for the enforcement of those rights".

[541] Chinonye Obiagwu & Chidi Anselm Odinkalu, Nigeria: Combating Legacies of Colonialism and Militarism, In Abdullahi An-Na'im (ed.), Human Rights under African Constitutions: Realizing the Promise for Ourselves (Philadelphia: University of Pennsylvania Press, 2003), 227. However, they further opined that the African Charter being a statute by itself, is capable of enforcement notwithstanding the ouster provisions of the CFRN.

negated by non-observance. This is definitely one avenue that could be meaningfully exploited by our legislature to assure the betterment of the lives of the masses of Nigeria...[542]

Consequently, one absolute way to bring about enforcement and realisation of SERs guaranteed under Chapter II is by enacting specific laws or establishing an authority for the purpose of its implementation and enforcement. The legislature has been able to enact several laws to give effect to the SERs provided for in Chapter II of the constitution. Establishments created such as the Independent Corrupt Practices Commission (ICPC) Act 2000, which was passed to eradicate corruption in Nigeria as provided for under section 15(5) of the constitution.[543] Additional legislations that were enacted include the National Environmental Standards Regulatory and Enforcement Agency (NESREA) Act 2007 which was established to realize the objective of environmental protection as guaranteed in section 20 of the Nigerian Constitution,[544] the Universal Basic Education Act, which was equally enacted to fulfil the right to education[545] and the National Agency for the Prohibition of Trafficking in Persons Act 2003, all these legislations were passed in order for the state to realise several rights already provided for in Chapter II of the 1999 Constitution. This point was further established in the Supreme Court case of *Attorney General of Lagos State v. Attorney General of the Federation*,[546] and *Attorney General of Ondo state v Attorney General of the Federation*[547], where the Supreme Court equally established that the courts are unable to enforce the provisions of Chapter II of the 1999 Constitution until the National Assembly enacts specific laws for its enforcement.

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[542] Mohammed Uwais, "Fundamental Objectives and Directive Principles of State Policy: Possibility and prospect" in C.C. Nweze, ed, *Justice in the Judicial Process* (Essay in Honour of Honourable Justice Eugene Uba Ezonu, JCA, Chapter 5, at P. 179.)

[543] Section 15(5) of the Constitution provides that the State shall abolish all corrupt practices and abuse of power.

[544] Section 20 of the Constitution provides that the State shall protect and improve the environment and safeguarded the water, air and land, forest and wildlife of Nigeria.

[545] Section 18 of the Constitution provides that the Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels

[546] (2004) All N.L.R. 90 175.

[547] (2002) 9 NWLR (Pt.772) 222

These pronouncements have clearly stressed that notwithstanding section 6(6)(c) of the 1999 Constitution, Chapter II can indeed be made justiciable and enforceable by legislation. Additionally, the Supreme Court, in the case of *Federal Republic of Nigeria v Alhaji Mika Anache & Others*[548] held that:

…The non-Justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words "except as otherwise provided by this Constitution". This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts.

Furthermore, in a 2019 Supreme Court case, Nweze, JSC equally established in the case of *Centre for Oil pollution v Nigerian National Petroleum Corporation*[549] that:

…The proper approach to the interpretation of chapter II should be by the mutual conflation of other provisions of the constitution with the provisions of the chapter. This is so because, if the constitution provides otherwise in another section, which makes a section or sections of chapter II justiciable, it will be so interpreted by the courts.

This has established that the provisions currently stated in section 6(6)(c) of the Constitution are non-justiciable neither are they enforceable, however, they can be justiciable subject to other provisions in the Constitution. It is imperative to categorically state that Nigerian courts should exercise their powers of expansive and integrative interpretation of matters contained in Chapter II of the constitution. Lord Denning in Parker v Parker highlighted this position.[550]where he affirmed that:

[548] 14 WRN (2004) 1-90 61
[549] 5 NWLR (2019)395-601
[550] (1970) AC 777

…If we do not do something just because it has never been done before, the law will not develop while the rest of the world moves ahead. This would be bad for both. The Courts must further adopt the concept of the realist school of thought that "what the courts say and nothing more pretentious are what is meant by the law…

In the *Government of the Republic of South Africa and Others v Grootboom and Others*,[551] the Constitutional Court of South Africa held that, the issue of whether SERs are justiciable at all in South Africa is put beyond question by the text of the Constitution. That the indivisibility status between both category of rights needs to be considered in interpreting the SERs and in determining whether the State has met its obligations. Similarly, in the Indian case of *Moluni Jani v. State of Karanataka*[552] the Indian Supreme Court held the right to education to be an integral part of the right to life hence, making the directive principles in this stance, enforceable.

Quite like the Nigerian Constitution, the Indian Constitution equally has its SERs provided for as FODPSP, hence non-justiciable. [553] In the case of *Madras v. Champakam*,[554] the Indian Supreme Court held that the Directive Principles must conform with the chapter on fundamental human rights. SERs cases in India have benefitted from a long history of judicial activism. Courts have applied an expansive and liberal interpretative approach in SERs claims. In the case of *Mohim Jain v. State of Katamaka*,[555] the Indian Supreme Court invalidated a state law which permitted medical colleges to charge exorbitant admission fees on the ground that it discriminated against the poor and in effect, curtailed the right to education which is essential to the right to life.

[551] 2000 (11) BCLR 1169 (CC)
[552] AIR (1992) SC 1856 at P. 864
[553] See Article 37 of the Indian Constitution which provides that the Directive Principles of State Policy shall not be enforceable by any court.
[554] AIR 1951, SC 226
[555] [1992] AIR SC 1964. 5 [1999] AIR SC 65

Consequently, in Nigeria, the provisions of the African Charter and other relevant laws that have been passed, can successfully be invoked to make the government accountable and demand the realisation SERs. This sufficiently answers the issues raised above regarding the legal implications of applying the African Charter and other human rights instruments in Nigeria. Nigeria Courts must draw inspirations from their Indian and South African counterparts, among other Nations, and relying on Denning's dictum as to how the realist school perceive what law is.

This thesis has argued that the 1999 Constitution has equally led to the uncertainty which has been created in the evolving global trend with respect to the desirable status of SERs. In line with this, it has been perceived that the ambiguity caused by the constitution can equally lead to a decline in the respect for the constitution, and possibly continue to create weaker enforcement methods towards the protection of SERs than might otherwise have been realisable. Furthermore, this apparent lack of political will to promote SERs, has been in most cases, premised on the status of the constitution.

Till date in Nigeria, there appears to be a wrong perception of SERs, this is because, it is believed that CPRs impose immediate obligation, whereas SERs are viewed as simply realisable based on progressive realisation. This position is wholly unjustifiable, as the promotion and protection of these group of rights must be seen to be of priority to the state, as these rights are not mutually exclusive but indivisible, interrelated and interdependent human needs which are paramount to human dignity and survival. The right to life is meaningless in any state where the right to health, education or even housing are not guaranteed. Indeed, of what significance is the right to personal liberty when most of the people are living in abject poverty?

Evidently, examining these rights would disclose that they do indeed comprise of the necessities of human existence. Food, education, housing, shelter, jobs are irreducible minimum requirements that promote human survival and enhance dignity. In fact, it is my humble view that the Nigerian government should be at the frontline of realising these rights as it forms the very foundation of a democratic Government. This is because, there is still a dearth of SERs litigation and resulting implementation challenges of SERs in Nigeria. Can it be argued that it may be as a result of a defective judicial process in Nigeria? Or perhaps lack of awareness? Or should alternative protection approaches be considered?

4.2.1. Other challenges to the realisation of SERs in Nigeria

Debates around SERs are now focused on its enforcement, this does not in any way indicate that this category of rights are now justiciable or gained universality such that all countries in Africa embrace and enforce them. Nigeria has SERs provided for in the Nigerian constitution, however as FODPSP, hence, non-justiciable.[556]

However, the fact today, is that there are other impediments to the effective and efficient enforcement of SERs and these challenges are hindering its enforcement which include, but not limited to: corrupt governance, mishandling of public funds, weak enforcement mechanisms, and lack of awareness. The African Union has linked the general development of Africa with the protection of SERs. Overall, these rights are given statutory recognition and justiciable under the African Charter.[557]

Regardless of the laid down provisions of the African Charter, several African Countries are yet to incorporate SERS into their domestic laws. The negativity of such provisions is that they are placed as Directive principles and are not justiciable such as the situation in Nigeria.[558]

[556] SERs are provided for in Chapter II of the 1999 Constitution
[557] Shehu(n56) p 103
[558] See sections 33-46 of the 199 Constitution.

The African Charter provides that "*satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights*".[559] While this still remains a challenge in Nigeria, there are still uncertainties as to how and to what extent they are a "*means of satisfying SERs*" and how well can judicial approaches facilitate its progress.[560] Shehu suggests that rather than challenging the right of the courts to decide on SERs claims, the focus should be on adopting best practices with a view to ensuring the targeted beneficiaries do benefit regardless of the available resources or other institutional constraints that may impede its realization.[561]

Examining the cases above, the judiciary has a significant role to play regarding the protection of SERs. They must be seen to adopt a liberal approach when considering SERs claims.

Ibe suggests that several factors impede the realisation of SERs in Nigeria. The author asserts that besides issues regarding its justiciability, corruption and incompetent leadership, lack of effective promotion and enforcement framework and lack of adequate support from the international community are other challenges that continues to hinder its realisation.[562] Olaniyan equally submits that there is a link between corruption and human rights law.[563] He is of the opinion that corruption is a human rights violation, this is because, it interferes with the rights of people to dispose of their natural wealth and resources which in turn increases poverty and hinders any form of development.[564] An act of corruption constitutes an essential

[559] See the preamble of the African Charter.
[560] David Landau, 'The Reality of Social Rights Enforcement' Harvard International Law Journal (2012) 53(1) 408-411 Available at: https://harvardilj.org/wp-content/uploads/sites/15/2012/01/HILJ_53-1_Landau.pdf> accessed 12 June 2019.
[561] Shehu(n56) p 107
[562] Stanley Ibe, "Beyond justiciability: Realising the promise of socio-economic rights in Nigeria" African Human Rights Law Journal, (2007) Available at: https://www.academia.edu/es/10764363/Beyond_Justiciability_Realizing_the_Promise_of_Socioeconomic_Rights_in_Nigeria accessed 18 April 2022.
[563] Kolawole Olaniyan, "The African Union Convention on Preventing and Combating Corruption: A critical appraisal" (2004) 1 AHRLJ 74-92.
[564] Ibid p20.

element in a chain of events that culminates in the violation of a right.[565] More explicitly, "corruption undermines the very foundation of a representative government, the rule of law, good governance and the tenets of human rights law".[566] Nigeria's current 154 ranking out of 180 countries in the 2021 Corruption Perceptions Index is a drop of 149 in the 2020 index,[567] this demonstrates that corruption in Nigeria is on the increase. Studies have been able to establish the impact of corruption on the quality and effectiveness of institutions.[568] Shehu equally affirms that poverty and all forms of deprivations are very much rife in Nigeria.[569]

This suggests that corruption is in fact a structural hindrance to the realisation and fulfilment of human rights. Furthermore, in accordance with the principle of interdependence of human rights,[570] the negative effect of an act of corruption on human rights may be manifested in the violation of more than one right.[571] Part of the efforts by the international community in view of the UN General Assembly's Agenda 2030 for sustainable development was to ask all states to "substantially reduce corruption and bribery in all their forms" and to return all stolen assets by 2030.[572]

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[565] International Council on Human Rights and Transparency International, Corruption and Human Rights: Making the Connection (Switzerland 2009) 27.
[566] Kolawole Olaniyan, Corruption and Human Rights Law in Africa (Hart Publishing 2014) 314.
[567] Corruption Perceptions Index Available at: https://www.transparency.org/en/cpi/2021 accessed 19 April 2022.
[568] Bertrand Venard, 'Institutions, Corruption and Sustainable Development' (2013) 4 (33) Economics Bulletin 2545-2562; Wouter Ebben and Albert de Vaal, 'Institutions and the Relation Between Corruption and Economic Growth' (2009) NiCE Working Paper 09-104. Gareth Sweeney, 'Linking Acts of Corruption with Specific Human Rights' (European Sub-Committee on Human Rights, 'Corruption and Human Rights in Third Countries' Workshop 28 February 2013) 1
[569] 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.
[570] See OHCHR, 'Vienna Declaration and Programme of Action' (12 July 1993) A/CONF.157/23. 165 UN ECOSOC 'Preliminary Report of the Special Rapporteur, Ms. Christy Mbonu on Corruption and its Impact on the Full Enjoyment of Human Rights, in Particular, Economic, Social and Cultural Rights' (7 July 2004) E/CN.4/Sub.2/2004/23.
[571] Gareth Sweeney, "Linking Acts of Corruption with Specific Human Rights" (European Sub-Committee on Human Rights, 'Corruption and Human Rights in Third Countries' Workshop 28 February 2013) 1
[572] Transforming Our World: The 2030 Agenda for Sustainable Development, GA Res. 70/1, 25 September 2015, Points 16.4, 16.5.

Mismanagement of public funds has enabled states to divert available resources which ought to be used towards the realisation of SERs as recommended by the ICESCR. This particularly obstructs the right to education, right to health, right to housing and other SERs. Resources are essential for the realisation of SERs. A criminal act qualifies as a "violation" only when a legal obligation is breached that makes the act unlawful.[573] In human rights law, a violation takes place when a state fails to perform one or several of its obligations to respect, to protect and to fulfil as substantiated in the General Comments.[574] The obligation to respect requires states not to violate human rights, that is, a negative imperative to refrain from infringements. This demonstrates that corruption is not in itself a direct cause of human rights violations, but a contributing factor that allows for such violations.

Although Nigeria does have anti-corruption mechanisms, such as the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Economic and Financial Crimes Commission-(EFCC), the Code of Conduct Bureau (CCB), the Bureau of Public Procurement (BPP), the Nigerian Extractive Industries Transparency Initiative (NEITI), the Public Complaints Commission, and the Office of the Auditor-General of the Federation. These institutions appear not to be very effective as inadequate financial resources are recurring complaint among all the relevant agencies.[575] Onyema supports this argument and affirms that agencies such as the EFCC suffers from organisational dysfunction, which are not limited to

[573] Sepúlveda Carmona, Magdalena, & Julio Bacio-Terracino. "Corruption and Human Rights: Making the Connection". *In Corruption & Human Rights: Interdisciplinary Perspectives*, edited by Martine Boersma and Hans Nelen, 25-49. (2010 Antwerp: Intersentia) p28.
[574] General Comments are issued by the UN Treaty-based bodies and seek to interpret human rights provisions and sector-specific topics.
[575] Chinwe Anwuli Mordi "The Impact of the Universal Basic Education Program in Addressing Rural Secondary School Dropouts" (2016). *Walden Dissertations and Doctoral Studies*. 3115. https://scholarworks.waldenu.edu/dissertations/3115

funding but, improper training of personnel and internal corruption which has made it susceptible to external influence.[576]

The court in *Gaul Ihenacho v Nigerian Police*[577] suggested this by stating that:

…There are usually dire consequences at every turn of event where lawlessness is condoned and perpetrated rather than doing the sacred biddings of the law……. chasing after an adversary and hounding him with state sponsored law enforcement agents paid with the sweat of taxpayers' toil rather than keeping to the terms of binding agreements is another form of aberration that must be strictly viewed...

Even though there are arguments that anti-corruption agencies "may provide an effective means of promoting probity in government and protection of state income and expenditure", Transparency International states are of the opinion that such bodies are more often failures than successes.[578] This is not far from the truth. Huther and Shah[579] are of the opinion that the likelihood of such institutions succeeding is dependent on the pervasiveness level of corruption in the country and the overall quality of governance.

From the above, it will appear that NGO's and civil societies are well-positioned in terms of their expertise and personnel, to ensure transparency and accountability in state affairs. And above all, a lawsuit filed by an NGO on behalf of a larger group of victims has a much greater political weight than a series of lawsuits by individual victims. The government, and in certain circumstances, individuals and private bodies, can be held accountable if they do not respect, protect and fulfil these rights.

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[576] Emelia Onyema, Roy Pallavi, Oredola Habee and Seye Ayinla, "The Economic and Financial Crimes Commission and the politics of (in) effective implementation of Nigeria's anti-corruption policy". (2018) ACE SOAS Consortium Anti-Corruption Evidence making Anti-Corruption real. Working Paper 7

[577] Gaul Ihenacho & 3 Ors. v. the Nigerian Police Force & 2 Ors (2017) 12 NWLR (Pt 1580) 424)

[578] Jeremy Pope, *TI Source Book, Transparency International* Berlin (1999).

[579] Jeff Huther and Anwar Shah, "Anticorruption Policies and Programs: A Framework for Evaluation", World Bank Policy Research Working Paper 2501 at 12 (2000).

The above discussion demonstrates that justiciability may not appear to be the only challenge facing the realisation of SERs. Nnamuchi affirms that statutory recognition of SERs such as the right to health care is not a necessary condition for access to adequate health services.[580]The author asserts that jurisdictions with robust access to health services do not necessarily have such rights constitutionally recognised.[581] This suggests that constitutional provision may not be the solution, there are other factors that will continue to hinder its realisation. Corruption has been a major obstacle to development in Nigeria, if allowed to go unabated, it may never allow Nigeria, a resource endowed country and its citizens prosper.

Due to the problems listed above, it is essential that the Nigerian government take immediate positive steps in fulfilling its obligations, SERs cannot be fulfilled without Government intervention.[582] It is also significant if SERs are given its full legal effect in national law, like what is applicable in South Africa.[583] This will provide a platform for possible enforcement mechanisms in Nigeria. The real test remains how to implement SERs. In order to implement state obligations as provided for under the African Charter and other international instruments, SERs should not be demoted to a non-justiciable status. In this respect, it is vital to adopt national legislations to give SERs the same level of protection as CPRs, as this is crucial in observing obligation of state guaranteed in Articles 1 and 2 of the African Charter on Human

[580] Obiajulu Nnamuchi "Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria" (2008). Journal of African Law, Vol. 52, No. 1, pp. 1-42, 2008, Available at SSRN: https://ssrn.com/abstract=1117230 accessed 20 April 2022

[581] For example, the Canadian Charter of Rights and Freedoms (schedule B to the Canada Act 1982 (UK) 1982, c. 11), since its enactment, the charter has been consistently invoked and relied upon to determine the propriety of government action with respect to access to physician, hospital and related services

[582] Salman Salman & McInerney-Lankford, Siobhan, "*The Human Right to Water"* Legal and Policy Dimensions. Law, Justice, and Development; Law Justice and Development series [2004]. Washington, DC, https://openknowledge.worldbank.org/bitstream/handle/10986/14893/302290PAPER0Human0right0to0H20.pdf?sequence=1&isAllowed=y?> accessed 15 June 2019.

[583]Manisuli Ssenyonjo. "Analysing the Economic, Social and Culture Rights Jurisprudence of the African commission: 30 Years since the Adoption of the African Charter" (2011) p397 available at <http://www.corteidh.or.cr/tablas/r26994.pdf> accessed 7 August 2018.

and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federation of Nigeria 1990, which provides that;

…As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, 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 powers in Nigeria...[584]

The Nigerian Constitution is supreme,[585] thus any law inconsistent with its provisions is declared null and void to the extent of its inconsistency.[586] Furthermore, except it can be established that SERs provisions that are guaranteed under the African Charter are inconsistent with the Nigerian Constitution, the state is obligated to conform to the provisions of the African Charter pursuant to its ratification. The decision of the court in *Abacha v Fawehinmi*[587] demonstrates that regardless of the provisions of the constitution, the various arms of government have an obligation to obey and implement the provisions of the African Charter except the provision has been expressly repealed.

The case of Socio-*Economic Rights and Accountability Project (SERAP) v Nigeria* can be seen as another case which had a similar outcome like the Abacha v Fawehinmi's case, the plaintiff, a civil society organisation in a public interest litigation instituted an action before the ECOWAS Court against the then President of the Federal Republic of Nigeria, alongside nineteen others.[588] The crux of the case was centred on the breach of SERs in some communities in the Niger Delta. The court held that there was a clear "violation of the right to

[584] See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (No 2 of 1983) Laws of the Federation of Nigeria 1990.
[585] Section 1(1) of the 1999 Constitution (as amended).
[586] Section 1(3) Ibid, See also the case of Attorney General V Atiku Abubakar (2007) 32 NSCQR 1 at para 85.
[587] General Sani Abacha v. Gani Fawehinmi [2001] AHRLR 172
[588] Suit No: ECW/CCJ/APP/08/09.

adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and health environment; and to economic and social development".[589] Because the rights which were violated belonged to the "second generation of rights" and are provided for in chapter II of the Nigerian Constitution as FODPSP,[590] the Government had refused to take any action. In that suit, the plaintiffs heavily relied on the African Charter, ICESCR and the ICCPR, given that Nigeria was and still is a signatory to these international instruments. The defendants however raised objections on several grounds, essentially on the Court's jurisdiction. The Court established that, "it had jurisdiction to adjudicate on the case brought by the Plaintiff against the corporate defendants," this is so because, Nigeria is a member nation of the ECOWAS and as such, its decision has a binding effect.[591]

The Court unanimously found the Nigerian government responsible for pollution by oil companies and made it clear that the government must hold companies and other perpetrators to account. The Court equally held that the right to food and social life of the people of Niger Delta had been violated by oil companies who had destroyed their environment, which affected their opportunity to earn a living and enjoy a healthy and adequate standard of living. The Court's judgement was applauded and seen as a key moment in holding the Government accountable. This judgement does provide a precedent that guarantees the right to a healthy environment. This is remarkable, even though, the right to a healthy environment is not justiciable in the Nigerian constitution.

Good governance can be achieved where SERs are guaranteed and made justiciable, this is because it gives meaning to human dignity. Aside its non-justiciability status, corruption which has continued to aggravate poverty in Nigeria has equally remained a major hinderance to its

[589] Ibid
[590] See Chapter II of the 1999 Constitution.
[591] Article 15(4) of the ECOWAS (Revised Treaty) provides that the judgement of the court shall have a binding effect on all member states, individuals, Institutions and corporate bodies.

realisation. In a bid to ensure the accountability and transparency of funds and properties recovered by anti-corruption agencies in Nigeria, the Senate has just passed the Proceeds of Crime (Recovery and Management) Act, 2022.[592] The Act aims to create a platform to aid the fight against corruption, money laundering and illicit movement of stolen funds. The Act equally aims to expand the mandates of existing statutory institutions to manage proceeds of crime, rather than creating a new body to carry out such functions. It is remarkable because it is the first comprehensive Nigerian legislation that deals with seizure, confiscation, forfeiture and management of properties derived from unlawful activities. It is believed that this Act curb corruption in Nigeria, time will tell.

This group of rights remains a myth far from reality despite the domestication of various international instruments that guarantees SERs to which Nigeria is a signatory. The poor standard of living attests to this fact. Some African countries have adopted proactive measures towards the realisation of SERs, the next section will consider the practice and status of SERs in South Africa and Kenya.

4.3 Selected Countries in Africa

Africa's history is filled with stories of human rights violations, wars and armed conflicts. These crises have been recurrent which has equally been the ground for disregard to the plight of man, the international community has taken a keen interest in Africa because of these gross violations. In other to put an end to this, the international community has set standards for other states to adopt in their various jurisdictions. Although steps to adopt a human rights culture in

[592] On the 12th of May 2022, the President of Nigeria signed into law, the Money Laundering (Prevention and Prohibition) Bill, 2022, the Terrorism (Prevention and Prohibition) Bill, 2022, and the Proceeds of Crime (Recovery and Management) Bill, 2022. With the aim of improving the anti-money laundering and counter-terrorist financing/proliferation financing framework in Nigeria.

Africa were not left to only foreign influence, as by the mid-1970's, African leaders took steps to develop human rights which were consistent to international law.

As will be established in this chapter, initial constitutions in Africa paid less attention to SERs and when it was incorporated into domestic laws, they were seen to be generally framed and required judicial clarification. Oloka-Onyango rightly affirmed that:

…It is no surprise that none of the independent constitutions made any mention of SERs. With the lone exception of the right to property, the Bill of Rights sections of the Kenyan and Ugandan Constitutions focused almost exclusively on civil and political rights. Nothing was said about education, health, shelter, or even about an adequate standard of living. Moreover, the way property rights were articulated was clearly not intended to cover the most in need – the socially marginalized and disenfranchised groups and communities. Rather, it was inserted in the constitutions in order to protect the property of the nationals of the departing colonial power.... [593]

The drafting stages of the constitutions mentioned in this study will also be considered, inferring that the initial drafters equally had difficulties in agreeing on the status of SERs which led to prolonged negotiations, while they had different reasons for refusing or agreeing to include these rights in the constitutions, the fact remains that there were concerns.

Interestingly, in the last decade, the apex courts in India, Canada and South Africa have conventionally been regarded as SERs responsive, this is so, as these courts have delivered judgments primarily with the aim of protecting SERs. Although these domestic courts have been dealing with distinctive national legal systems, they have however activated corresponding ideas of important rights which are fundamental and, more broadly put,

[593]Joe Oloka-Onyango, "Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View" The George Washington International Law Review, Vol. 47, 2015, Available at < https://ssrn.com/abstract=3621124>

inconsistent with the narrow notion of what how human rights used to be perceived by early philosophers and leaders. This interpretation of human rights is gradually becoming well recognised for the meaningful fulfilment of SERs.

The sub-sections below will provide an understanding into the inclusion of SERs in South Africa and Kenya and the extent to which they are guaranteed in their various constitutions. It is only reasonable that this argument commences with South Africa, as its Bill of Rights is largely seen as one of the most advanced globally. This is so, as its constitution comprises of all categories of human rights that are equally provided for in other international human rights instruments. Several scholars have established that South Africa has set a yardstick globally regarding the constitutional protection and judicial enforcement of SERs.

4.3.1 South Africa

Social inequalities were deeply rooted by Apartheid and the duration that it lasted for, there were substantial transfer of property and wealth especially from the "*haves to the haves not*." During the period of Apartheid, the revenue of the underprivileged or low earners fell with about 60%, while that of most of the population only dropped with about 35%. In addition, by 1996 the disparity between the rich and the poor was even greater.[594] By the mid-1980s, a certain group of black students, who were law students studying at the University of Natal Durban, South Africa, formed a committee called the Anti-Bill of Rights Committee.[595] The group consisting of principled law students from the troubled and oppressed society chose to form a committee that was in opposition of the idea of a Bill of Rights, when it would have been logical to oppose Apartheid. The group of students saw the planned bill of rights as an

[594] UNDP Human development report: (Oxford University Press 2002). Available at: Frontmatter (undp.org) accessed 19 October 2020

[595] Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights – The Grootboom case". 1-22. Paper – Syllabus, Oxford and George Washington University Human Rights Law Summer School 3-3o June 2005

instrument to be used by the white minority groups to enable them to remain in South Africa and halt future changes to their social and economic predicament.[596]

Unfortunately for the students, they were oblivious of the fact that a Bill of Rights was beneficial to them and would successfully end the dominant partial distribution of wealth and resources produced by the Apartheid era and most importantly protect their property.[597] To the group of black students, a Bill of Rights was seen as an interference for South Africa to balance access to wealth and resources, ensuing that the disadvantaged continue to remain poor. As commented by Sachs, one of the observers had identified the Bill of Rights as "Bill of Whites."[598]

The short-term 1993 South African Constitution was designed to restore the disparities that happened in the past and aimed to create a society founded on core democratic standards and of course social justice.[599] As the drafters of the constitution were concluding, a major issue that arose was whether SERs should be included in the bill of Rights alongside CPRs and if they should be justiciable and to what extent if at all.[600] Several social and economic rights were included in the new constitution, but fundamental rights such as the right to health and housing were conveniently excluded. Various groups intensely promoted the inclusion of SERs in the South African bill of rights and additional numerous bodies presented a strong petition to their Constitutional Assembly maintaining that a constitution that failed to recognise SERs did not reflect the desires of the people.[601]The groups expressed their concern that if their constitution only included SERs, "the haves" would continue to prosper and maintain the uneven allocation of wealth and resources. As an alternative, they suggested that the new South

[596] Ibid
[597] Ibid
[598] Ibid
[599] Charlie Heyns, "Introduction to Socio-Economic Rights in the South African Constitution". Socio Economic Rights- Project http://www.chr.up.ac.za/centre_projects/socio/co mpilation1part1.html accessed 10 August 2019
[600] Ibid
[601] Ibid

African government should be given the legal obligation to reallocate income and property by means of recognising SERs.[602]

The arguments presented by the group was positive, which led SERs to be provided for in the South African draft Constitution.[603] Prior to creation of the Constitution and before its adoption, it was important the South African Constitutional Court certified that the provisions in the final Constitution conformed with the thirty four constitutional values already itemised in the interim Constitution and most significantly, that it guaranteed universal rights, supported democracy and improved on cultural diversity and most importantly, prohibited all forms of discrimination.[604]

While the certification was going on, some opposing groups called into question the need for the inclusion on SERs in the South African Constitution.[605] They believed that its inclusion would infringe the doctrine of separation of powers and give the judges autonomy to dictate matters involving social policies and state budget, which was not within their purview. Additionally, they were strongly of the view that SERs were not justiciable, as they were not viewed as fundamental rights. Their opposition was examined by relevant legal experts who concluded that the inclusion of SERs is significant in any democratic government. During the accreditation judgement given by the South African Constitutional Court, the Court held amongst other things that: "*The doctrine of separation of powers will not be affected by the inclusion of SERs in their constitution and the courts can now be able to protect SERs from "improper invasion*".[606] After its certification, the South African Constitution came into force on the 4th of February 1997.

[602] Ibid
[603] Saras Jagwanth, Democracy, Civil society and the South African Constitution: some challenges. Discussion Paper. < http://unesdoc.unesco.org/images/0012/001295/1 29557e.pdf> Accessed 10 August 2019
[604] Ibid
[605] Ibid
[606] Ibid

The South African Constitution is acknowledged for its broadminded and progressive stance primarily because the country has expressly included SERs in its constitution[607] and the courts have the liberty to state what is fair and reasonable.[608] This measure is also attributable to the courts regarding SERs in India.[609] The South African Constitution's preamble is also significant as it underscores on recognising the inequalities that occurred in the past and the importance of remembering the individuals who had lost their lives in a bid to bring about social change in the country. It also asserts to develop the standard of living of their citizens. These clarion calls emanating from the preamble set the bedrock for the advancement of judicially enforceable constitutional SERs against harrowing thoughts of apartheid. The South African Constitution addresses SERs by establishing the right of everyone living in South Africa to basic education, housing, shelter, water, food and social security. Furthermore, Section 7(2) of the Bill of Rights provides that "*the state must respect, protect, promote and fulfil the rights in the Bill of Rights"*.[610]

As demonstrated above, during the drafting stage of the Constitution, inclusion of SERs was challenged. The debate against the inclusion of SERs was mainly that the rights were essentially non-justiciable.[611] In addition, another disagreement was on the issue of separation of powers, as the drafters believed the protection of SERs should be within the purview of the legislature and executive and not the judiciary, as the judiciary lacked democratic legitimacy to determine matters involving allocation of state capital.[612]

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[607] Sections 26-29 of the South African constitution consist of wide SERs provisions. Chapter two of the South African constitution, the bill of rights provides for a wide variety of Socio-economic rights which include right to housing, right to health, labour rights, right to food and water and right to a healthy environment.

[608] See, Section 172 of the South African constitution.

[609] Upendra Baxi, "Constitutionalism as a Site of State Formative Practices", 21 Cardozo L. Rev. 1183 (2000) at 1205. Baxi asserts that the influence of the development on this front in India has impacted South African Constitution.

[610] South African Constitution 1996. https://www.justice.gov.za/legislation/constitution/chp02.html

[611] 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, 12

[612] Carol C. Ngang, Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take 'other measures' Africa Human Rights Law Journal (2014) 14 AHRLJ 655

There were others that agreed SERs should be included in the Constitution, however, they were equally of the opinion that the significant issue to be considered was how and to what extent these rights will be enforceable.[613] Whilst the debates against its judicial enforcement focused on the doctrine of separation of powers, they seemed to overlook the concept of checks and balances which provides that the three arms of government are monitored by each other, consequently, it is arguable that the Courts should be able to apply their 'quasi law-making' powers to enforce socio-economic rights.[614] These arguments were considered in the First Certificate Judgment in which the Constitutional Court held that although socio-economic rights are not universally accepted as fundamental rights, they are, at least to some extent justiciable and at the very minimum be negatively protected from invasion.[615] The Constitutional Court agreed in this case that the protection of socio-economic rights might result in courts making decisions with direct budgetary implications but the Court also noted that enforcement of civil and political rights could also have similar repercussions.[616]

The South African Constitutional Court has on numerous instances rejected the State's argument that resource constraints prevents the state from fulfilling socio-economic rights. [617] In doing so, the Court has tended to agree with the United Nations Committee on Economic, Social and Cultural Rights which has noted that;

…In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been

[613] Charles Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 Boston College Third World Law Journal 305-306
[614] Ngang (n567) p14
[615] Ibid p15
[616] Mubangizi (n565) p19
[617] Treatment action Campaign V Minister for health 2002(4) BCLR 356 (T) 14 December 2001 CASE NO.: 21182/2001; Government of the republic of South Africa v Grootboom ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations...[618]

Chapter II of the South African Constitution[619] includes a variety of SERs on the following subjects, labour issues,[620]the environmental matters,[621] property issues,[622] housing,[623] health,[624] food[625], water[626] and education.[627] The constitution equally provides in section 36[628], that the SERs should not be restricted except the limitation is "*reasonable and justifiable*". The section equally provides that the factors which ought to be considered should include the nature and scope of the right, the legality of the limitation, the ultimate relationship between its purpose and the limitation and if at all, and if there exists less restrictive means to be able to achieve the purpose. To be able to interpret the rights provided for in the constitution, Section 233 of the constitution[629] directs courts to refer to any reasonable interpretation that is consistent with international law to be applied over any other South African law.

More clearly, in a situation where the South African law is inconsistent with the African Charter, the constitution directs that the interpretation must be consistent with the African charter. This primarily means that the state must be seen to go extra miles in other to enhance the status of SERs.[630] Even though, the South African Constitution does not adequately provide details on what the rights to water, food, housing or health should entail, the South African

[618] General Comment 3, The nature of State parties' obligations (Article 2 para 1 of the CESCR) (5th Session, 1990)
[619] Constitution of the Republic of South Africa 1996
[620] Ibid Section 27
[621] Ibid Section 24
[622] Ibid Section 25
[623] Ibid Section 26
[624] Ibid Section 27
[625] Ibid Section 27
[626] Ibid Section 27
[627] Ibid Section 29
[628] Section 36 provides that the rights listed to be limited only by laws of general application, and only to the extent that the restriction is reasonable and justifiable in "an open and democratic society based on human dignity, equality and freedom
[629] Section 233 of the constitution requires a court to prefer a reasonable interpretation of legislation that is consistent with international law over other interpretations that are not consistent with international law
[630] Mubangizi (n567) p19

constitution is quite clear on the obligation of the state in regard to its fulfilment. There is actually no defined minimum core obligations required on the state, which to some extent has indeed created some ambiguity. However, the constitution does place the burden on the state to take relevant, "*legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights"*.[631]

Looking at the case of *Soobramoney v Minister of Health, KwaZulu-Natal*,[632] the claimant, Thiagraj Soobramoney, suffered from chronic renal failure (among other diseases) and required renal dialysis to remain alive. When he was unable to pay for his hospital bills, he sought the service of a state funded hospital in Durban. The hospital refused treating Soobramoney because his general physical condition did not qualify him for treatment under the criteria or guidelines used by the hospital to determine eligibility for such treatments. Soobramoney sought an order in court for the hospital to provide him with access to dialysis treatment to be able to prolong his life. The High Court dismissed his application. On appeal, the Constitutional Court having found the hospital's standards reasonably justified, unanimously dismissed the appeal and held that the failure to provide treatment to him did not violate any provision of the South African Bill of Rights. The Court held that the right to health care does not have to be inferred from the right to life because section 27 of the Constitution specifically deals with health rights. The case largely turned on whether the hospital violated Soobramoney's right not to be "*refused emergency medical treatment*" (in accordance with section 27(3) of the Constitution). The Court found that Soobramoney's case was not an "emergency" in the sense of a sudden catastrophe, but rather an "*ongoing state of affairs*". Instead, the case falls under sections 27(1) and (2) of the Constitution which deal with the allocation of non-emergency medical treatment. Obligations imposed on the state regarding access to health care are

[631] Ibid p20
[632] 1998 (1) SA 765 (CC)

dependent upon the resources available, as stated in sections 27(1) and (2). Due to limited resources, the hospital had adopted a policy of admitting patients who could be cured within a short period and those with chronic renal failure who are eligible for a kidney transplant. The Court declared that it could not interfere with decisions taken in good faith by political organs and medical authorities as to how to allocate budgets and decide on priorities.

This case was widely criticized for failing to lay down precise and proper guidelines for the interpretation of SERs.[633] The decision of the Constitutional Court appears to indicate an unreasonably deferential approach in SERs claims. The case was largely criticized for not granting Soobromaney's access to immediate medical treatment, which is provided for in section 27(3) of the South African Constitution. The court did find that this case was not classified as an "*emergency*" in the sense of a sudden catastrophe, but instead, the court saw his situation as an "*ongoing state of affairs*". The court held that the case falls within the ambit that deals with the allocation of non-emergency medical treatment. Obligations which are imposed on the state regarding access to healthcare are largely dependent on the state's resources as stated in section 27(1) and (2).

Furthermore, the South African courts also failed to address the right to housing in the case of *Government of the Republic of South Africa v Grootboom*.[634] The case involved a group of adults and children who had been rendered homeless when they had been evicted from their informal setting which was on a private land, prior to this, they were living in an informal settlement called Wallacedene. Even though the living conditions at Wallacedene was very

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[633] Charles Ngwena & Durojaye, *Strengthening the protection of sexual and reproductive health through human rights in the African region*. (Pretoria University Law Press 2014).

[634] Grootboom's case para 551.

intolerable, as they had no water, sewage or refuse removal services and 5% of the shacks had electricity. Mrs. Grootboom lived with her family and her sister's family in a shack about 20 metres square.

Many had applied for subsidized low-cost housing and had been on the waiting list for as long as seven years.[635] The eviction process was very rough and unpleasant, it was referred to as, "*reminiscent of apartheid-style evictions*".[636] They had asked the local government to provide them with a temporary dwelling and some basic amenities, which were all denied. The Constitutional Court had held that the state had failed to fulfil its obligations as provided for in Section 26 of the South African Constitution, which guarantees the right to adequate housing. In addition, the Court equally held that the right to housing was more than "*brick and mortar*" and did require other services which included other provisions like water and sewage removal to be available to individuals.[637] In arriving at its decision, the court did not rely on the minimum core obligation, but rather, held that the decision arrived at was solely based on the reasonable test approach. Justice Yacoob, who gave the lead judgement, stated that the housing policy did not adequately provide for those in need of emergency relief or even for those in desperate need for housing, which in his opinion was unreasonable.[638]

In addition, the constitutional court equally refused to grant an order that was requested by Mrs Grootboom and the other applicants for the states to provide them with alternative housing pending when they had the capacity to sort out their permanent accommodation. The court declined in granting the applicants this order as it held that the right to basic shelter which was guaranteed under the South African constitution did not entitle them to receive immediate shelter on demand.[639] Regardless of the debate that the court must be guided by, the

[635] Ibid para555
[636] Ibid para 556
[637] Ibid para 557
[638] Ibid.
[639] Ibid

interpretation of adequate housing as provided for under the ICESCR, Justice Yacoob in his final conclusion asserted that it was unnecessary for the court to decide in the first instance, the minimum core right.[640] The decision has been heavily criticized by several scholars for the court's inability to provide the basic requirements for the minimum core obligations for the right to adequate housing.[641]

The applicants were however provided with basic amenities as a result of a settlement reached prior to the hearing of the case by the Constitutional Court, but the decision by the court was disappointing on the community. This is because, legal action had to be taken to enforce the remedy against the local government. The court held that,

…legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the states obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the states' obligations…[642]

The decision had a major impact on housing policy in South Africa. Most cities put in place a proper allocation in their respective housing budgets to address the needs of those in desperate need. The South African government established a Housing Development Agency (HDA), the agency was established to work with provinces, municipalities and private sector developers to

[640] Ibid para 66
[641] David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*"* (2002) 119 S. African L.J.484 492
[642] Grootboom case(n551) para 500

increase the country's housing delivery rate, the aim was to build partnerships to create integrated sustainable human settlements.

Grootboom's case is one of the most cited SERs cases, as it laid the foundation for subsequent successful SERS cases in South Africa and elsewhere. The Court was able to lay the foundation for the justiciability of the obligation to progressively realize SERs, applying the reasonable test approach.

Bilchitz did heavily criticize the court's reliance on reasonableness as opposed to minimum core suggesting that the reasonableness approach did lack specificity and failed to provide a time frame. The author also stated that the court did not need excessive information to provide minimum core contents for socioeconomic rights as, "*people share basic interests in socio-economic entitlement that can be specified independently of context: in relations to housing, one of these interests includes, at least, the ability to be protected from the elements*."[643]

In the highly celebrated case of *Minister of Health and Others v Treatment Action Campaign and Others*.[644] A Non-Governmental Organization, Treatment Action Campaign in a bid to force the South African government to provide antiretroviral drugs to the public healthcare system specifically called Nevirapine, which is a drug that is able to reduce the rate of HIV transmission from mother to child, requested that the drug should be freely distributed to women who had been infected with the HIV virus. The court held that the government's policy and the measures that had been put in place to curb the mother to child transmission of HIV at birth did fall short of compliance with section 27 (1) and (2) of the South African Constitution and ordered that the state provides the required medication and remedies available for this programme.[645] In arriving at its decision, the Constitutional Court considered the concept of

[643]Bilchitz (n609)
[644] 2002 (5) SA 703 (CC)
[645] Ibid para 737-738

"minimum core" as already developed by the UNCESCR which has been obligated to monitor states' obligations and steps undertaken by state parties to the ICESCR.[646] It was held in this case that the rigid nature of South African government approach clearly demonstrated that the entire policy in place ought to be reviewed, the court held that;

…Hospitals and clinics that have testing and counselling facilities should be able to prescribe nevirapine where that is medically indicated. The training of counsellors ought now to include training for counselling on the use of nevirapine. As previously indicated, this is not a complex task, and it should not be difficult to equip existing counsellors with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV...[647]

The decision in the TAC case has been widely commended as a deeply significant judgment and as a symbol of the power that courts can have on SERs cases. The judgment in this case was estimated to have saved lives and mobilized affected individuals and groups across the country. The judgment led to a definite increase in access to Nevirapine by pregnant, HIV-positive women.[648] It removed the restriction of access to ARV treatment for AIDS in the public health sector and informed a new thinking in relation to the obligation of the State to the treatment of HIV and AIDS.[649] The case was therefore one in which the interests of the individual HIV positive pregnant women and their children was commensurate with the general public welfare that they receive treatment. The decision established a remedial framework for

[646] Ibid para 738
[647] Ibid
[648] Pieterse Marius, *Can rights cure? The impact of human rights litigation on South Africa's health system*. (Pretoria University Law Press 2014)
[649] Ibid p40

judicial review and enforcement of the obligation to ensure access to healthcare and other SERs.

Based on the court order in Grootboom's case, one might have expected that the court adopt the same approach by ordering the government to formulate and implement a comprehensive Nevirapine distribution nationwide. However, the court went beyond this and ordered the government to remove all restrictions preventing doctors at public hospitals from dispensing Nevirapine. This case sets an inspiring model for integrating political and legal action. The case equally demonstrates that for lawyers working in the field of human rights and social justice litigation, the TAC's case reinforces that while law and legal institutions are used as tools of social change, their impact depends on how they are applied. As efforts are put towards litigation, much more of it is required to ensure that a successful court decision translates into successful societal outcomes.

According to the UN Committee regarding the Covenant "*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*." [650] If the covenant was indeed read in a manner as not to establish such a minimum core obligation, it would have been largely deprived of its content. In the same token, it must be noted that any assessment as to whether a state is fulfilling its obligation must take into cognisance the availability of resources within the state. Article 2(1) of the ICESCR obligates states to take necessary steps "*to the maximum of its available resources*".[651] In other for a state to be able to attribute its failure to meet its minimum core obligations to a lack of availability of resources, the state must be able to demonstrate that it

[650] CESCR General Comment 3. The nature of States parties' obligations (Art. 2, par.1) 14/12/90

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

had taken every step and effort within the availability of its resources at their disposition as a matter of priority those minimum obligations.[652] Regardless of the considerations of the minimum core obligations, the constitutional court decided to rely on the reasonableness test approach that was equally applied in the Grootboom's case.

In its judgments on SERs, the Constitutional Court had emphasised that, in addition to their textual setting, the rights need to be interpreted in their social and historical context.[653] One of the arguments regarding the development of South Africa's jurisprudence on SERs has been whether Sections 26 and 27 impose minimum core obligations on the State. In other words, the Court has been asked to decide if SERs provisions in the Constitution entitle its citizens to a minimum level of rights or is the approach adopted mainly to evaluate the reasonableness of government's actions or inactions. In Grootboom's case, the amici curiae[654] invited the Constitutional Court to approve an interpretation of section 26 that would impose minimum core obligations on the State. Although the parties to the case had based their arguments on section 28(1) (c), the amici expanded the issues before the Court to include a consideration of section 26 of the Constitution.[655] They highlighted the unfair reasoning of the Court and requested an interpretation that would reconcile the qualified rights of "everyone" to adequate housing in section 26 with the unqualified right of children to shelter in section 28(1)(c).

The amici positioned the minimum core within a continuum of positive obligations imposed on the State in section 26(1) read with (2) by suggesting that:

…This does not imply that only the 'core' is subject to adjudication, or that meeting the minimum core requirements would satisfy all of the obligations on the State? The 'core'

[652] Ibid para 10
[653] Grootboom's case (n551) at paras 22 and 25; TAC (n617) at para 24
[654] The South African Human Rights Commission and the Community Law Centre (University of the Western Cape) ('CLC') represented by Geoff Budlender of the Legal Resources Centre. The written submissions are available on-line at: http://www.communitylawcentre.org.za/Court-Interventions%20/05grootboom-right-to-adequatehousing-the-rights-of-the-child/grootboom_heads_of_arguments.pdf
[655] Grootboom (n551) para 18.

provides a level of minimum compliance to which resources must be devoted as a matter of priority. This duty clearly has to be balanced with the obligation to put into operation programmes aimed at full realisation of the right, and to move progressively towards full realisation...[656]

Notwithstanding this point of departure, the Constitutional Court was not prepared to apply a minimum core approach in relation to section 26. It rejected the approach mainly on the grounds that it would be difficult to determine in the abstract what the minimum threshold ought to be [657] and their needs were diverse.[658] The only role envisaged by the Court for the concept of minimum core obligations was possibly as a factor in assessing the reasonableness of the measures adopted by the State in particular cases.[659] The constitutional promise of these SERs in South Africa is also unique because they are not limited by a floor or basic minimum, but rather the constitution promises equal access to these rights.

The Court's rejection of the notion of minimum core obligations has attracted a substantial amount of criticism.[660] In addition to this, David Bilchitz asserted that;

…There is a need for the Court to clarify the state's obligations imposed by socio-economic rights. This would entail that the state is not left with an amorphous standard with which to judge its own conduct but would be able to assess its conduct against clear benchmarks. The current system of invoking the amorphous notion of reasonableness does not provide a clear

[656] Ibid
[657] These will vary according to factors such as income, unemployment, availability of land and poverty. Grootboom (n551) para 32.
[658] Ibid para 33.
[659] The Court stated that: *"There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable*" Ibid at para 33.
[660] Prior to the Grootboom judgment, a number of scholars had argued in favour of an implied minimum core obligation in sections 26 and 27. See G Van Buren 'Alleviating Poverty through the Constitutional Court' (1999) 15 SAJHR 52, 57.

and principled basis for the evaluation of the state's conduct by judges or other branches of government in future cases...[661]

The author argued that the Court had failed to distinguish between "*the invariant, universal standard*" that must be met in order for an obligation to be fulfilled, and the varied particular methods that can be adopted to fulfil this standard, and thus comply with a constitutional obligation.[662] The author went on to argue that the minimum core obligation represents "the standard of socio-economic provision necessary to meet people's basic needs". Bilchitz views the minimum core obligation as one of two components of the duties imposed by the phrase, 'progressive realisation', in the second subsections of sections 26 and 27. This component requires the State to prioritise the fulfilment of the urgent survival needs of people.

It is apparent that the Constitutional Court tends to ignore the minimum core approach and apply the reasonableness approach instead, the reason for this will be explored in greater detail in chapter five. Even though the approach may have its challenges because it may be difficult to basically point out the essential of the requirements of a right, it does provide a starting point. The significance of these rights in its constitution is founded on the fact that they are the necessities of life. This can be seen in the preamble of the constitution which envisages the adoption of the constitution as being the supreme law and in other to do so inter alia "*improve the quality of life of all citizens and to free the potential of each person*".[663] Section 7(2) of the South African Constitution obligates the state to "respect, protect, promote and fulfil SERs ".[664] The implication of this is that states must not only refrain from interfering with the enjoyment of these rights, but they must also act in order to protect them.[665]

[661] Bilchitz(n640) p40.
[662] Ibid.
[663] Nadasen Sundrasagaran, *Public Health Law in South Africa* (Butterworth, Durban 2000) p80.
[664] Ibid
[665] David Brand, Introduction to socio-economic rights in the South African constitution' in David Brand and Charlie Heyns eds*), Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005)3

According to Danie Rand, South African Courts are still able to protect SERs in two major ways, either through law making powers and by adjudicating constitutional measures that are intended to promote SERs.[666] Additionally, the South African Courts have so far been able interpret SERs using both approaches.

Nevertheless, some academics have argued that the reasonableness approach has created a slow implementation of SERs claims in South Africa as certain judgements in cases can be traced to the refusal of the court to set explicit guidelines on state obligations.[667] Regardless of the above, the South African constitution is seen as the most admirable globally.

Most interestingly, the Constitutional Court has also developed what is referred to as "Meaningful engagement". In the case of *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others,*[668] the court held that courts must "*have regard to extraneous factors such as morality, fairness, social values and the implications and circumstances which would necessitate bringing out an equitably principled judgment*."[669] In *Port Elizabeth Municipality v Various Occupiers*[670] the Constitutional Court endorsed this interpretation,[671] and stated that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) explicitly requires courts to infuse the law of evictions with elements of grace and compassion and to balance the competing interests of land owners and unlawful occupiers in a principled way.[672] Prevention of Illegal Eviction is seen in its requirements that an eviction is "just and equitable"[673] or "in the public interest".[674]

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[666] Ibid p4
[667] Blitchiz(n609) p151
[668] 2000 (2) SA 1074 (SE).
[669] Ibid at para 1081F–G.
[670] 2005 (1) SA 217 (CC).
[671] Ibid para 35.
[672] Ibid para 37.
[673] Section 4(8)(a) of Prevention of Illegal Eviction. South Africa's history of denial of land rights by dispossession and forced removals made the regulation of evictions imperative. Before this, black people had no recourse when they were forced off their land that they occupied, or even owned.
[674] Sections 6(1)(b) and 6(2) of PIE.

Justice Sach's highlighted about the managerial role of the courts which led him to consider if it is suitable for the courts to engage the parties in mediation.[675] The practical impact of "active judicial management" does lay in the elements that the court did consider in concluding that the eviction would not only be just and equitable and most importantly a holistic approach was adopted.[676] The idea of "active judicial management" which emerged from Port Elizabeth Municipality case[677] did play a substantial role in the constitutional court decision of *Main Street Johannesburg V City of Johannesburg and others*[678] in that case, the city of Johannesburg was to eject approximately 400 occupiers from its buildings, which they considered to be unsafe and unhygienic. The Supreme Court had authorised the said eviction and ordered the city of Johannesburg to support those in desperate need of housing with a temporary place.[679] On the 30th of August 2007, two days after the Constitutional Court heard the occupier's application for the leave to appeal, the court later gave an interim order which was designed to confirm that the parties to the suit, "*engage with each other meaningfully on certain issues*".[680] A major argument in this case made by the occupiers was that Johannesburg city ought to have given them a hearing before deciding to take the decision to evict the occupiers.[681]

Furthermore, Yacoob asserted that the obligation on the state to engage meaningfully with people who would otherwise be left homeless following their ejection was grounded in section 26(2) of the South African Constitution which provided that the state must be seen to take "reasonable action". The requirement to take reasonable action meant that the state is supposed to take steps regarding the provision of adequate housing. Where the state sought an ejection

[675] Ibid para 39-47
[676] Ibid para 54
[677] Ibid para 55
[678] 2008 (3) SA 208 (CC)
[679] Ibid para 5
[680] Ibid para 7
[681] Ibid para 7

order which will render people homeless, the court must consider if at all the relevant authorities had indeed engaged with the occupiers in question and ensure that the state had satisfied section 26(2).[682] On the other hand, the individuals who are being ejected or being confronted with homelessness also had an obligation to act reasonable. The court further held the link between meaningful engagement and the participation in any democratic state stressed that people in need of housing should not be treated any less as they should be treated as participants who are in the process of finding housing solutions.[683]

The court equally set out a detailed engagement order, which consisted of the subject matter and the objectives of the meaningful engagement, interestingly, the order also specified a date where the parties had to submit their affidavits to the court informing the courts on the progress made with the engagement.[684] After the parties had submitted their affidavits, they equally indicated that they had reached a settlement agreement, even though, there was some disagreement regarding the issues that still needed to be resolved in the court.[685] But what was significant, was that the settlement agreement did form a basis for the court's judgement on the merits of its appeal, the agreement did contain detailed provisions which was aimed at ensuring that the buildings were made "safer and more habitable" as an interim immediate measure. The court further held that the agreement was indeed a reasonable outcome which was as a result of the engagement process.[686] In addition, "active judicial management" would not only have an impact on how a court decides on an issue before it, but also on the procedures that the court chooses to adopt and the available remedies.[687] It is vital that the managerial roles of

[682] Ibid para 17-18
[683] Ibid para 20
[684] Ibid para 6
[685] Ibid para 25-27
[686] Ibid para 28.
[687] Ibid(n638) para 36. Although the idea of meaningful engagement was suggested by the court's in Grootboom's case para 87

judges would need to be applied in creative ways which will require the parties to engage with each other in any attempt to be able to find a common acceptable solution.[688]

The idea of a meaningful engagement is a promising contribution to the jurisprudence of SERs and has been applied successfully in South Africa. As a judicial measure, the use of a meaningful engagement can provide SERs claimants with some sort of relief whilst at the same time promoting their dignity. It is important to note that the effectiveness of an engagement order is limited in the sense that, it depends on the parties involved.

In a recent case of Community of Hangberg of Cape town,[689] the city had demolished a dwelling ("Wendy house"), that was developed by Ginola Phillips, this happened on the 11th and 19th of June 2020. The occupier who was a member of the Hangberg community approached the High Court for relief on the grounds that the city had unlawfully evicted him without following due process. It was also put forward before the court that he was equally entitled to restoration for his building because "*he was dispossessed from his home and accordingly unlawfully evicted*".[690] The City did not dispute that PIE did apply in this instance, however, the city averred that the Wendy house was not considered a home because Mr Phillips did not actually sleep in the building most times. The city equally alleged that Mr Philip had been living with his mother and the second time that the building was demolished, it was only partially built. Additionally, the City alleged that its failure to obtain a court order before evicting Mr Phillips was due to impossibility in that it "*could not access the courts due to the COVID-19 lockdown directives which restrained eviction proceedings*".[691] The court rejected all the City's arguments and arrived at its decision on the basis of regulation 36(1) of the Alert Level 3 Regulations. The court added that the pandemic had caused extreme hardship

[688] Ibid para 36
[689][2020] ZAWCHC 66, para 4.
[690] Ibid Para 6.
[691] Ibid para 11.

on poor communities and there no justifiable reason to evict Mr Philip except for a not-so-plausible averment that the Wendy house had been built on an environmentally protected sand dune. The court concluded that the City's actions were "*a sore and painful reflection of a failure to appreciate the plight of our poor communities, the hardships suffered and what can probably be described as objectifying the indigent as having no individual rights worthy of recognition*".[692]

The judgment is seen as commendable and serves as a cautionary measure across South Africa, implying that the courts were not tolerating illegal evictions, even if carried out against unlawful occupiers who knowingly and deliberately flout by-laws and legislation that prohibit land invasions. In the judgment, the court chose to protect human dignity and promote the right to housing, even if doing so perpetuated illegality. This suggests that in deciding a case, it is pertinent that the court equally considers a broad fair and equitable treatment.

As part of the mechanism towards protecting SERs, section 184(3) of the South African Constitution obliges the various organs of the state to make available relevant information to the South African Human Rights Commission (SAHRC)[693] on an annual basis. The SAHRC is expected to use the information received from the different organs of Government to monitor and assess the realisation of the rights in question. The SERs Reports are key summaries of actions presented by relevant organs of state. The aim of these reports is to equally identify any inadequacies or shortcomings of the measures adopted for each SERs. The information provided must include steps which the state must have taken towards the realization of SERs regarding health, housing, social security, food, education and the environment.

[692] Ibid para 10

[693] Section 184 (2) of the South African constitution empowers the Human Rights Commission to investigate and report all human rights issues in the country. In addition, it equally vests powers on the commission to carry out proper research and educate on human rights related issues

Regarding the mechanisms for implementation and enforcement, South Africa appears to be more proactive, particularly regarding judicial enforcement. The constitutional court, which is unique to South Africa has greatly influenced the status of SERs.

4.3.2 Kenya

Kenya aims to build a society that is founded on the very core national values and principles of democratic governance which include: national unity, patriotism, devolution of power, rule of law, active participation, human dignity, justice, human rights, accountability and sustainable development.[694] The set rules and principles binds all state government, state officials, public officials and all other persons whenever it applies.[695]

Under the repealed 1963 Kenyan Constitution, the Bill of Rights generously provided for the CPRs and SERs was non-existent in its constitution. The constitution of Kenya 2010 adequately provides for SERs,[696] this was a glaring disparity to the rescinded Kenyan Constitution. With its passing, Kenya equally began to recognise the importance of SERs and their role in democratic governance. In Kenya, these rights are now justiciable and enforceable. Article 19 of the Constitution of Kenya affirms that, "*the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies*",[697] and the aim of recognising human rights and freedom is to be able to preserve the dignity of its citizens and communities in other to protect human dignity.[698]

[694] Article 10(2) of the Constitution of Kenya
[695] Ibid Article 10(1)
[696] Ibid Article 43
[697] Ibid Article 19(1)
[698] Ibid Article 19 (2)

When the Kenya constitution was being drafted, there were no arguments as to the justiciabilty of SERs.[699] The arguments that existed during the drafting process was principally on what was perceived to be "*controversial and contentious matters such as land, reproductive health (abortion), marriage (gay rights) and devolution*".[700] The drafters did not focus on issues like SERs and if at all they should be judicially enforceable, this position changed when SERs cases began to emerge before the courts. Even though, there was little focus on the extent to which SERs should be judicially enforceable, SERs was still included in the Kenya Constitution which is enshrined in chapter four of the Kenya Constitution of 2010.[701]

Like the South African Constitution, the Kenyan Constitution does not provide in detail the contents of each SERs. Section 21(1) of the Kenya Constitution provides that the state is equally advised to take legislative actions, adopt policies and other approaches to ensure that the rights contained in that section are fulfilled. However, the Kenyan constitution equally provides in Article 20(5)[702] that that the state can be absolved from its obligations in Article 43 if it can prove that it lacks the required resources. Obviously, it is a clear determination of the drafters of the constitution considering the economic and financial resources that is required for its fulfilment. For instance, in other for the state to fulfil the right to education, it will require hiring trained teachers, building schools and ensure that the schools are equipped with adequate

[699] Godfrey O. Odongo & Godfrey M. Musila, "Direct Constitutional Protection of Economic, Social and Cultural Rights under Kenya's 2010 Constitution" in Danwood Mzikenge Chirwa and Lilian Chenwi (eds), The *Protection of Economic, Social and Cultural Rights in Africa*: International, Regional and National Perspectives (Cambridge University Press); Japhet Biegon, _The Inclusion of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical Issues' in Japhet Biegon and Godfrey Musila (eds) Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues (10th Series of ICJ Kenya's Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012)

[700] Ibid p343

[701] Constitution of Kenya 2010 adequately provides for SERs

[702] Article 20 (5) of the Kenya constitution provides that, "In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles,(a) it is the responsibility of the State to show that the resources are not available; (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion"

learning materials, likewise, the provision of water will require town planning and drilling boreholes. The provision of health care services will equally include building hospitals, employing capable doctors and supply of medicines.

Two theories were suggested by Godfrey Odongo and Godfrey Musila as to why SERs were later included in the Kenyan Constitution of 2010. Their first reason was based on the language that was used in the constitution, such as equity, equality and dignity, furthermore, they suggested that the pressure from the Kenyans who became increasingly aware of their rights and the need for its recognition. Their second theory was that there was a lot of internal pressure to recognise and protect these rights within Kenya and align with other countries like South Africa that recognises the importance of SERs and equally makes them justiciable.[703]

The protection of these rights is an indication that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources."[704] Fundamentally, either through internal or external pressure, the government of Kenya did recognize the need to simplify the justiciability of socio-economic rights as an essential way to transform the country.

Similar to the South African Constitution, Article 21(1) of the Kenyan Constitution provides that:

…(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

[703] Ibid p344
[704] John Kabui Mwai & 3 others v Kenya national examination council & 2 others [2011] eKLR

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities (4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms...[705]

The Kenyan constitution demonstrates that SERs are justiciable as can be seen in some of its cases regarding health, shelter and education. Regarding health, as guaranteed in section 43 of the Kenyan Constitution, the petitioner in the case of *Mathew Okwanda v The Minister of Health and Medical Services*,[706] had claimed that his right to health had been breached. The petitioner was a 68-year-old man who had already been diagnosed with a terminal disease. The petitioner had sought an order by the court to compel the state government to provide him with adequate treatment and medicine, the petitioner equally requested for funds to enable him pay for his food, water and housing.

Even though the Court specified that SERs which had been included in the Kenya Constitution was a sign "*to transform Kenya from a society based on socio-economic deprivation to one based on an equal and equitable distribution of resources*", the court ruled in favour of the defendants. The Court stated that the claim was for a particular need and not an all-inclusive approach to the right to health and because the state government did provide health services but at a cost, there was clearly no human right infringement. This is also an indication of the method adopted by the Kenyan judiciary to concentrate on a holistic approach that can facilitate the state to fulfil its obligations instead of focusing on just individual demands. The court in Okwanda held that;

[705] Section 21 of the South African constitution 1996
[706] [2013] eKLR

…On the basis of the material before the court, I find that at least the Government Hospitals provide healthcare to the petitioner at a cost. Whether the form of healthcare provided in these circumstances meets the minimum core obligations or the highest standard is not one that was the subject of evidence and argument before me. The issue of the prohibitive costs involved in accessing the treatment and whether such treatment should be free bearing in mind the necessity to progressively realize these rights was not explore in the depositions and therefore there is no basis upon which I can make a finding one way or the other…[707]

This statement above does indicate that the Kenyan courts are indeed willing to consider the minimum core approach in determining SERs claims unlike South African courts, the Kenyan courts also aim to seek evidence in other to decide on what is the minimum core of each right. Yet again, this equally raises the question of if quantifiable or qualitative facts are required to determine the minimum core for SERs or if SERs are just basic essentials that are universally known and common to each SERs as contended by Bilchitz.[708] Nevertheless, contrasting to the South African Court in Grootboom's case, which provided a series of justifications for not applying the minimum core approach, it is evident that the Kenyan courts appear to be more accessible to this method of analysing SERs.[709] The Kenyan Court equally persuasively contended that, "*even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question*". It must be recalled that the rights provided for under Article 43(1) (a) is preceded on the establishment of a set standard. This set standard can only be judged in an all-inclusive manner.[710]

[707] Ibid
[708] David Bilchitz "Are Socio-Economic Rights a Form of Political Rights?" (2015) South African Journal on Human Rights, 31:1, 86-111, Jeff Handmaker, Thandiwe Matthews. (2019) Analysing legal mobilisation's potential to secure equal access to socioeconomic justice in South Africa. *Development Southern Africa* 36:6, pages 889-904
[709] See the case of Jared Juma v Kenya Broadcasting Corporation and others judicial review no. 24 of 2013
[710] Ibid paras 16 & 21

In the case of *Satrose Ayuma & 11 others v. The Registered Trustees of Kenya Railways Staff Retirement Benefits Fund Scheme and Others,*[711] the petitioners were inhabitants of a housing development which the Kenyan Railway had owed for over fifty years. The respondents had issued the petitioners a notice to vacate the building within ninety days and immediately detached their water while the petitioners were still very much in the building. In addition, the respondents equally began destroying the complex before the expiration of the notice that was given to them. Subsequently, the petitioners sued for the breach of their right to shelter and their right to water as well. In arriving at its decision, the Court did admit that there was a clash between the right to housing, right to dignity and the right to property, but the court still decided in favour of the petitioners. The court relied on the South African court decisions, the general comments of the UNCESCRs as well as a decision of the African Commission in the *Social Economic Rights Centre and the Centre for Economic and Social Rights v Nigeria.*[712] The Court stated that the right to housing was essential to the promotion of other fundamental rights[713] and that issue of eviction also required judicial oversight.[714] The Court asserted that because the Kenyan constitution did not adequately provide for any suitable legal guidelines for evictions, the United Nations Basic Principles and Guidelines on Development based Eviction and Displacement[715] ought to have been referred to. The court equally held that the respondents ought to have been given adequate reasonable notice, discussed with the concerned parties and offered to provide the petitioners with alternative accommodation. The Court established that:

[711] Petition No 65 of 2010 [2011] eKLR
[712] Communication No. 155/96 (2001).
[713] Satrose's case (n665)
[714] Ibid
[715] UN Basic Principles and Guidelines on Development-based Eviction and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, 5 February 2007.

…At the very minimum, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities…[716]

The court equally recommended that the Kenyan government pass laws regarding evictions that are consistent international standards.[717]

In Satrose's case, even though, the Court failed to identify the minimum core requirements regarding the right to housing, the court contended that the Kenyan government was meant to follow the provisions provided for by the United Nations Guidelines on evictions. It is interesting to acknowledge that the determination of the minimum core approach of SERs is not considered, even though it is highly recommended, but a reasonableness approach. This demonstrates the effectiveness of this approach.

The case of *Mitu-Bell Welfare Society v Attorney General & 2 others*,[718] where the court established that the argument that social economic rights cannot be claimed two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the state considers it is ready to meet its constitutional obligations. Articles 21 and 43 require that there should be 'progressive realisation' of social economic rights, implying that the state must begin to take steps, and be seen to take steps, towards realization of these rights.[719]

The Court also observed that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection. Its obligation requires that it assists the court by showing if, and how, it is addressing

[716] Ibid
[717] Ibid
[718] Petition No. 164 of 2011
[719] Ibid Para 53

or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans.[720]

The issue of SERs was also tested in the case of *John Kabui Mwai and 3 others v Kenya National Examinations Council & Others,*[721] where the court aimed to determine if a government policy which restricted the number of pupils from private primary schools was discriminatory and infringed the right to education. The court noted that the inclusion of SERs in the Kenyan Constitution aimed at enhancing the economic needs of the Kenyan people especially the poor in other to promote their dignity. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This was adequately provided for in Articles 6(3) and 10 (2) (b).[722] Additionally, the Court in John Kabui Mwai's case opined that, "*the realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need*".[723] In addition, the Court held that the transformative agenda of the Constitution of Kenya is to reconstruct Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources.*[724]*

In most African Countries, a major impediment to the realisation of SERs is inadequate resources, as the resources that are available are inadequate to expedite the immediate delivery of socioeconomic goods and services to every citizen on demand. Countries such as Kenyan

[720] Ibid Para 78
[721] John Kabui Mwai case (n704) p4
[722] Ibid para 6
[723] Ibid para 7
[724]Mutungi Onesimus "Constitutionalising of Basic Rights" available at Available at http://www.commonlii.org//cgi_bin/dip.pl/ke/other/keckrc/200/4.htm accessed 22nd of May 2020.

aim to focus on applying a holistic approach in fulfilling the SERs and looks beyond the individual.[725]

Furthermore, any Kenyan citizen whose rights have been breached does not necessarily have to rely on its constitutional provisions, as Article 2(6) of the Kenyan Constitution adequately provides that treaties and conventions that have already been ratified shall equally form part of their laws.[726] This clearly suggests that the people of Kenya can equally rely on other relevant instruments which may include, ICCPR[727], ICESR[728]; UDHR[729] and the African Charter amongst others.

The Kenyan constitution provides that the objects of a democratic government, amongst other things is to be held responsible in the exercise of its powers, to encourage state progression by acknowledging and respecting diversity; provide powers to its people to promote active participation especially in areas that directly or indirectly affect them; recognising the need for peaceful society to enable them accomplish progress; promoting the interest of the minorities and the marginalised and to equally enable the delegation of the various arms of government by encouraging checks and balance.[730]

On the 11th of January 2021, the Kenyan Supreme Court delivered a judgment in *Mitu-Bell Welfare Society v. Kenya Airports Authority,*[731]the case was centred on the unlawful eviction and demolition of the homes of families residing in an informal settlement on public land for over 19 years. The members of the village had sought the High Court to stop the Kenya Airports

[725] John Kabui Mwai case (n704) para.6.
[726] See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.
[727] ICCPR p171.
[728] ICESCR p 3.
[729] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[730] Art. 174, Constitution of Kenya 2010
[731] Mitu-Bell Welfare Society v. Kenya Airports Authority, SC Petition 3 of 2018

Authority and the State (the respondents) from evicting them from their dwelling. On the 23rd of September 2011, the High Court judge had issued an interim order, which was disobeyed by the respondents and on the 19th of November 2011, they were forcefully evicted. The forced eviction took place without due notice and despite a High Court order prohibiting government authority from conducting the evictions, pending hearing of an application on the matter. Mumbi J in finding for the petitioners stated that the actions of the respondents in demolishing the village resulted in a violation of the rights of the petitioners under the Constitution. The Learned Judge then issued structural interdict requesting that the respondents provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements and that the respondents engage with the petitioners, with a view to identifying an appropriate resolution to the petitioners 'grievances following their eviction from Mitumba Village. The case was then taken to the Court of Appeal, the Court decided in favour of the appellants and proceeded to set aside the ruling of the High Court. The Court revisited the facts of the case and among other considerations and concluded that the trial judge had erred on various points of fact and law. The Appellate Court found that the appellants had no legitimate claim to the land, and could not, therefore, maintain a claim for violation of their right over the property (land) under Article 40. The appellate Court held that the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another. This decision attracted wide debate and sparked discussions.

On the other hand, the Supreme Court opined that as a member of the international community and a signatory to various United Nations treaties and Conventions, Kenya was bound by such international guidelines that were intended to safeguard the rights of persons liable to eviction. The Court emphasised upon Constitutional provisions in this regard that Article 2 (5) of the Constitution provides that, "*The general rules of international law shall form part of the law*

of Kenya" and while Article 2 (6) of the Constitution provides that, *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya".* The Court equally held that "*Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements".*

This decision has been lauded as progressive, having overturned the judgment of the Court of Appeal that was much criticised by global scholars as retrogressive for the realisation of socio-economic rights in Kenya.

4.4 Protection of SERs in South Africa and Kenya

The framework for constitutional democracy in South Africa and Kenya assigns to the courts a vital role in assuring effective protection and translation of the range of entrenched socio-economic rights. This in turn has enabled the courts in several situations to exercise extensive authority that has significantly influenced reforms.

The principle of progressive realisation of SERs is a common feature in both the South African and Kenyan Constitution. Section 26 (2) and 27 (2) of the South African constitution obligates the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of SERs. Article 21 (2) of the Constitution of Kenya on the other hand, provides that the State shall take legislative, policy and other measures including the setting of standards to achieve the progressive realisation of SERs. Progressive realisation of SERs takes cognizance of the fact that not all SERs must be implemented immediately.[732] Karl Klare,[733] in the context of South Africa, and Mark Mwendwa,[734] in respect of Kenya,

[732] Christopher Mbazira, 'A path to realizing economic, social and cultural rights in Africa? A critique of New Partnership for Africa's Development' (2004) 4 African Human Rights Journal 36.
[733] Klare Karl, 'Legal culture and transformative constitutionalism' (1998) 14(1) SAJHR at 146–188.
[734] Mark Mwendwa, 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' 2019 SSRN at 2

observe that features and mechanisms built into these constitutions are meant to trigger and guide the intended transformation.

The South African Constitution enshrines a Bill of Rights that forms the building blocks to the country's constitutional democracy.[735] The Constitution guarantees SERs with the caveat that these rights are to be realised progressively, subject to resources available to the state. For example, section 26 of the Constitution provides that:

… (1) *Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right...*

The various arms of the state are responsible for ensuring the progressive realisation of SERs. In addition, it is equally possible for realisation to happen through the courts. The South African Constitution contains an explicit injunction that makes its SERs enforceable by judicial action.[736] In order to foster the envisaged transformation, the Kenyan constitution contains a Bill of Rights that guarantee a range of justiciable SERs.[737] They are guaranteed in Article 43 of the Constitution.

To be able to provide remedy when these rights are violated, the constitutions of both countries grant the respective judiciaries with extensive review powers. In both jurisdictions, the courts are required to provide appropriate relief in cases where SERs are threatened or violated.[738] Such flexibility is granted in order to allow courts to issue innovative remedies which adequately protect SERs in both jurisdictions.

[735] Section 7 Constitution of South Africa 1996
[736] Ibid Sections 8 & 38
[737] Sandra Liebenberg, "Socio-Economic Rights: Adjudication Under a Transformative Constitution European" Journal of International Law, Volume 24, Issue 2, May 2013, Pages 739–744.
[738] See Article 23(2) of the Constitution of Kenya 2010 and Section 38 of the Constitution of South Africa 1996

International law does play a vital role in both jurisdictions. In South Africa, the courts usually consider international law when faced with interpreting rights and obligations imposed by these rights upon the state.[739] The Constitutional Court of South Africa has asserted on several situations that the weight to be attached to any rule of international law will be examined on a case by case and apply the relevant principle of international law that are binding on the state.[740] Thus, when interpreting constitutional rights, courts must incorporate the relevant international human rights standards, especially those that are binding on South Africa. In Kenya, the general rules of international law [741]and any treaty or convention ratified by Kenya form part of the domestic law.[742]

South Africa and Kenya have both ratified the ICESCR and are bound by the provisions of the bound African Charter. Therefore, and as has been confirmed by the courts in both jurisdictions,[743] when interpreting the duties imposed by SERs upon the state, the courts have been known to incorporate the standards recognised in the ICESCR and the African Charter, as interpreted by the CESCR and the African Commission respectively.

The South African court in the case of *Fose v. Minister of Safety and Security*[744] inferred that "appropriate relief" to imply such "*relief that is required to protect and enforce the constitution and the court may even fashion new remedies to secure the protection and enforcement of all important rights*".[745] Moreover, even though Section 3 of the South African State Liability Act[746] prohibits a successful party in a dispute from implementing a final court judgment in

[739] See s 39(1)(b) of the Constitution of South Africa of 1996
[740] See Grootboom's case(n551) para 26.
[741] Article 2(5) of the Constitution of Kenya, 2010.
[742] Ibid Article 2(6). This has also been demonstrated in Mitu-Bell Welfare Society v. Kenya Airports Authority, SC Petition 3 of 2018

[743] Satrose Ayuma's case (n711) para 69; Grootboom's case(n550) paras 45–47.
[744] 1997 (3) SA 786 (CC)para 19.
[745] Ibid para39
[746] No.20 of 1957

opposition to the resources of the state or even its officials, that notwithstanding, there exists pressure on the state to conform with International law.

The South African courts have established that SERs are interconnected with CPRs.[747] With this is mind, the South African courts seem to have a better constitutional mechanisms and structure to manage SERs related disputes though, there is no provision in its constitution explicitly that states that SERs are judicially enforceable or otherwise. The South African courts are aware of their broad constitutional powers to grant "appropriate relief"[748] and exerts preference to make "any order that is just and equitable". [749] Danie Brand[750] asserts that the South African Constitution is a retroactive one. It is evident that it is in line with the constitution which aims to improve the status of the South African people and fill the vacuum and pain that the apartheid had created.

Kenya's 2010 "transformative" Constitution directly incorporated a host of SERs into the country's legal framework becoming an exemplar of the direct approach to addressing this category of rights,[751] the transformation was almost immediately apparent as Kenya witnessed a literal explosion in SERs-litigation, in what could be described as a "leap-frogging" effort on the part of civil society and a receptive judiciary. Cases include those mandating the government to provide affordable drugs and medicines,[752] dismissing a law which had mandated the criminalisation of HIV/AIDS exposure and transmission,[753] and several cases on health rights in general.

[747] Grootboom's case(n551) para.2
[748] Section 38 of South African Constitution 1996
[749] Ibid Section 172 (1) (b). See Eric C. Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court", 38 Columbia Human Rights L. Rev 321, (2007): 347-384.
[750] Danie Brand, "Introduction to Socio-economic rights in the South African Constitution. International" Journal of Legal Information (2005), 33(3):492-495.
[751] Oloka-Onyango Joe, "Using Courts of Law to Tackle Poverty and Social Exclusion: The Case of Post-2010 Kenya Law", Democracy and Development, Vol. 19, pp. 193-210
[752] Patricia Asero & Others v. Attorney General, Petition 409 of 2009.
[753] The AIDS Law Project v. AG & 3 Others, Constitutional Petition No.97 of 2010; [2015] eKLR, March 18, 2015.

There has also been a spate of decisions on forcible evictions,[754] protection of the environment, and the rights of Indigenous peoples' to land. Not all the post-2010 decisions in Kenya have been progressive. For example, in the case of *John Mwai and others*, the court failed to apply the right to education,[755] similarly, in the case of *Charo wa Yaa v Jama Abdi Noor and 4 others*,[756] the court affirmed that the right of housing provided for in Article 21(3) is *"... not a final product for dispensation but is an aspirational right, which the State is to endeavour to render progressively*." This, and other cases where the courts have failed to step up have led some critics to comment that the Kenyan judiciary is yet to make the necessary transition to a new constitutional dispensation.[757]

Nevertheless, the 2010 Constitution of Kenya turned around the SERs jurisprudence in the country and provided a new boost to this kind of jurisprudence not simply in the sub region but for the continent. Ultimately, the Kenyan example conclusively demonstrates that the argument about the non-justiciability of SERs is simply incorrect. In addition, Article 21 of the Constitution of Kenya provides for progressive realisation of SERs because the realisation of this category of rights is largely reliant of the determinations of policy makers and not the courts.

It is evident that SERs are now being included in various constitutions in the world today. Ibe suggests that[758] there exist dual equivalent regimes of SERs in Africa. The author suggests that the first is demonstrated by South Africa, which explicitly makes SERs justiciable in their domestic courts. Kenya, likewise, fits into the first type of category. Under this category,

[754] See also Susan Waithera Karuike & 4 others v The town clerk Nairobi City Council, petition No.66 of 2010 [2011]
[755] Petition No.15 of 2011[2011] eKLR
[756] High Court of Kenya at Mombasa Miscellaneous Civil Application No.8 of 2011 (unreported).
[757] Arwa Jotham Okome, "Litigating Socio-Economic Rights in Domestic Courts: The Kenyan Experience," Law, Democracy and Development, Vol.17 (2013): 419-443.
[758] Stanley Ibe, Beyond justiciability: realising the promise of socio-economic rights in Nigeria (2007) 1 *AHRLJ* 225-248

individuals and organizations alleging that their rights have been breached may approach the courts to seek redress.[759] The other category aligns with most of the western world in the assertion that SERs are 'no more than pious wishes'.[760] In light of the above, it is obvious that SERs form an elaborate part of the Human rights model in South Africa and Kenya hence their significance cannot be ignored.

4.5 Conclusion

Both the 1996 Constitution of South Africa and the 2010 Constitution of Kenya are transformative in nature. It is evident that South Africa has made the most progress in the advancement of SERs. Regarding the mechanism for the recognition of SERs, South African still takes the lead particularly with respect to its judicial mechanisms. Kenya has equally made significant progress regarding the status of SERs. The Constitutional Court which is a special feature in South Africa in comparison to other countries equally has a lot to do with the progress being made. It is evident that the level of economic development has been greatly influenced by the realisation of SERs. This is because as mentioned earlier, realisation SERs plays a significant role in promoting the dignity of man and economic development.

The next chapter will critically examine the countries that have been selected for this study, the aim of chapter five will be to study the various enforcement mechanisms that have been used in South Africa and Kenya juxtaposing them with the position in Nigeria with the aim of answering the research questions.

[759]Pieterse Maruis, "Coming to terms with Judicial Enforcement of Socio-Economic Rights" 2004 SAJHR 383 – 388 where he asserts that in many constitutional democracies, citizens have increasingly turned to courts to protect their rights in the realm of socio-economic interests.
[760] Ibe (n757) p229

CHAPTER FIVE: ANALYSIS OF THE FINDINGS FROM CASE STUDIES

5.1 Introduction

Considering findings from the case studies, this chapter examines the progress of socio-economic rights in two jurisdictions and explains existing justiciability mechanisms for their enforcement. This chapter will answer the research questions posited in chapter one of this research, by highlighting major findings from the case studies, including the challenges and obstacles that have been discovered in the implementation of social economic rights in both jurisdictions and relate the findings to the current position in Nigeria.

5.2 Judicial Enforcement of SERs in Kenya and South Africa

This section aims to examine the approaches adopted in South Africa and Kenya regarding the protection of SERs. This study aims to argue that the methods adopted in these countries may equally be considered by the Nigerian Government and perhaps achieve the same results.

5.2.1 The African scene: National comparisons

The world poverty clock indicates that Nigeria with a population of over two hundred million people, has nearly fifty percent of its population living in abject poverty.[761] The situation becomes more critical when it is noted that by 2050, the number of poor persons living in Nigeria would be more than half of this number considering the surge of Nigeria's young population, this is a ticking time-bomb for the sub region.[762]

Waiting is an accepted part of realization under International human rights law.[763] In other to fulfil a right, a state must be seen to act positively.[764] The duty to fulfil rights may take a

[761] World Poverty Clock <https://worldpoverty.io/map> Accessed 16 June 2020
[762] Ibid
[763] Katharine G. Young, *The Future of Economic and Social Rights* (Cambridge University Press, 2019)
[764] Katharine G. Young. Waiting for Rights: Progressive Realization and Lost Time. *The Future of Economic and Social Rights, Katharine G. Young, ed., (*Cambridge University Press 2019)

considerable time, especially for states with limited resources, or uncoordinated enforcement mechanisms.[765] The lapse between rights recognition and rights fulfilment is usually referred to 'progressive realization', which is the obligation by which state parties to the ICESCR agree to be bound.[766] The promotion and protection of SERs continues to lag behind that of CPRs largely because a whole industry of intellectuals has been devoted to demonstrating that the two categories of rights are fundamentally different.[767]

It is important to identify the wording used in the South African Constitution and the Kenya Constitution. Regarding the right to shelter, the South African provision is similar to the Kenyan Constitution. The South African Constitution provides for '*the right to access adequate housing*' whilst the Kenyan Constitution guarantees "*the right to accessible and adequate housing and reasonable standards of sanitation*". Even though, the South African constitution does not mention sanitation, the Kenya constitution expanded on the right to housing to include sanitation.[768] Regarding the right to health, the Kenyan Constitution refers to "the highest attainable standard of health" while the South African constitution simply mentions the right to have access to health care services. By incorporating the words "highest attainable standard of health," the Kenyan Constitution perhaps tries to protect Kenyans from being exposed to undeveloped health care. The Kenyan courts have referred to the South African law when interpreting health rights.[769]

It is evident that the Kenyan Constitution is more detailed and generous in its language and wording, and it also appears the drafters made a conscious determination to set minimum

[765] Ibid p10
[766] Article 2(1) ICESCR
[767] Lord Lester of Herne Hill QC & Colm O'Cinneide, "The Effective Promotion of Socio-Economic Rights," in Yash Ghai & Jill Cottrell (eds.), *Economic, Social and Cultural Rights in Practice*: *The Role of Judges in Implementing Economic, Social and Cultural Rights* (Intersights London, 2004) p19-22.
[768] Satrose's case(n711) para 74
[769] In addressing health rights, the court in Matthew Okwanda's case referred to Soobramoney's case stating that the state had to adopt a holistic approach taking cognisance to the larger needs of the society

guidelines in its constitution. It is debatable however, that the Kenyan courts are cognizant of the minimum core approach, but it has been established that the courts are yet to have made a finding on whether the same applies in the Kenyan context. In the case of *Mathew Okwanda*[770] where the court held that, "*Whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was the subject of evidence before m*e".[771]

Even though both countries have adopted the reasonableness approach, the South African courts have indeed played a key role in advancing the jurisprudence of the Kenyan law regarding the enforcement of SERs. Nevertheless, they have equally acknowledged the importance of the minimum core approach in the interpretation and enforcement of SERs.

It will be relevant to mention India at this point as its Constitution[772] equally differentiates between CPRs and SERs. Examining the Indian constitution, Article 37 provides that the rights contained in the FODPSP are not enforceable by the courts. However, the courts view SERs as central to their democratic government and remarkably, the courts in India have implemented a means to give motivation to the state in applying the rights guaranteed in part IV of its Constitution.

It has been established that the courts in India are well known especially for judicial activism in promoting rights guaranteed in its constitution. Consequently, SERs have been transformed from being non-justiciable to legally enforceable rights. This was established in the case of *Unnikrishnan v. State of AP,*[773] were the court held that regardless of the designation of a right, it can be applied as fundamental, although it may not be labelled as a fundamental right in the constitution. In addition, the Supreme Court expanded the right to life to include the right to

[770] Okwanda's case(n706) para 21
[771] Ibid
[772] SERs are provided for in Article 36-50 of the Indian constitution
[773] 1 SCC 645 (1993)

health.[774] Judicial activism by the Indian courts has helped to shape SERs in India. The courts have decided that each of the rights should be viewed as equal and none is superior to the other, what is also fundamental in governance of an entire country cannot be less important in the life of an individual.[775] Even though the Indian courts have not always litigated in favour of the litigants who have had their SERs violated, the courts have been able to hinder any law that violates SERs provisions guaranteed in its constitution.[776] To certify obedience with their judgements in regard to SERs, the courts would instruct the government to create a strategy, typically within a precise period to remedy the said infringement.

It has become increasingly clear that the inclusion of SERs in any domestic constitution is a political one however, the duty of interpreting and enforcing SERs is undeniably the function of the judiciary.[777] The South African courts are responsible for developing the normative scope of socio-economic rights by highlighting the duties imposed on states. Giving this rights priority and providing a generous and substantive interpretation is required to be able to achieve societal aims. Brian Ray and Sandra Liebenberg assert that, "*a substantive interpretation of socio-economic rights is central to promoting the transformative agenda of the South African constitution for a number of reasons*".[778] The government can be held accountable for its obligations to secure for all members of society a basic set of goods, such as education, social security, health care, food, water, shelter, access to land and housing.[779] Its justiciability does

[774] Francis Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 2 SCR 516.
[775] Circle of Rights, "Justiciability of ESC Rights – the Indian Experience" University of Minnesota, Human Rights Resource Centre, Available at:<http://hrlibrary.umn.edu/edumat/IHRIP/circle/justiciability.>21 August 2019
[776] Central Inland Water Transp. Corp v Ganguly (1986Central Inland Water Transp. Corp. v. Ganguly (1986) 2 S.C.R. 385–88. The court held that bargain put forward was based on unethical terms as it contradicted the justified reasons and seems to have taken place under unfair edge over the others. And the state under Section 39 should favour the policy of safeguarding its citizens and providing equal pay for equal work for both sexes i.e. males and females equally decreasing the concentration of wealth and means of production to the common detriment.
[777] Goldstone Richard, "A South African Perspective on social and Economic Rights".(2006) Human Rights Brief 13, 4-7.
[778] Brian Ray, Sandra Liebenberg. Socio-Economic Rights. Adjudication under a Transformative Constitution, (2013) European Journal of International Law, Volume 24, Issue 2 Pages 739–744.
[779] Sections 26, 27, 28(1)(c) and 29. of the South African Constitution

assist in ensuring the realisation of the State's constitutional obligations to the poor.[780] The inclusion of both categories of rights in the South African Constitution, symbolises an understanding that full transformation from an apartheid society requires both a restructuring of the legal-political framework that upheld it, as well as the transformation of the overwhelming social and economic consequences of its policies and laws.

5.2.2 Courts in South Africa and Kenya

The South African constitution contains a solid foundation for the enforcement of relevant SERs. As suggested by Ebadolahi,[781] the Constitution is renowned all over the world for integrating both categories of rights into its Bill of Rights, thus making them justiciable. In the case of Governing Body of the *Juma Muzjid Primary School & Others v. Essay N. O. & Others*[782] the Constitutional Court expanded the right to basic education in South Africa. In that case, the court differentiated between 'basic education' as provided for in section 29 (1)(a) of the South African Constitution[783] from 'further education' provided for in section 29 (1)(b) and established that while the former is immediately realisable, the latter is to be 'progressively available and accessible. The judgement delivered in this case, is seen as one of the most influential judgments in education law jurisprudence in South Africa, apparently as it has encouraged the lower courts to provide functional content to the right to education. Although the rights to housing, health, food, water, social security and further education are qualified to the extent that their realisation is subject to the internal limitations of 'progressive realisation', 'reasonable legislative measures', and/or 'available state resources', the Court held

[780] Katherine Young, "A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review" (2010) 8 International Journal of Constitutional Law 385.
[781] Mitra Ebodolahi, 'Using Structural Interdicts and the South African Commission to Achieve Judicial Enforcement of Economic, Social and Cultural Rights', 83. New York University Law Review [2008]1565 –1606.
[782](CCT 29/10[2011] (ZACC13:2011
[783] The court held that it was the states obligation to provide basic education as guaranteed by the constitution, but it was not confined to making places available at schools. It also entails building classrooms, distributing teaching materials, etc

that the right to basic education is an immediately realisable right as it does not contain any of the qualifiers.

Furthermore, in the case of *Tripartite Steering Committee & Anor v. Minister of Basic Education and Ors,*[784] the High Court held that the right to education is meaningless without transport to and from school at state expense in appropriate cases and that the failure of the state to provide means of transportation violated the student's right to basic education pursuant to section 7 (2) of the South African Constitution. The Constitutional Court adopted a reasonableness approach in deciding state's action. This approach discards a functional questioning of the right, and simply tends to establish whether the state has performed reasonably in giving effect to the right in dispute.[785]

This approach was extensively explained by Constitutional Court in the case of Grootboom[786]which dealt with the right of access to housing as provided for in section 26 of the Constitution.[787] The Court rejected a substantive inquiry by refusing to interpret section 26(1) as giving rise to a minimum core content.[788]According to the Court, section 26(1) read in conjunction with section 26(2) merely imposes a positive obligation on the state 'to adopt and implement a reasonable policy, within its available resources' to ensure the progressive implementation of the right.[789] The Constitutional Court has continuously applied this approach to the other SERs claims.[790] The South African constitutional court has remained in the forefront of judicial intervention in SERs issues. In addition, the Court has also held that should a state refuse to fulfil SERs, they would have to prove the lack of funds as part of their defence.

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[784] 1830/2015] (5) SA107 (ECG).
[785] Wilson Stuart & Dugard Jackie 'Constitutional jurisprudence: The first and second waves' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 38
[786] See Grootboom case(n551) para 30
[787] Lorette Arendse, "The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective <file:///C:/Users//Downloads/The_Obligation_to_Provide_Free_Basic_Education_in_.pdf> accessed 4 January 2021
[788] Grootboom's case(n551) paras 34-36.
[789] Ibid paras 39-46.
[790] See Treatment Action Campaign case(n617)

This also can serve as a reply to the argument on separation of powers as it is a clear example of the judiciary being able to check the acts of the executive. Despite the supposed challenges to the enforcement of SERs, it is undeniable that these rights are especially important to any country.

The incorporation of SERs into the constitution remains the bedrock of economic and political development thereby promoting both executive and legislative arms to set all the necessary political and institutional machineries in motion for its realisation.

As provided for by the South African Constitution, the courts are seen to be an impartial forum[791] in which SERs can be refereed. In deciding cases of this nature, the presiding officers act independently when applying the law and without fear or favour. The courts play a significant function as they are responsible for interpreting and applying the laws enshrined in the constitution and other relevant laws. Some relevant and prominent judgments that have contributed to South Africa's jurisprudence in the area of SERs include the Grootboom, Soobramoney's and Makwanyane's cases. Importantly, in Grootboom's case, the court stressed on the indivisibility of SERs and Civil and political rights. According to the Constitutional Court:

…Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation

[791] Section 165 (2) of the Constitution of South Africa

of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential...[792]

The Constitutional Court has in several cases also underscored the centrality of participatory democracy to the achievement of constitutional goals and values,[793] the necessity of this participation for purposes of informed decision-making[794] and acknowledged the duty of the State to take positive measures to ensure that the public has the effective capacity and opportunity to participate in decision-making processes.[795] In particular, it has highlighted the need to listen to the voices of the poor and the marginalised group.[796] The Court has equally asserted that the participation of all citizens especially the poor in participating in their access to goods and services, validates the values of dignity and democracy.

Over the years, SERs have experienced incredible transformation. They are now increasingly becoming the cornerstone of social actions all in a bid to ensure its realisation and enforcement in Africa. This stems from its importance in the lives of every African citizen, essentially as it focuses on the necessities of life. The primary mechanism for the enforcement of SERs has been considerable effective through the courts as demonstrated in the case studies in the previous chapter. Because of the status of this group of rights, the phrase, "progressive realization" has been associated with SERs, which has been set against the obligation provided in various human rights treaties.

[792] Grootboom's case(n551) para 23.
[793] In Masetlha v President of the Republic of South Africa 2008 (1) BCLR 1 para 181, the Constitutional Court elaborated upon the goals and values of the Constitution in relation to democracy and participation: "[I]t is apparent from the Constitution that the democratic government that is contemplated is a participatory democracy which is accountable, transparent and requires participation in decision-making.
[794]Ibid para 33.
[795] See Doctors for Life International v The Speaker of the National Assembly 2006 (12) BCLR 1399 (CC) para 108, 112–117.
[796] Ibid para 115, where the Constitutional Court highlighted the importance and value of participation by marginalised groups in legislative processes in order to give legitimacy to legislation and dignity to those who participate.

Several authors have articulated their discontent with imprecision of the reasonableness concept. It has been contended that the reasonableness approach fails to provide meaningful content to SERs provided for in various national constitutions. The idea of reasonableness was introduced in the optional protocol to the ICESCR in other to assess individual complaints regarding state compliance. This approach aimed to determine the extent to which deliberate measures were taken and targeted towards the fulfilment of SERs to ascertain if discretion was applied, but most importantly, to determine if resource allocation is in line with international human rights standards.

On the other hand, the concept of "minimum core obligations" has equally attracted considerable debate.[797] The concept has been noted for its uncertainties, especially debates on who should determine its content.[798] In assessing a state's policies with the aim of considering if and to what extent they have complied with their duties to progressively fulfil these rights, the CESR tends to consider the extent to which they are available, adequate, accessible and adaptable.[799]

In South Africa, even though the Constitutional Court has been asked to define the "minimum core obligation" that arise from provisions under sections 26 and 27, the Court has been unwilling to do so.[800] It has taken the view that, it is for the government to determine the scope of the minimum core obligation rather than the courts, but that determination will be subject to

[797] See Katharine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' Yale Journal of International Law 33 (2008); Erika De Wet, The Constitutional Enforceability of Economic and Social Rights: The Implications of the German Constitutional Model for South Africa (Durban: Butterworths 1996)
[798] Ibid p113-114
[799] Lilian Chenwi, 'Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court' Research paper written for Studies in Poverty and Inequality Institute (2010). Lilian Chenwi contends that availability of resources requires state parties to take positive steps and ensure that the expected goods and services and proper frameworks required to enjoy any right are readily available to all irrespective of how it is achieved.
[800] See Grootboom's case(n588) at para 33

scrutiny by the courts. This approach has been criticised by some commentators,[801] but approved by others.[802] Where the government fails to take steps to fulfil economic and social rights, the courts will compel it to act.[803] With this in view, it will be essential that the various arms of government define the content of the minimum core for each right, with the aim of reviewing its reasonableness, as this will in turn enable state's implement their policies in a reasonable manner and within a reasonable time. This will in turn influence Government policies as it will become necessary to address the needs of the most vulnerable and prevent Government from adopting regressive measures in relation to SERs.

Examining the minimum core approach, the aim for adopting this principle was to guarantee the fulfilment of at the very least, the barest minimum level of each of the rights provided for in the ICESCR.[804] Each state party to the covenant are obligated to guarantee that SERs are fulfilled. State parties are bound to fulfil a minimum core obligation by ensuring the satisfaction of a basic level of rights.[805] The approach aims to bridge the gap which exists between inadequate resources and fundamental rights.[806] It is not expected that states spend resources which they do not have or exhaust all its resources fulfilling SERs obligations.

The Limburg Principles mandate states to take all legislative, administrative, judicial, economic, social and educational measures to fulfil the obligations provided for under the

[801] Craig Scott and Philip Alston, "Adjudicating constitutional priorities in a transnational context: A Comment on Soobramoney's legacy and Grootboom's promise" (2000) 16 SA Journal on Human Rights 206-268
[802] Carol Steinberg, "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 123 South African Law Journal 264-284; Karin Lehmann "In Defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core" (2006) 22 American University International LR 163-197; Cass Sunstein "Social and economic rights: Lessons from South Africa" (2001) 11 Constitutional Forum 123-131.
[803] See Grootboom's case (n551)
[804] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 10
[805] See Grootboom's case(n551)
[806] Russell Sage, 'Minimum State Obligations: International Dimensions' in D Brand & S Russell (eds) Exploring the Core Content of Socio-economic Rights: South African and International Perspectives (2002) 11 14.

ICESCR.[807] The Principles restate that the legislative actions may not be sufficient enough, however, it should be complemented by applicable judicial remedies.[808] The legislature and the executive as the political organs, however, are responsible for ensuring the progressive realisation of SERs, while the courts also complement the two organs.[809] The internationally acknowledged concepts of the several obligations generated at least four levels of duty to respect, protect, promote and fulfil these rights.[810] Similar provisions are made in section 7(2) of the Bill of Rights in South Africa and in section 13 of the Nigerian Constitution.[811] The obligation of 'progressive realization' under the ICESCR is often interpreted in light of available resources, this research has demonstrated that this is not necessarily the case.

According to the Limburg Principles on the Implementation of the ICESCRs, states are "obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all",[812] similarly, the Maastricht Guidelines provide that "minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties".[813] Bilchitz has rightly affirmed that the minimum core obligations are positioned upon states to realise SERs without delay.[814]

[807] The Limburg Principles on the Implementation of the ICESCR, para. 17. A group of 29 experts in international law adopted the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights on 6 June 1986, 70, at para. 17. See the UN Doc. E/CN.4/1987/17, 1987, and 7 Human Rights Quarterly (1987), 122–35. Limburg guidelines are not legally binding per se, but provide a subsidiary means for the interpretation of the Covenant. See also E. A. Taiwo, 'Defining the Nature and Content of the Right to Education in Nigeria: A Call Towards a Positive Realisation', seminar paper presented at the Tilburg Law School during a Lunch Seminar Series of the Netherlands Institute of Advance Studies, 8 December 2011, at 14

[808] Para. 19 of the Limburg Principle: see also Taiwo (n789), p16.

[809] Sections 34 and 38 South African Constitution.

[810] See the SERAC's case.

[811] Section 7(2) mandates the state to respect, protect, promote and fulfil the rights in the Bill of Rights while section 8(1) of the South African Constitution provides that the Bill of Rights applies and binds all organs of the government. Section 13 CFRN also mandates all organs of government to observe and apply the provisions of DPSP in Chapter II of the Constitution. See also Ibe p201

[812] UN Commission on Human Rights, 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987, E/CN.4/1987/17, principle 25.

[813] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, para 9.

[814] David Bilchitz(n662) p2

At this juncture, the researcher acknowledges that several African countries are already fulfilling their obligations regarding SERs already provided for in the covenant, considerable efforts have been done, however, more efforts will still need to be put in to ensure that this practice is embraced in state parties in line with the universal duties to respect, fulfil and protect SERs. Even though the UNCESCR suggests the use of suitable means in recognising these SER, the application of other mechanisms has been established to be equally effective, especially where it becomes necessary to provide effective remedies.[815]

Having carefully examined the various arguments, this thesis suggest that what amounts to a minimum core is fundamentally a question of fact which domestic courts can determine specific to each state, so long as it is within the scope indicated by the UNCESCR. Minimum core obligations are basically a simple[816] meaning of SERs without preconception to the principle of progressive realisation. This principle will allow the courts to implement the basic essential of each SER and in turn the state will be held accountable for any breach as the progressive realisation standard is frequently without its challenges and contradictions.

In an expanded line of cases,[817] even though the South African courts have declined to apply the minimum core approach as a foundation in determining their cases involving SERs despite the guidance suggested in the General Comment 3.[818] The courts have heavily relied on the "reasonableness test" which comprises the scrutiny of state's obligation imposed on the government by the South African constitution and then analysing the reasonableness of the government's actions or inactions in respect of the violation. Regardless of the Court's

[815] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para 9.
[816] Ibid p244
[817] See Grootboom's(n551) and Treatment Action Campaign cases(n617); Mazibuko v City of Johannesburg [2010] 3 BCLR 239 (CC). Juma Musjid Primary School and others v Essay NO and others 2011 (8) BCLR 761 (CC).
[818] African Commission on Human and Peoples' Rights Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights <www.achpr.org/instruments/economicsocial-cultural/> accessed 30 January 2019.

awareness of international jurisprudence and the fact that the Constitution does not rule out a minimum core approach,[819] the Court has refused to define and develop the minimum core of constitutional socio-economic rights.

The South African courts in respect to the other arms of government have typically stated that defining what amounts to a minimum core content of each SERs should be within the ambit of the legislature or executive arm of government, and in their opinion, the courts lack the official capacity to do so. The South African debate on the minimum core customarily centres on its prospective role in the judicial enforcement of SERs.[820] In other words, the argument focuses on how and to what extent the courts should define the minimum core when evaluating conformity with the government's SERs obligations.[821] As earlier mentioned, the South African Constitution in principle has made it the main responsibility of the legislature and executive and not the judiciary to provide specific content to the SERs in its Bill of Rights.[822]

Moreover, even though the idea of the minimum core obligation showcases notably in international and regional instruments especially African, neither the UNCESCR nor the African Charter expects to classify and expand the minimum core to the exclusion of the courts in State Parties. The South African Court also observed that although the Committee on ESCR has established that the socio-economic rights guaranteed in the ICESCR impose a minimum core obligation, its General Comment "*does not specify precisely what the minimum core is*".[823]The Court suggested that in the absence of comparable types of

[819] Wesson Murray, "Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court" (2004) 20 South African Journal on Human Rights 284 at 302
[820] See Bilchitz (2003) at 1-26; Bilchitz (2002) at 484-501. See also Liebenberg (2010) at 146-198.
[821] Bilchitz (2002) at 484-501; Mbazira (2009) at 68-72; Liebenberg (2010) at 163-198.
[822] Courts can also give content to constitutional socio-economic rights through interpretation and have a quasi-law-making role to translate these rights into enforceable legal claims. See Liebenberg (2010) at 40; Pieterse M "Legislative and executive translation of the right to have access to health care services" (2010) 14 *Law,* Democracy and Development 231 at 232.
[823] See Grootboom case(n551) at para 30.

information and evidence, it was more difficult to define the minimum core in the domestic context.[824] The South African Constitutional Court have justified why they have rejected adopting the minimum core approach, reason being that, there are no immediate right for everyone to access a minimum core under each SERs[825]; the court lacks the technical competence and democratic legitimacy to determine the minimum core elements of these rights[826]; and making such a decision would violate the separation of powers.[827]

In Kenya on the other hand, the courts are yet to adopt a minimum approach in deciding SERs case However, given the similarities in the constitutional frameworks with South Africa, the three objections that had already been raised by the South African Constitutional Court are likely to be applicable in the Kenyan courts. This has already been demonstrated in the Kenyan Court of Appeal in the case of *Kenya Airports Authority v Mitu-Bell Welfare Society*[828] where it was held that courts should be cautious not to undermine the separation of powers when enforcing the positive duties created by these rights. The obligation to provide vulnerable groups with access to the minimum core element of each right is one of the positive obligations of the state.

Furthermore, the South African Constitutional Court has dealt with the concept of meaningful engagement in the enforcement of SERs, a similar approach was applied by the High Court in *Kepha Omondi Onjuro v Attorney General*,[829] *the Satrose case*[830] and *Mitu-Bell Welfare Society v Attorney General.*[831] In these cases, the High Court of Kenya adopted precedent from the South African Constitutional Court by issuing structural interdicts which required the

[824] Ibid at para 31 and 32
[825] TAC's case(n617) Ibid para 34.
[826] Grootboom's case (n551) 32–33. However, it should be noted that, in the Grootboom case, the court suggested that there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable
[827] Mazibuko v City of Johannesburg(n767) para 61.
[828]Mitu-Bell Welfare Society(n718) para 141.
[829] 2010 (3) SA 454 (CC). para224
[830] Satrose case(n710) note 22
[831] [2013] eKLR.

parties to the case to engage meaningfully with each other and revert to court with an appropriate plan.[832] The Kenyan Courts have been given discretionary power adopt new remedies and ensure that the provisions of the Bill of Rights are not seen as mere aspirations.[833]

With the 2010 constitution, progress has been recorded with the enforcement of SERs. In deciding SERs cases, the Courts have adopted a test of reasonableness to scrutinise whether adequate measures have been taken by the state in response to the violation of a particular SER. In doing so, the court does not necessarily compare other existing measures that have been put in place, ones it considers what is available as being reasonable, the test for this requirement would be satisfied. In the case of Federation of Women Lawyers Kenya, the Court opined thus:

…The Government must ensure that the National and County Governments have laws, policies, programs and strategies that are adequate to meet its obligation under Article 27. The measures must establish coherent programs towards the progressive and the immediate realization of all the rights within the State's available means. The programs and the legislations must be capable of facilitating the realization of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive, not for the courts. We think the measures they *adopt must be reasonable, practicable and they must be able to address the long term and the short term needs of the vulnerable groups of our society…*[834]

In addition, the High Court in the case *of Jaffer v Ministry of Justice*[835] relied on the Grootboom's case and held that:

[832] Ibid para 79
[833] Mark Mwendwa, 'The jurisprudence of Kenya's Court of Appeal on socioeconomic rights' (2019) p15 Available at: https://ssrn.com/abstract=3379560 Accessed 19th of December 2021
[834] Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another, Petition No. 102 of 2011
[835] Jeffer Isaak Kanu v Ministry of Justice, National Cohesion and Constitutional Affairs & 3 Others [2013] Eklr.

…A court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met…

This test has been heavily criticised for being inadequate in demonstrating the actual content of SERs and the nature of obligations they aim to protect.[836] There are still some unsettled queries as to the nature of the minimum core content especially regarding state obligations. There remain likely areas of conflicts in trying to understand the relationship between the core content and core obligations of the various SERs. In some of the General Comments[837], and international law instruments, the lines between core content and core obligations are quite unclear, which has made it difficult to appreciate their functions in relation to the realisation of specific SERs.

That notwithstanding, the Courts in Kenya have made considerable efforts in providing remedies whenever a SER is violated. And most importantly, the courts have been able to develop resourceful approaches that address these violations. This is an indication that the law is an instrument of transforming the society. Several remedies that have been awarded have equally compelled the government to adopt certain measures to ensure that SERs are protected.[838]

[836] Centre for Economic and Social Rights, The Universal Periodic Review: A Skewed Agenda? Trends Analysis of the UPR's Coverage of Economic, Social and Cultural Rights (New York: CESR, 2016), 11
[837] CESCR General comment 3 and CESCR General Comment No. 14

[838] Jennifer Gitiri, "Progressive Nature of Social and Economic Rights in Kenya: a Delayed Promise?" Volume 6, Number 1, (2020) Available at: https://doi.org/10.31078/consrev615 accessed 1st of January 2022

Both constitutions were designed to ease the country's break with its past and transform their society that is based on certain ideals.[839] Karl Klare,[840] relating to South Africa, and Mark Mwendwa,[841] in respect to Kenya, both observe that features and mechanisms in their constitutions were designed to trigger and guide the intended transformation. For a start, it is generally agreed that the realization of all SERs cannot be achieved in a short period of time.[842] Progressive realisation of SERs is a standard that has been adopted by various states in seeking to transform SERs by overcoming historical injustices, post conflict situations, and affirmative action.[843] Even though, a general acceptance of progressive realisation of SER has not been achieved since the establishment of the ICSECR.[844] There is no doubt that through judicial activism the frontiers of human rights and social justice can be expanded for the benefit of the large majority of Africans.[845]

In both jurisdictions, the reasonableness approach has been adopted in preference to the minimum core approach. With regards to SER jurisprudence in South Africa, the principle of reasonableness was first stated by Yacoob J in Grootboom's case[846] which focussed on the interpretation of the right to adequate housing guaranteed in section 26 of the South African Constitution. According to Yacoob J, rational and adequate measures on the part of the government "*must establish a coherent public housing programme directed towards the*

[839] Pius Langa, 'Transformative constitutionalism' (2006) 17 Stellenbosch Law Review at 351– 352; Mwendwa, M. 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' 2019 SSRN at 2
[840] Karl Klare, 'Legal culture and transformative constitutionalism' (1998) 14(1) SAJHR at 146–188.
[841] Mwendwa(p787)
[842] CESCR, General Comment no. 3, para. 9
[843] Ahmed Dawood and Elliot Bulmer, *Social and Economic Rights International IDEA Constitution-Building* Primer 9, 2nd Ed (Stockholm: International Institute for Democracy and Electoral Assistance, 2017), 12-14.
[844] Kondo Tinashe, "Socio-Economic Rights in Zimbabwe: Trends and Emerging Jurisprudence," African Human Rights Law Journal 17 (2017) 163-193
[845]Nlerum S. Okogbule & Cleverline T. Brown, Social and Economic Rights and Transformative Constitutionalism in Africa: Imperative of Expanding the Frontiers of Judicial Activism US-China Law Review, (2019), Vol.16, No. 2, 52-64
[846] Grootboom's case(n551)

progressive realisation of the right of access to adequate housing within the state's available means". [847] Yacoob J, went on to suggest that:

…. any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable….[848]

As noted above, the test for reasonableness is subjective, and depends on the circumstances of each case that is before the court, with the aim that the legal system is faced with an evolving standard of reasonableness in SERs claims. In addition, the standard of the reasonableness approach can be seen to be derogable, given that the standard applied by each court is subject to the limitations of resources available within the state. The court in the South African case of *Minister of Health v TAC*[849] affirmed that "…. *the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them as the state is not obliged to go beyond available resources or to realise these rights immediately*".[850]

By adopting a standard of reasonableness, the South African and Kenyan courts have created a standard of review that addresses the concerns that many critics may have regarding the justiciability of SERs. This confirms the immense contributions by the courts in the enforcement of SERs.

[847] Ibid
[848] Ibid
[849] TAC's case(n617) para 34.
[850] Ibid

5.3. Human Rights Institutions

The 1990s brought about an exponential increase in the establishment of National human rights institutions in Africa. National Human Rights Institutions (NHRIs) have now become an integral part for the protection of human rights in Africa. Several African countries have established human rights institutions, however, its functions vary in terms of its mandate and mode of establishment. Kenya and South Africa have both established human rights institutions in their respective states. Even though these institutions are diverse, they all adhere to the Paris Principles. The South African Human Rights Commission (SAHRC) is one of the most respected NHRIs in Africa.

The SAHRC was established in 1995, following the coming into force of the Human Rights Act 1994. Also relevant to this institution is Article 184 of the South African Constitution of 1996, which provides for its functions.[851] The SAHRC plays a significant role in the protection and enforcement of SERs, It is responsible for monitoring among other rights, SERs implementation.

The SAHRC performs three major functions. The first is to promote the respect for human rights, secondly, to ensure protection, development and attainment of human rights and thirdly, to monitor and assess the observance of human rights in the South Africa.[852] To be able to carry out its functions effectively, the Commission has been granted wide powers under the law.[853]

Annually, the Commission requests information from various organs of the Government on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the

[851] The SAHRC has the mandate to promote and protect human rights. The Commission equally monitors human rights violations

[852] See Article 184(1) of the Constitution of South Africa

[853] These include the power to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate. Article 184(2),

environment".[854] In this respect, the Commission has drafted several reports,[855] in which it analysed efforts taken by the government in implementing SERs, considering whether the relevant and applicable laws, policies and programmes were reasonable, if the budgets were sufficient, if progress had been achieved on SERs and on that basis, made recommendations to government.[856] As provided by the South African Constitution,[857] each year SAHRC must require relevant organs of state to provide it with information on the measures taken towards the realisation of the rights in the Bill of Rights, in particular housing, health care, food, water, social security, education and the environment. In addition, the SAHRC presents annual reports to parliament regarding their focus areas.

Furthermore, the courts equally recognise the significance of SAHRC. Their role was noted in Grootboom's case, where the court ordered that the SAHRC was to monitor and report compliance with the court's judgement.[858]

The SAHRC reports have been seen to be unsatisfactory as the approach adopted has been seen to be ineffective. Questionnaires are usually completed by government agencies or departments and based on the responses received, a report is generated. The reports do not provide sufficient analysis of their findings nor provide valuable recommendations. Nevertheless, the SAHRC can hold government accountable regarding the fulfilment of SERs and in some situations, institute legal actions. It can be argued that the Commission has been able to establish itself as "*an effective and enthusiastic defender of human rights*".[859] The

[854] Constitution of the Republic of South Africa, 1996 sec 184(3).
[855] See https://www.sahrc.org.za/home/21/files/Annual%20Report%202019%20-%2020.pdf. The last report was published in 2020
[856] Khoza Sibonile 'Socio-economic rights in South Africa' (2007) Community Law Centre, University of Western Cape
[857]184 (3). Constitution of South Africa, 1996
[858] Grootboom's case(n551) para 97
[859] The Committee was chaired by the late Kader Asmal and was established by parliament to review the so-called Chapter 9 institutions, including the SAHRC. The report is available at <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf.> accessed 17 October 2021.

Commission has equally used its mandate to tackle poverty through its regular reports on socio-economic rights. These reports have been able to provide a critical assessment of Government's efforts to meet its constitutional obligations.[860]

The Kenya National Commission on Human Rights has the mandate to protect and promote human rights in Kenya. The Commission was enshrined by the Kenya National Commission on Human Rights Act 2002 No.9 of 2002. In 2010, the 2002 act was repealed, and the Commission constituted under Article 59 of the Constitution of Kenya 2010 and operationalized by the KNCHR Act 2011. The Commission acts as a watchdog over the government to ensure that the Government complies with its obligations under international treaties and conventions on human rights. In facilitating access to remedy, section 29 (2) of the KNCHR Act provides that the Commission should endeavour to resolve any matter brought before it by conciliation, mediation or negotiation. The KNCHR has been effective in executing its mandate. Every 4-5 years, it sets strategic objectives and on an annual basis, it publishes an Annual Report. The effectiveness of the KNHRC can be gauged from its annual reports, among other things.

The Commission is required to report to the President and National Assembly annually. The report usually includes an assessment by the Commission of the Governments' compliance with obligations. Complaints related to economic, social, and cultural rights are the most prevalent. As a result, the Commission partnered with the Ministry of Labour to explore the possibility of pro-bono lawyers.[861]

[860] Ibid
[861] See KNCHR available at <http://www.knchr.org/Portals/0/AnnualReports/Annual_Report_2015_2016.pdf?ver=2017-09-20-163245-917> accessed 03/11/2021.

From the foregoing, even though there are similarities between the various commissions, it is also clear that their roles, mandates, and levels of effectiveness do differ in several respects. Human rights institutions can be seen to be a highly effective instrument in promoting and protecting human rights in Africa, mainly because, they are flexible, less bureaucratic, and accessible to the common person.

5.4. The role of Non-Government Organisations in the enforcement of SERs

In the area of human rights promotion and protection, NGOs have performed and continue to perform a myriad of roles or functions. Several issues have been placed on the international human rights agenda because of pressures from NGOs.

Looking at South Africa's constitution, the constitution was framed in such a way that creates a space to promote NGOs involvement over democratic institutions, monitor human rights and to give citizens, especially the poor, vulnerable and excluded, the tools to know and assert their rights. The country evidently has a rich tradition of civil society advocacy for human rights.[862] A typical example is the Treatment Action Campaign (TAC), a popular Civil society in South Africa, that had spent decades successfully fighting for HIV treatment and access to medicines, they have also pioneered patient-treatment education.[863] TAC brought the notion for the first time that people living with HIV should be consulted and should be part of planning and medical response. In 2000, the Legal Resources Centre (LRC) and a group of civil society organisations in the Grootboom case, successfully petitioned the courts to order government to provide housing for people with no access to land. These examples demonstrate that the landscape for NGOs in South Africa is much more diverse and assertive in holding government

[862] Connell Raewyn, *Gender and power: society, the person and sexual politics*: (John Wiley & Sons 2014).

[863] See Mark Heywood; South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health https://namati.org/wp-content/uploads/2017/04/Heywood-2009_SA-HIV-treatment-campaign.pdf.

accountable compared to other developing countries. This depicts that NGOs are essential institutional players in activating economic growth and development and implementing social welfare programs to support government efforts. Their role has become incredibly significant as majority of them focus on the welfare of citizens.[864] It is evident that strong civil society presence was part of the political transition to democracy, including helping to shape the new South African constitution.[865]

In addition, their role involves SERs campaigns, litigation, creating public awareness, research and training and monitoring the advancement of SERs. In addition, they provide legal and paralegal support.[866] For example, a South African research institute, Studies in Poverty and Inequality Institute (SPII)[867] has been able to generate a tool that aims to monitor and measure human rights compliance.[868] The institute's approach is based on a three-step approach. The initial step was to determine efforts made by the government, followed by assessing budget allocation and government expenditure, while the third approach aims to measure the attainment of the right.[869]The research institute has been able to produce several reports and critically assessed South African Government expenditure by providing a detail report between 2008-2009 and 2017-2018.[870] Following the report, the research institute concluded that government data was not adequate enough to generate a full assessment on SERs compliance.

[864] Clarke Gerad, Non-governmental organisations and politics in the developing world. The Politics of NGOs in Southeast Asia (Routledge 2006) 33-56.
[865] Ibid
[866] Khoza (n810) p69
[867]See the annual report for 2019: http://spii.org.za/wp-content/uploads/2020/08/2019-Annual-Report.pdf
[868] Dawson Hannah, "A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-economic rights in South Africa" Studies in Poverty and Inequality Institute, July 2014.
[869] See the 2019 Annual report (n 775)
[870] Matthews Thandiwe, "Within Its Available Resources – an assessment of South African government spending on socio-economic rights from 2008/09 to 2017/18" SPII Occasional Paper, September 2017 available at http://spii.org.za/wp-content/uploads/2018/03/SPII-Occ.-Paper_FINAL.pdf. Accessed 20 June 2020

This conclusion of their report was like the UNCESCR, when assessing South Africa's country report in 2018.[871]

NGOs occupy a strategic space in Africa, a space that governments either cannot or would not fill and, often, produce social services that can support those provided by governments. African NGOs have taken responsibility for areas of activity that has added value to governmental efforts and address specific needs of society.

5.5 Nigerian Judiciary till date

Nigerian Courts have taken a conservative and a very restrictive approach in dealing with cases relating to the SERs provisions in Chapter II of the constitution, as well its provisions in other relevant treaties. This misinterpretation is grounded on two narrow provisions of the constitution as ousting the jurisdiction of the courts from inquiring into whether authority has performed or breached the SERs provisions of the constitution.

Examining the Supreme court decision in *Abacha v Fawehinmi*[872] which has been mentioned earlier in this study, the Supreme Court held that although, Nigeria being a member state of ECOWAS and by its supplementary protocol, Nigeria has a duty to honour any human rights treaty (including the African charter) it has entered and incorporated in its municipal laws. But the supremacy in line with section 1(3) of the Nigerian constitution creates the barrier of enforcing these rights, as they are inconsistent with the 1999 constitution. The Supreme Court of Nigeria was quite insistent as it suggested that the provisions of the African Charter are justiciable.[873]

[871] See para 11 of the CESR's 'Concluding observations on the initial report of South Africa' available https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en**.** Accessed 20 June 2020

[872] See Abacha v Fawehinmi case (n39) para249

[873] Ibid p250

However, the supremacy clause under the Nigerian constitution pursuant to section 1(3) contradicts the enforceability of such rights. The 1999 Constitution is supreme law and all other legal norms must conform. Where there is any inconsistency between the constitution and such other law, that other law to the extent of its inconsistency is null and void and of no effect whatsoever. This was equally reiterated by the Supreme Court, by Hon. Justice Samuel Walter Nkanu Onnoghen CJN, as he then was in *Dr. Olubukola Abubakar Saraki v. Federal Republic of Nigeria,* where the court affirmed that" *if any other law is inconsistent with the provisions of this Constitution, this constitution shall prevail, and that other law shall, to the extent of the Inconsistency be void*"[874]

The courts have on several situations relied solely on section 6(6) c of the constitution and not taken cognisance to other provisions of the constitution which would have supported the interpretation of SERs. The ECOWAS Court of Justice have equally emphasised that the "*rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before the court*".[875] The stance of the law regarding SERs cases is usually determined with reference to section 6(6)c of the 1999 Constitution which makes SERs non-justiciable. This has continued to hinder the realisation of SERs in Nigeria. Danie Brand contends that the restrictions of SERs should not be seen to hinder an individual's right to freedom and dignity.[876] Orago suggested that courts must adopt an adjudication method that adequately engages with SERs claims.[877] Some courts in Nigeria have begun to adopt a different approach in deciding SERs cases.

[874] SC.852/2016 NGSC 53 (SC.852/2015) [1960] NGSC 1

[875] Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Universal Basic Education Commission, Suit ECW/CCJ/ APP/08/08, ruling of 27 October 2009

[876] David Brand, " Courts, Socio-economic Rights and Transformative Politics." unpublished LLD thesis, University of Stellenbosch (2009)p.102.

[877] Nicholas Wasonga Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes', 16 (5) PER/PELJ (2013), 178.

In the case of the *Attorney General of Ondo State v. Attorney General of the Federation & 35 Ors,*[878] the Court held that all SERs are enforceable in instances where the government has enacted statutes meant for its realisation. This was, indeed, a leeway. This simply means that FODPSP need not remain mere aspirations. Another commendable decision was demonstrated in the case of *Jonah Gbemre v. Shell Petroleum Development Company of Nigeria & 2 Ors*[879] where the court expanded the right to life to equally include the right to a healthy environment and dignity of person which are guaranteed in the Constitution and the African Charter. The actual origin for the court's decision was that a threatened environment not only constitutes a threat to the fundamental right to life and dignity of person, but also a violation of the right to a healthy environment. Interestingly, this judgment drew the fury of the Nigerian government who made every effort to hinder the execution of the court order. Situations like this, depicts the ambiguity and irregularity of the attitude of the government towards the fulfilment of SERs. This challenge is equally compounded by the attitude of the courts as they are in a suitable position to change this narrative.

In addition, in the case of *Centre for Oil Pollution Watch v Nigerian National Petroleum Cooperation*,[880] where an NGO known as Centre for Oil Pollution Watch, commenced an action at the Federal High Court Lagos, against the Nigerian National Petroleum Corporation (NNPC) over an alleged oil spillage in Acha Community of Isukwuato Local Government Area of Abia State. The NGO claimed that the oil spillage had terribly affected the community and its environment, making life miserable for the inhabitants. The NGO therefore claimed reinstatement, restoration, and remediation of the impaired and/or contaminated environment; potable water supply as a substitute for the contaminated streams; and provision of medical facilities for the evaluation and treatment of affected victims of the oil spillage. NNPC filed a

[878] (2002) 9 NWLR (Pt. 772), 222
[879] Unreported Suit No. FHC/B/CS/53/05 delivered on the 14th of November 2003
[880] Suit NO: [2019] 5 NWLR [PT.1666] P.518

defence in which it raised a preliminary point of law, challenging the locus standi of the NGO and justiciability of the rights claimed, and prayed the Court to strike out the suit. The trial Court upheld the contention and struck out the suit. The Court of Appeal dismissed the appeal filed by the NGO. Still aggrieved, the NGO approached the Supreme Court, the Court specifically relied on the provisions of Article 24 of the African Charter, Section 33 (1) of the Nigerian Constitution and Section 17 (4) of the Oil Pipelines Act to hold that the right to environment can be justiciable in Nigeria and held that, these instruments recognised the fundamental right to a clean and healthy environment. This was the first time that the Nigerian Supreme court affirmed that the right to a clean and healthy environment can indeed be justiciable in Nigeria.[881]

This judgment creates a binding judicial precedent in Nigeria and all other (lower) courts in the country are expected to follow it.[882] Even though the comments on the justiciability of the right to a clean environment were made as an obiter, the court's decision can equally serve as a starting point to further transform the progressing jurisprudence around SERs in Nigeria.[883] Notwithstanding, the criticism of the judgement in *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation*[884], the judgement demonstrates the positive impact of the African Charter on national law. These cases demonstrate that the Nigerian Government must ensure that the implementation of SERs must conform with international law. Dakas C.J. Dakas, contends that:

…. A Government that is detached, aloof and insensitive to the welfare of its people has, therefore, lost its mission and focus. A government that has neither a mandate nor an agenda

[881] Ibid
[882] Eghosa Ekhator, Sustainable Development, and the African Union Legal Order (March 14, 2021). in Dr Olufemi Amao, Prof Michele Olivier and Prof Konstantin Magliveras (eds.) *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (Oxford University Press). Available at SSRN: <https://ssrn.com/abstract=3804404> accessed 10th January 2021
[883] Ibid p21
[884] Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (n878)

anchored on the welfare of its people is like a rudderless ship that sails against tempestuous tides in a rocky terrain."[885]

When the state fails to fulfil its obligation, the courts must be seen to act to intervene to ensure compliance. The role of international, regional, or domestic courts must be seen as the same by ensuring the rule of law.

It is my humble opinion that litigants can take advantage of these judgments to bring an action in court and challenge SERs claims successfully as these cases do form judicial precedent.

It is to be noted that the countries used in this thesis have been very pro-active. Though the South African judiciary has a conducive constitutional climate for a justiciable socio-economic right, Kenyan judiciary can be seen to make commendable efforts[886]. Nigeria obviously does not come close to the two jurisdictions though recent developments are encouraging. However, with the pronouncement of the Supreme Court in *Centre for Oil Pollution Watch v NNPC*, where the Supreme Court declared "*that the non-justiciability of section 6(6)(c) is neither total nor sacrosanct*",[887] it is hoped that the justiciable debate in relation to Chapter II will be laid to rest. Despite the shortcomings of Chapter II, it will appear that the challenge is not the justiciability status of SERs, it is its enforceability. However, the status of SERs in Nigeria has continued to have a negative impact on its implementation

5.6 Conclusion

Kenya and South Africa have made tremendous progress in the adjudication of SER, many challenges still exist, however, it is an indication that progressive realisation of SER is still work in progress. States are therefore responsible for the progressive realisation of the rights

[885] Dakas C.J. Dakas: "A Panoramic Survey of the Jurisprudence of Indian and Nigerian courts on the Justiciability of Fundamental Objectives and Directive Principles of State Policy" in E. Azinge and B. Owasanoye (eds.) *Justiciability and Constitutionalism: An Economic Analysis of Law* (NIALS Lagos, Nigeria, 2010) 262-323 at 321

[886] See the case of Mitu-Bell Welfare Society v. Kenya Airports Authority(n718)

[887] Centre for Oil Pollution Watch vs. NNPC (n877) para 569

in question and are required to make every effort towards fulfilling it. The Courts in Kenya and South Africa have similarly struggled to find adequate remedies anytime SERs are violated, this way developing resourceful ways in addressing SERs violations. This chapter has argued that rights are protected when the states put in place protective laws, enforcement institutions and provide a relevant framework. The Nigerian courts can equally be seen to have made considerable improvements regarding SERs cases, the judiciary can be seen to have adopted a transformative approach, which is commendable, it becomes imperative that the courts need to interpret the Constitution with a view of securing a concrete basis for the realisation of SERs. The next chapter aims to proffer useful recommendations towards the protection of SERs in Nigeria.

CHAPTER SIX: RECOMMENDATIONS

6.1 Introduction

The findings reaffirm the essential notion which directed the foundation of this study seeking to merge answers to the research questions raised, and the justifications established. Despite the preceding, the findings agree that Nigeria's journey towards effective enforcement of SERs is far from being satisfactory, even though it can be argued that efforts have been made. The analysis in the previous chapter is posited given the widespread SERs infringement in Nigeria notwithstanding some constructive efforts being made to transform the status of SERs. This chapter aims to suggest recommendations for potential reforms, highlighting the limitations of the study and suggesting directions for further research.

6.2 Poverty and Socio-Economic Rights

Poverty is a contemporary human right issue that requires urgent attention. SERs are closely related to development and eradication of poverty. [888] It is a great impediment to the enjoyment of basic rights by individuals. In the words of John C Mubangizi, "*poverty is not new. It is not a recent affliction of humankind. It has always been with us…of all the social phenomena that have a significant impact on human rights, poverty ranks highest… some have agreed that poverty is a violation of human rights*".[889]

The relative inattention given to SERs has led to the fact that the substance and significance of most SERs remain less important. The imprecise and uncertain way in which these rights have traditionally been formulated constitutes a fundamental obstacle to its development and progressive realisation. The realisation of the SERs in most of African countries has been

[888] Danwood Chirwa & Lilian Chenwi, 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives (2016) 3.

[889] John Mubangizi, Poverty production' and human rights in the African context", Law, Democracy & Development, The Journal of the Faculty of Law of the University of Western Cape (2007) 1, Vol.11 p5.

hindered on account of dwindling state resources, which is further attributed to corruption in public offices.[890]

In defining the contents of SER rights, distinction is made between core content and minimum core content. The "core content" of a right clearly identifies what comprises of the rights.[891] Its core content has both a "universal" and a "unique" characteristic.[892] The "minimum core content" of SERs, is regarded as the unquantifiable standard that must be recognised for all individuals in all situations. It suggests a baseline that Government should not be seen to drop even in the most unfavourable situations. Unlike certain aspects of the "core content" which in some cases may be restricted in exceptional situations, the "minimum core content" cannot be derogated from or diminished. It is the core content of rights that determines and establishes the minimum benchmark for governmental actions.

The "minimum core content" of a right determines the minimum requirement that every person must be seen to enjoy, in its dearth, the right is seen to be absent. Achieving a precise meaning of content of rights is a useful tool for its implementation, as it allows it to be feasible to achieve a minimum guideline for assessing the compliance of a right. Nevertheless, where they cannot be inferred away from the territory in which they apply, they can be beneficial for reference purposes. Some advocates consider that aiming on such definition can be counter-productive to pursuits.[893] They base their arguments on the complexity of determining a commonly appropriate guidelines, and some activists believe that defining the "core content" and "minimum core content" is essential as to effectiveness. They maintain that defining the "core

[890] Felix Olaniyi Olayinka, Implementing the Socio-economic and Cultural Rights in Nigeria and South Africa: Justiciability of Economic Rights. African Journal of International and Comparative Law. (2019) 27. 564-587.
[891] Mubangizi Ibid p6.

[893] Udu Eseni Azu, Alisigwe Henry & Afolabi Ajibolu, "Employing International Standards in Advancing the Enforcement of Economic, Social and Cultural Rights In Domestic Jurisdictions" International review of law and jurisprudence 2020 Vol 2 No3 Available at https://nigerianjournalsonline.com/index.php/IRLJ/article/viewFile/883/868 accessed 14th June 2021

content" of every right is a way to recognise its content, and to help distinguish the certain state obligation. Philip Alston, a former UN Special Rapporteur on extreme poverty and human rights by the Human Rights Council commented thus: "*Each right must therefore give rise to an absolute minimum entitlement, in the violation of its obligations*".[894] Recognising economic and social interests as a matter of rights reflects positively on states and constitutions (as well as companies and organizations, justiciability crowns efforts to make SERs a reality for all.[895] It is now well established that the realisation of SERs is vital and should be fulfilled simultaneously with the implementation of CPRs.[896]

As already mentioned earlier, Article 2 of the ICESCR, provides that states are obligated to take immediate positive steps subject to the availability of their resources. This is usually done with a view to progressively achieve the full realisation of the rights provided for under the ICESCR through all appropriate means including legislation and the provision of judicial remedies.[897] The progressive realisation principle provided for in the ICESCR has been misinterpreted by various states, as states have been left with the opinion that SERs are not meant to be immediately enforceable.[898] Perhaps because of the disjointed and exceptionally broad description provided for in Article 2, that the UNCESCR affirmed in General Comment 3 stating that:

[894] Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights,' Vol.9 Human Rights Quarterly (1987) pp. 352-53.
[895] Katharine Young, ed. The Future of Economic and Social Rights. (Cambridge University Press 2019). Pp. 1355
[896] Manisuli Ssenyonjo 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15(6) The International Journal of Human Rights 969. See also Felix Olaniyi Olayinka, Implementing the Socio-economic and Cultural Rights in Nigeria and South Africa: Justiciability of Economic Rights. African Journal of International and Comparative Law. (2019) 27. 564-587.
[897] Article 2(1) ICESCR; see also General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, paras 1-2.
[898] Kathrine Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) Int'l Journal of Constitutional Law 385.

…Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources…[899]

Notwithstanding all the arguments on SERs being uncertain and unqualified of judicial clarification, a persuasive narrative continues to be argued towards a suitable and operative means of its enforcement especially through the courts.

6.3 The realisation of Socio-Economic Rights in Nigeria

The preamble of the Nigerian constitution details the political aim and the pace to encourage a transformative country in a bid to improve the quality of life of its citizens.[900] The scope of SERs that can be enforced is not without limit as the state has the power to determine the aspects of SERs that can be immediately realised given the resources available to it. The Human Rights Committee has suggested that 'immediacy "does not equate with instant".[901] The scope

[899] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 9.

[900]Carol Ngang, Judicial Enforcement of Socio-economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take "Other Measures.(2014) AHRL*J*, 660.

[901] Katharine G. Young. "Waiting for Rights: Progressive Realization and Lost Time." *The Future of Economic and Social Rights*, Katharine G. Young, ed., (Cambridge University Press 2019).

of SERs is internally limited by the standard of progressive realisation, which obliges the state to take steps towards its realisation.[902] This is done with a view to attaining the full realisation in a progressive manner,[903] depending on the economy and available resources[904] and in terms of alternative economic demands.[905] The above variables, however, make the determination of the content of SERs an issue for the courts. The courts interpret provisions on SERs in a way that aligns with the available resources of the state. This means that the enforcement of SERs is that political forces hinder the courts as they scrutinise government's measures for reasonableness.[906] The realisation of the SERs in Nigeria, has been hindered on account of dwindling state resources, which is further attributed to corruption in public offices. The establishment of the ICPC[907] and EFCC[908] in Nigeria are commendable steps towards fulfilling the state's obligations.

The United Nations has the obligation to engage specialised agencies to monitor implementation by competent organs of a state.[909] The UN's efforts notwithstanding, to enforce the SERs by a universal standard discourages most governments in developing nations to spend

[902] Article 1 African Charter; Article 2(1) of the ICESCR. The African charter provides that Member States of the Organization of African Unity shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.
[903] Orago(n831) p180.
[904] Article 2 ICESCR; Section 26 South African Constitution; Grootboom's case para 46. It is obvious that the South African Bill of rights binds all organs of Government to its principles and the rule of law. In addition, private individuals and other bodies are equally bond by the Bill of rights. Courts have been able to apply and develop the common law making sure it is compatible with the provisions guaranteed under the South African Bill of rights. Furthermore, the courts are also given the powers of interpretation as provided by section 39 of the South African Constitution, the powers of the courts are equally stated in section 172 of the South African Constitution. The courts are equally under obligation to declare an act to be inconsistent with the constitution if such acts conducted by the state is seen as invalid
[905] Orago(n831) p185
[906] Carol Ngang, "Towards a Right to Development Governance in Africa. Journal of Human Rights". (2018) 17. 107-122. 10.
[907] Corrupt Practices And Other Related Offences Act 2000 (Section 6a-f of the ICPC Act provides for the duties of the commission); Section 15(5) of the Nigerian Constitution provides that the state abolishes all abuse of power and corrupt practices as the abuse of office and administrative processes can hinder citizens enjoyed of all groups of rights :In addition, the Government's obvious acceptance of whistle-blowers to help curb corrupt practices is a sign that the recognition of SERs is for the enjoyment of all
[908] Economic and Financial Crimes Commission (establishment) Act 2004 (EFCC Act). The Act mandates the EFCC to combat financial and Economic crimes.
[909] Article 18 ICESCR.

public funds and resources on white elephant projects having no direct relevance to the welfare of most citizens. This government's disposition is what Carol Ngang describes as 'business as usual' and the author urges the courts to be pragmatic and more transformational.[910] Under International Human rights law, states are obligated to ensure that individuals enjoy basic standard of living to enable them to live in dignity. It is pertinent for states to ensure access to these rights for all without any form of discrimination.[911]

The current legislative framework in Nigeria is deficient in translating these guaranteed rights into entitlements which has adversely affected its enjoyment and failing to satisfy the people it is meant to protect. It is pertinent that practical approaches are put in place for its realisation and in turn enable the courts play its complementary role towards the realization of SERs in Nigeria. Mbazira has affirmed that judicial enforcement demonstrates the court's commitment towards fulfilling the provisions contained in the ICESCR with the aim of progressively advancing the dignity of individuals in the state.[912] This approach equally ensures that the state is seen to be very responsive not just in upholding the rule of law but most importantly inn SERs claims.[913] The proactive approaches by the courts does not in any way make the courts act in excess of their constitutional powers but demonstrates a response to the failure of the state with the aim of regulating state actions.[914]

[910] Sections 26(2) and 27(2) Constitution; Ngang p660.

[911] Article 25 of the UDHR provides that, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

[912] Mbazira, (n251); D Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as Directive Principles' (1992) 8 South African Journal on Human Rights 475; S Liebenberg 'Social and economic rights: A critical challenge' in S Liebenberg (ed) The Constitution of South Africa from a gender perspective (1995) 79.

[913] Ibid. see Mbazira

[914] Mazibuko v City of Johannesburg CCT 39/09 (2009) ZACC 28 paras 98 & 160.

Notwithstanding some of the positive advancement towards the recognition of SERs in Nigeria, its enforcement is still a challenge, however, drawing inspiration from other African Countries used in this study, it is believed that the status of SERs will gradually improve in Nigeria.

Contemporary efforts must be made towards protecting SERs in Nigeria, innovative approaches have been adopted in Kenya and South Africa, these methods can equally be applied in Nigeria and perhaps achieve the same results.

6.4 The way forward

6.4.1. Adjudicating Socio-Economic rights in Nigeria

Courts utilise a wide range of interpretative approaches or standards of review when adjudicating on SERs. The normative standards of minimum core and reasonableness approach can certainly contribute to the effective enjoyment of SERs, with the scope confined to exploring where both concepts interact as standards of review that courts may utilise in adjudicative contexts in evaluating state compliance with their human rights obligations. The adaptable nature of the reasonableness approach can be a beneficial element in Nigeria in regard to SERs claims, so long as the courts are able to scrutinise actions taken by the state in relation to the realisation of the basic aspects of each SER without recourse to the availability of resources, this is because, it is evident that the expectation of states should be to meet their minimum obligations in respect of the basic minimum aspects of each right. Where the state fails to meet its obligations, the courts is able to request steps taken and proof that corroborates the non-availability of resources, as a possible reason for not meeting its minimum obligations, this approach is vital as it is not in all cases that meeting minimum core obligations require the availability of resources.

The court in Grootboom's case decided that the best approach to SERs adjudication was the adoption of the standard of reasonableness. Therefore, the ultimate question is not whether the minimum core of the right was violated, which would entail an examination of what constitutes the minimum core, but rather, "whether the measures taken by the state to realise the rights … are reasonable".[915] Consequently, in such circumstances, the court will not "inquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent".[916] Instead, it will examine whether the decision and program adopted by the state is reasonable; this gives the state considerable flexibility to adopt realistic programs. This approach quickly dispels the criticism that court enforcement of SERs threatens the principle of separation of powers. With this approach, the legislature can decide which type of programs to implement and how to implement them.

In Grootboom's case, applying the reasonableness test to the Government's housing programme, the Court realised that the programme was inconsistent with section 26 of the Constitution because "*it failed to provide relief for the people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations*".[917] The Court was then left to deal with how to formulate an effective remedy to deal with the constitutional violation. Bearing in mind the separation of powers principle, the Court did not specify the relief; rather it made a declaratory order, "*to the effect that the state's housing programme should include "reasonable measures" to provide relief for this group of housing beneficiaries*".[918] It also stated that the new programme should be similar, though not limited, to a program that had been drafted by the local authority, but had yet to be implemented.[919]

[915] Grootboom's case(n551)
[916] Erasmus Gerhard, 'Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments' (2004) 32 International Journal of Legal Information 243, 248-9.
[917] Sandra Liebenberg, 'Adjudicating Social Rights Under a Transformative Constitution' in M Langford (ed), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (2008) 85.
[918] Ibid p85
[919] Ibid p85

Unlike in Grootboom's case, the court in Minister of Heath and Others v Treatment Action Campaign and Others granted quite a strict remedy against the state. The court ordered that the state "*plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country*." [920]

The cases mentioned in this research deal with enforcing a state's positive obligations in relation to SERs. The courts have demonstrated that these cases can be properly adjudicated and that the tools to achieve effective remedies are within their jurisdiction.

Following what has been discussed in the previous section, this section will also explore another approach to implementation of SERs in Nigeria.

Judicial activism may appear to be one of the most sustainable routes for the enforcement of SERs. This is because the Nigerian Judiciary has the power to oversee the activities of the arms of Government. It is an especially useful tool towards ensuring enforcement of SERs claims. International Human rights law has greatly influenced national legal systems.[921] This is greatly due to the role played by the judges in the various jurisdictions in the application of international law.[922] Judicial activism has always been around for centuries, but has been brought into scholarly reputation by Arthur Schlesinger, Jr in 1947.[923] Ever since the term gained academic prominence, it has remained subject of immense controversy.[924] The UNCESCR has established that, irrespective of whether or not domestic courts have the capacity to enforce all, or only some aspects of SERs, they must still be subject to applicable

[920] (2002) (5) SA 721, (5)
[921] Laura Stella Enonchong, "International Constitutional Law and Judicial Review of Domestic Human Rights Legislation." (2019) Vienna Journal on International Constitutional Law, 13 (2), pp. 87-118
[922] Ibid
[923] Katherine Kmiec, "The origin and current meanings of judicial activism." California Law Review, (2004) 92(5), 1441.
[924] Ibrahim Imam, "Judicial activism in Nigerian Supreme Court and the consolidation of democracy" (2012) (Unpublished Ph.D. thesis, University of Ilorin Nigeria).

remedies. [925] Furthermore, the Committee has also established that claims must be heard with effective remedies if there is a breach, this is essential to the link between human rights and the rule of law.[926]

To this end, it is expected that courts in Nigeria draw inspiration from decisions of courts in other jurisdictions like South African and Kenya. In working to ensure the implementation of international standards in SERs in domestic jurisdictions, it is pertinent to recall that Nigeria and South Africa share similar constitutional framework. It is instructive therefore that Nigerian judges should be aware of and use decisions by courts in other jurisdictions, especially the innovative case law and practice of the South African and Kenyan Courts where the enforcement SERs is impinged upon the constitution.

The South African practice presents a model for the Nigerian judiciary. The dearth of a dependable justiciable status of SERs in Nigeria should stimulate the judiciary to find solutions around this obstacle by adopting some innovative approaches for the enforcement of these rights as done by South Africa and Kenya. The judiciary plays a vital role in holding any government accountable. By obeying specific principles that motivate Nigeria's Constitution, courts can uphold the foundational standards of dignity, equal opportunity, and liberty, expand participation and guarantee accountability, the enforcement of these rights requires the state to take positive steps. The judiciary has failed to be proactive, which has challenged the realisation of these rights.[927] However, Section 6(1) of the Nigerian Constitution affirms that the judicial authority for the federation is vested in the courts, in addition, Section 6(6) b equally affirms that the judicial powers vested in the courts applies to, "*all matters between persons,*

[925] CESCR General Comment No. 9, The Domestic Application of the Covenant, (Nineteenth Session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para 2.
[926] Ibid para 3
[927] Joseph Diescho, "The paradigm of an independent judiciary; its history, implications and limitations in Africa" (2008)33-37: See also Carolyn Logan," Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans Afrobarometre Policy No.39, March 2017 p2-3.

or between government, authority and to 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 person".[928]

This suggests that the Courts do have a huge role to play regarding the realisation of SERs cases.[929]

An Indian decision that demonstrates judicial activism and equally gave a broader meaning to the right to life was the case of Caroline *v Union Territory of India,*[930] where the court established that,

…the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings...[931]

The court systematically applied the right to education and shelter which are clearly non-justiciable and created a much broader approach to the right to life. The South African courts have an innovative approach regarding SERs and this has equally been complemented by judicial activism.

The progressive approach towards the recognition of SERs in South Africa Constitution has been the foundation for most of its SERs claims as can be demonstrated in its decisions.[932]

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[928] Section 6 (6) b of the 1999 Constitution as amended.
[929] Others have suggested that socio economic rights as contained in the Chapter II of the Constitution be made justiciable by expunging section 6(6)(c) from our Constitution. See Adeoye, O. J. and Aina, S. A., "Socio economic rights under the Nigeria legal system: issues and challenges International Journal of Current Research, (2018) 10, (07), 71433-71438
[930] ALL IR (1981) 746, 5.
[931] Ibid p8
[932] Charles Fombad & Kibet Eric, "Transformative constitutionalism and the adjudication of constitutional rights in Africa." (2017) African Human Rights Law Journal, 17(2), 340.

Judicial activism was also demonstrated in *Social and Economic Rights Action Centre (SERAC) v Centre for Economic and Social Rights (CESR) v Nigeria*,[933] where the African Commission on Human and Peoples Right asserted that regarding state obligation, the state must ensure that they are seen to respect, fulfil and protect the rights of its citizens. This was after the Commission had received communication of massive human rights infringement by the Nigerian government in collaboration with the Shell Petroleum Development Company on the Ogoni people. The Government was held responsible for the acts and directed to clean the destruction they had caused.[934]

In addition, the *West African Court of Justice and Human Rights in Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*[935] the Court equally held that the even though section 6(6)b of the 1999 Constitution makes the right to education non-justiciable,[936] the court established that the rights guaranteed by the African Charter are justiciable.

Looking at India, highlighting how SERs can be implemented even as FODPSP, Bhagwatti affirmed in the case of *Minerva Mills v Union of India*[937] that;

…Directive Principles impose an obligation on the State to take positive action to creating socio-economic conditions in which there shall be an egalitarian social order with social and economic justice, justice for all, so that individual liberty would become a cherished value for all, and the dignity of the individual a living reality not only for a few privilege persons but for the entire people…

[933] Communication 155/96, (2001) AHRLR 60.
[934] Ibid.
[935] Suit No. ECW/CCJ/APP/08/08 2009
[936] Ibid para 41
[937] AIR (1980).

Through this case, the apex court also established that the FODPSP and other fundamental rights should complement each other, and it is wrong for Government to give priority to the first generation of rights, while giving less priority to SERs.

The debate that SERs lack the characteristics of justiciability cannot, therefore, be continued in the face of any rational study of law at both national and international levels.[938] Studying the various cases mentioned in this study from different legal systems, the various courts have been able to demonstrate that they have the capacity to identify the applicable legal values to apply in cases concerning alleged breaches of SERs, while equally respecting their various restrictions in regard to the distinctive role and competencies of governments. From the foregoing, it can be argued that the refusal of most African states in providing for SERs directly or indirectly has to an extent impeded the courts from performing its functions.[939]

Judicial enforcement of SERs has experienced major setbacks in Nigeria with a collection of complex issues which has resulted to this approach being elusive. Notwithstanding, it is seen as necessary as the mere inclusion of SERs in the constitution is insufficient to ensure its realisation. It is vital for the Nigerian Judges to be seen to be more proactive and interpret constitutional and legal instruments with the aim of ensuring its enforcement. It is pertinent that the courts interpret and apply constitutional provisions extensively with the aim of enhancing transformation in Africa. The courts must begin to interpret the constitution with a view to securing a concrete basis for the justiciability of SERs.

[938] Fons Cooman & Fried van Hoof (eds.), The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25-28 January 1995 in Utrecht, (Utrecht: SIM Special No. 18); J. Squires, M. Langford and B. Thiele, Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights (Sydney: Australian Human Rights Centre and University of NSW Press, June 2005).
[939] Nlerum Okogbule S. & Cleverline T. Brown, "Social and Economic Rights and Transformative Constitutionalism in Africa: Imperative of Expanding the Frontiers of Judicial Activism" US-China Law Review, February 2019, Vol.16, No. 2, 52-64 Available at: <file:///C:/Users/44756/Downloads/Social_and_Economic_Rights_and_Transformative_Cons.pdf>

In the realm of justiciability of Chapter II of the Constitution, the courts must demonstrate a readiness to, as the courts in South Africa and Kenya have done. It is important to understand that the fundamental right to life enshrined in section 33 of the 1999 Constitution should not be interpreted rigidly as the right to life does not mean the right to life alone, it also entails that health emanates from the right to life and since life is considered to be precious, it must not be interpreted narrowly, as it also includes, the right to shelter, clothing amongst others. Since fundamental rights are enforceable and the Directive Principles are not, then Directive Principles must conform to and run ancillary to fundamental rights for them to be enforceable. It is satisfying to note, however, that the Nigerian courts seem to be becoming more initiative-taking and responsive.

In Nigeria, both the minimum core and the reasonableness test approach are possible approaches to the direct justiciability of SERs, even though, they both have downsides. While the minimum core approach is best suited to the justiciability of negative obligations, the reasonableness approach has characteristics and potentials that lend it to the review of positive obligations. The former concentrates on the content of rights to identify minimum obligations, whereas the latter centres on the obligations of states or measures in order to realise rights.

In what is considered by many as a commendable decision, the court in the case of *Gbemre v. Shell Petroleum Development Company of Nigeria & 2 Ors*[940] declared that the actions of the 1st and 2nd Respondents in continuing to flare gas during their oil exploration and production activities in the applicant's community is a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter. The basis of the court's decision was that an endangered environment

[940] Gbemre's case(n833)

constitutes a threat to the fundamental right to life and dignity of human person and as such protecting the environment, which is part of socio-economic right, is the most potent means to securing the right to life and dignity.

Danie Brand argues that limitation of the SERs should not jeopardise a person's right to dignity, equality, and freedom within a democratic community.[941] Similarly, Orago is of the opinion that courts should opt for an adjudication approach that engages effectively with the arguments proffered by the state for the limitation of SERs.[942]

It will appear that the courts in Nigeria have already began using the reasonableness approach in deciding SERs cases. It will be beneficial if this approach is adopted in all SERs claims. Adopting this approach balances the primary role of the legislature and executive in Nigeria, enabling them to develop policies and to give effect to state's constitutional obligations. The Courts role will then be to assess whether the policy in place is capable of facilitating the realisation of SERs. This approach provides a flexible tool for assessing realisation of SERs that considers the characteristics of the domestic situation and local context, by recognizing the key responsibility of the various arms of Government for the implementation of SERs.

6.4.2 Employing Policy Instrument and Legislation to Guarantee Socio-Economic Rights

There is an essential relationship between the enjoyment of democratic governance and the implementation of SERs. As such, it is essential that the Nigerian government should, through policymaking and legislative reform continue to advance the implementation of SERs. Domestic economic action plans can be applied as a tool for assessing the government's

[941] David Brand, 'Courts, Socio-economic Rights and Transformative Politics', unpublished LLD thesis, University of Stellenbosch, 2009, p. 102

[942] Nicholas Wasonga Orago, Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes (2013). Potchefstroom Electronic Law Journal, Vol. 16, No. 5, 2013, Available at SSRN: https://ssrn.com/abstract=2428048 p 208). See also Articles 4 and 5 of the ICESCR, 1966.

commitment to SERs and its compliance in terms of relevant international treaties protecting these rights. The Nigerian government should continue to ensure that it ratifies international standards on SERs and domesticate them through legislation in meeting with the demands of Section 12 of the Constitution. This represents an intention to commit to the agreements. Furthermore, the government should also enact laws and formulate policies that adhere to international human rights standards. As earlier stated in this study, the courts are unable to enforce Chapter II of the constitution unless the National Assembly has enacted laws for their enforcement.[943]The implication of the foregoing is that once the National Assembly enacts a law for the enforcement of any of the provisions of Chapter II in the Nigerian Constitution, the Court will enforce it in spite of the non-justiciability status of SERs as provided for in section 6(6)(c) of the Nigerian constitution.

In addition, in UNCESR General comment 3,[944] the Committee asserts that legislation "*is highly desirable and in some cases may even be indispensable*" to the fulfilment of SERs. This demonstrates that it is necessary therefore to have a proper legislative framework for the protection of SERs, as this will provide an additional accurate and comprehensive meaning of the nature and content of various SERs. Such a provision will define precise duties and purposes of the various arms of government in giving result to SERs. Legislation is a better option because plans and policies have their limitations. This is because policies are repeatedly established by government representatives and may amount to a government setting the standards which may not have been established as part of a well-publicized consultative procedure. South Africa has become an important reference point among countries globally. Indeed, as Brand asserted that;

[943] See the case of Attorney General of Ondo State, where the Supreme Court held that Courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws for their enforcement, as has been done in respect of Section 15(5) of the 1999 Constitution by the enactment of the Corrupt Practices and other Related Offences Act 2000

[944] Article 2 CESCR General Comment No. 3.

…The Constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socioeconomic rights operate pro-actively. They are translated into concrete legal entitlements that can be enforced against the state and society by the poor and otherwise marginalized to ensure that appropriate attention is given to their plight…[945]

As earlier stated, these rights as enshrined in the South African and Kenyan Constitution are made justiciable, thereby conferring power on the courts to determine any question about them. This is in direct contrast with the Nigerian Constitution which, albeit provides for SERs, but fundamentally failed to make them justiciable rights.

In Nigeria, constitutional recognition of SERs as fundamental rights, while not necessarily the panacea to all problems originating from SERs, does give greater room for judicial intervention in holding the government accountable in implementing measures and providing an avenue for seeking judicial remedies for SERs violations. A constitutional amendment, while important, may not be adequate. It is pertinent that SERs must be protected in the manner contemplated under international human rights law with the Nigerian government required to "respect, protect and fulfil" these rights. This will lead to some level of compliance in Nigeria.

6.4.3 The National Human Rights Commission (NHRC)

National human Rights institutions are increasingly becoming necessary parts of human rights architecture. This is so especially in the field of SERs, where their added value is seen as most valuable. The NHRC was established by the National Human Rights Commission Act,[946] in line with United Nations resolution which enjoins all member states to establish independent

[945] Daniel Brand, 'Introduction to Socio-Economic Rights in the South African Constitution' in D Brand and C Heyns (eds) *Socio-Economic Rights in South Africa* (PULP, 2005).
[946] National Human Rights Commission Act Cap N46 LFN 2004 Vol. II. It came into effect on 27th September 1995.

national institutions for the promotion, protection and enforcement of human rights.[947] The NHRC serves as an extra-judicial mechanism for the respect and enjoyment of human rights. It also provides a platform for public enlightenment, research, and dialogue to raise awareness on Human Rights issues.[948] The Commission has a complaints mechanism accessible to every Nigerian citizen whose rights have been violated. The NHRC Amendment Act has conferred the Commission with the mandate to, amongst others:

…To deal with all matters relating to the promotion and protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the United Nations Charter and the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and other international and regional instruments on human rights to which Nigeria is a party… [949]

The NHRC 2010 (Amendment Act) equally gives the Commission quasi-judicial powers to summon persons, gather evidence, award compensation, and enforce its decisions. Most NHRIs carry out similar work, but the difference lies in the weight given to their functions and scope of their mandate.[950] NHRIs are also vested with the responsibility to advise government on matters concerning the promotion and protection of human rights[951] and are mandated to offer advice on the conformity or otherwise of existing or proposed legislation with international human rights norms.[952] To realise its mandate, the Commission established

[947]United Nations General Assembly Resolution No. 48/134 of 20th December 1993.
[948] See http://www.nigeriarights.gov.ng/about/overview.html accessed 17 September 2021.
[949]Section 5(a) National Human Rights Commission Act (Amendment) Act, 2010
[950] Margaret Sekaggya, "Value of human rights institutions: Human rights commission processes" in CM Peter (ed) The protectors: Human rights commissions and accountability in East Africa (2008) 72.
[951] Para 2 Paris Principles.
[952] Paras 1(a)-(g) Paris Principles.

offices across the 36 states of the country. It is today one of the few MDAs with offices in all the states of the federation.

As stated in Chapter five, the mandate of the Kenya National Commission of Human Rights and the South African Human Rights Commission inter alia, is to investigate upon receiving complaints about the violation of human rights, to visit places of detention, to educate the public about human rights and to act as the chief agent of the government in ensuring compliance with its obligations under international treaties and conventions on human rights.[953] The SAHRC is one of the most respected NHRIs in Africa. It is well-funded by the State, enjoys considerable independence, and commands a lot of respect from the population in the country. It is one of the many institutions established in post-apartheid South Africa to address the ills associated by years of racial discrimination in the country.

When fully independent, the NHRC can engage in a variety of interventions, this is because, their constitutional mandate and the strategic location it holds between state and citizens affords the opportunity and platform to engage with both. With this, they are uniquely placed to intervene and advance SERs. It is increasingly being recognized in the relevant literature that, important as they obviously are, international institutions cannot in themselves suffice as the primary sites of the struggle for human rights.[954]

In addition, the presence of NHRC has a scope for building a co-operative relationship between the Commission and the courts in the enforcement of orders relating to socio-economic rights. For example, the courts may wish to involve the Commission in the supervision and enforcement of its decisions and orders in respect of socio-economic rights.[955]

[953] Lawrence Mute, "Infusing human rights in policy and legislation: Experiences from Kenya National Commission on Human Rights'

[954] Jack Donnelly, Post-Cold War Reflections on the Study of International Human Rights, in ethics and international affairs: a reader 236, 252 (Joel H. Rosenthal ed.1995)

[955] In Grootboom's case, the Human Rights Commission undertook to monitor and report on the State's compliance in accordance with the judgment. See para 97.

Apart from attempting to obtain redress for victims of violations through the courts, the Commission in Nigeria have been able to bring systemic abuses of SERs to the attention of government and the public. By involving both government officials and civil society organisations in the information gathering and dissemination process, the Commission can gain a greater understanding of the impact of government programmes on disadvantaged communities and whether they are, in fact, being reasonably implemented.[956] The Commission achieves this by organising roundtable meetings and engage media practitioners using their platform to enlighten the general public on their basic rights.

Unlike courts of law, which are very technical and procedural, human rights institutions are more accessible to the common Nigerian. It is evident that the commission's mandate is unique, and its function are significantly fundamental to achieving a sustainable Human rights practice in Nigeria, this is only possible when the government does not interfere with the affairs of the commission. The Commission has not been able to live up to its mandate for certain reasons, some of which include the influence of political leadership, lack of funds and lack of cooperation from other agencies of government. NHRC should also be empowered to play a greater role as the South African Human Rights Commission.

6.4.4 Non-Government Organisations

The last two decades have seen a massive growth in Non-Governmental Organisations (NGOs) on a global scale.[957] As earlier noted above, in Nigeria, even though the NHRC does exist, the commission is usually constrained or incapacitated in their mandate and unable to safeguard human rights violations in Nigeria. This has forced the attention to shift towards NGOs.

[956] On the requirement that government programmes must be implemented, see Grootboom's case at para 42.
[957] Micheal Lavalette & Ferguson Iai, "Democratic language and neo-liberal practice: the problem with civil society." (2007) International Social Work, 50(4):447-459.

In Africa, these entities are usually funded by foreign aid and able to fill the void that states fail to fulfil in alleviating poverty.[958] Bernhard et al, [959] affirmed that there are significant areas where NGOs support a state in promoting democracy and good governance. In addition, Paulos Milkias, suggested that significant role played by NGOs is to improve the stunted development-centric needs of people.[960] In contemporary times, the role of NGOs across the globe are changing significantly especially in tackling societal challenges. They are now viewed as evolving phenomenon, being increasingly initiative taking in its response toward remedying community issues, and intervention for domestic, regional, and international governance.[961]

In Nigeria, NGOs and civil societies have been able to provide strong platforms for the coordinating and mobilising action on issues of public interest. These platforms are usually led by professional associations and trade unions, particularly Nigeria Labour Congress, (NLC) Trade Union Congress and Professional organisations such as the Academic Staff Union of Universities (ASUU), Nigeria Medical Association (NMA), Nigeria Bar Association (NBA) and Human Rights Advocacy groups. It should be noted that before the advent of NGOs, the traditional watchdog civil society organizations in Nigeria include trade unions, student unions, parents/teachers' associations, and professional associations. Idumange suggests that "Civil societies have been widely recognized as an essential 'third' sector. Its strength can have a positive influence on the state and the market. They are therefore seen as an increasingly

[958] Gayle Allard and Candace A. Martinez, "The Influence of Government Policy and NGOs on Capturing Private Investment" (OECD Global Forum on International Investment: 27–28 2008), www.oecd.org/investment/globalforum/40400836.pdf.

[959] Micheal Bernhard, Hicken Alan, Reenock, Christopher & Lindberg Staffan, "Institutional subsystems and the survival of democracy: Do political and civil society matter? V-Dem Institute Working Paper Series, April 2015

[960] Paulos Milkias, "The Role of Civil Society in Promoting Democracy and Human Rights in Ethiopia," A paper presented at the Ethiopian American Council Conference hosting the Honorable Anna Gomes, European Union M.P. on the theme "Protecting the Democratic Rights of the Ethiopian People: Reflections and Next Steps," held in Los Angeles, California, on July 2, 2006 Available at: http://ethiomedia.com/carepress/author_paulos.pdf Accessed 15th December 2022

[961] Emmanuel Ike Udogu, The military, civil society and the issue of democratic governance: Towards Nigeria's fourth republic. (1995) Journal of Developing Studies, 13(2), 206–220. p.11.

important agent for promoting good governance like transparency, effectiveness, openness, responsiveness, and accountability".[962]

While citizens can approach the courts, many choose not to do so. Their voices and struggles are, however, heard by NGO reports which focus on socio-economic situation at all levels, specifically focused on the plights faced by individuals. It is evidently clear that permitting a greater degree of participation by NGO's, would in turn, make the socio-economic problems faced by individuals heard, and of course, constitute yet another positive step the realisation of SERs in Nigeria. A more recent test case for governance on human rights which was taken up as a challenge was the handling of the Corona Virus pandemic by the government. The International Centre for Investigative Report (ICIR) and Socioeconomic Right and Accountability Project (SERAP) called on the federal government to declare publicly palliative received from corporate organizations and individuals, show modalities for palliative sharing among states of the federation and indices used for measuring. The Government was coerced to make such information public as was requested by the groups. This was to ensure that funds meant to cushion the effect of COVID were used for their intended purpose and distributed equitably to vulnerable Nigerians.

The real test for commitment to human rights norms lies in the mechanisms that have been put in place for its realisation and enforcement. To ensure that SERs do not end up as mere government aspirations, it is vital that the progress made is closely monitored. Such monitoring must be designed to give a comprehensive overview of the existing SERs situation in a country. The aim is to enable citizens determine how and to what extent government has performed in respect of the implementation of SERs. These institutions, amongst other tasks, engage in

[962] John Idumange, "Civil Society and Good Governance", A Paper Presented at a One -Day Government/Civil Society Interactive Session Organized by the Office of the Senior Special Assistant to the Governor of Bayelsa State on Civil Society on Thursday, 2nd August 2006 at the Banquet Hall, Government House, Yenagoa, Bayelsa.

public advocacy events directed at equipping the rural and urban poor with the requisite skills to interface with government and demand good governance.[963]

In chapter one, corruption had been identified as a major challenge hindering the realisation of SERs in Nigeria. Although, it exists throughout the world, there have been significant increases to the attention paid to corruption in Nigeria due to the prominent level of poverty. Corruption is a plague that has a wide range of corrosive effects.[964] A society that is free from corruption supports good governance, transparency, accountability, and development.[965] Despite the fact that Nigeria is indeed one of the highest producers of petroleum products globally, prevalent corruption has caused the country to remain incapable of fulfilling SERs. Consequently, malnutrition, poor health prospect, unemployment and underdevelopment, abject poverty, rising insecurity, and political instability have been the hallmark of the nation, this demonstrates lack of good governance. Good governance suggests that the government officials are accountable, protection of human rights and respect for citizens. In addition, good governance has been intricately linked to:

…the extent to which a government is perceived and accepted as legitimate, committed to improving the public welfare and responsive to the needs of its citizens, competent to assure law and order and deliver public services, able to create an enabling policy environment for productive activities; and equitable in its conduct...[966]

In addressing these multi-faceted challenges, NGOs are considered the most capable and formidable non-state actors that can engage the government based on their track records in

[963] Stanley Ibe, 'Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities' (2010) 10 African Human Rights Law Journal 211.
[964] United Nations Office on Drugs and Crime ''Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption'' New York 2003
[965] Ibid p45
[966]Anthonia Simbine "Citizen's Disposition Towards Governance and Democratic Rule in Nigeria", NISER Monograph Series, (2000) No. 15.

handling critical areas of human and national existence especially in the management of societal ills and improving human lives, their strict demand for accountability, transparency, observance of rule of law and sustenance of civil rule.

The UNCESCR responsible for supervising state parties' obligations under the ICESCR has developed innovative ways of involving NGOs in the reporting system under the covenant. These include inviting the submission of shadow reports[967] or alternative reports as well as opportunities for oral representation. For instance, for an NGO to acquire observer status, it must meet a series of requirements and provide documents supporting its application. First, the NGO must work in the human rights field,[968] its objectives and activities must align with the principles and objectives in the African Union Constitutive Act, the preamble of the African Charter, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[969] and the NGO must also be willing to provide information on its finances and other documents required in the application process.[970]

Mugwanya strongly recommends that NGOs should not only participate in the processes of preparing reports, but should also participate by submitting additional reports.[971] The African Commission has, for instance, been said to be held accountable in practice more consistently by NGOs than by the AU.[972] It has been demonstrated that the participation by NGOs in the work of the UN Committee is one of the most significant and perhaps the most controversial aspect of the supervision system.[973] Regarding the legal framework for effective participation

[967] ACommHPR, Rules of Procedure (2010), Rules 74, 75(5)
[968] ACommHPR, Resolution 361 on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights in Africa, 59th Ordinary Session (2016), Ch. I, para. 2, available at http://www.achpr.org/sessions/59th/resolutions/361/
[969] Ibid
[970] Ibid paras. 2-3.
[971] George Mugwanya 'Examination of State Reports by the African Commission. A Critical Appraisal' African Human Rights Law Journal 200 I (I) 268.
[972] Viljoen (n504) p383.
[973] Matthew Craven, The International Covenant on economic. Social and Cultural Rights: A Perspective on its Development (Clarendon Press 1995) p81.

of civil society in the fight against corruption in Nigeria, the United Nations Convention against Corruption (UNCAC) and the African Union Convention against Corruption are very explicit. These international legal frameworks ratified by Nigeria impose obligation on her to ensure the participation of civil society in the fight against corruption.

The participation of civil society is provided for in Article 13 of UNCAC which states:

…Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non- governmental organizations and community- based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption....[974]

Similarly, Article 12 (subsections 1 and 2) of African Union Convention on Combating Corruption, the state is mandated to undertake to:

…Be fully engaged in the fight against corruption and related offences and the popularisation of this Convention with the full participation of the Media and Civil Society at large; Create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs; Ensure and provide for the participation of Civil Society in the monitoring process and consult Civil Society in the implementation of this Convention...[975]

It is important to note that their objectives are to promote socio-economic development by removing obstacles to the enjoyment of SERs as well as civil and political rights. This suggests

[974]Adopted by the UN General Assembly on the 31st of October 2003, by resolution 58/4. It came into force on the 14 December 2005.

[975] The Convention entered into force on 5th August 2006. One of its objectives is to promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.

that there are legislative and other measures are in place in Nigeria, but actual implementation still needs to be improved. NGOs are in no way rivals to the already existing organisations such as the EFCC and the ICPC which have the statutory duties to fight corruption but have been set up to complement these government agencies.[976]

The Transparency International's Corruption Perceptions Index describes corruption as the misuse of public office for personal advantages. In contrast, proceeds of corruption are assets or property obtained wholly or implicitly from the crime of corruption.[977] Ayoade asserts that lack of political will has given room for corruption in Nigeria. [978] Additionally, the various anti-corruption agency reports have not been used to improve the anti-corruption laws to be able to recover proceeds of corruption in Nigeria. [979] Corruption is a critical crime and combating it and recuperating assets are arduous responsibilities confronted by anticorruption agencies. With the passing of the Proceeds of Crime (Recovery and Management) Act 2022, which is a commendable development by the Nigerian Government, the Act makes comprehensive provisions for the seizure, confiscation, forfeiture, and management of properties derived from unlawful activity. In addition, the new law mandates the creation of dedicated accounts for the proceeds of crime and other confiscated assets to enhance accountability.[98o] It is believed that this approach will serve as disincentive to others and facilitate economic growth. NGO's can equally use this platform to monitor government activities by ensuring that they are seen to be accountable, this will of course promote wider participation.

[976] See section 6 of the Proceeds of Crime (Recovery and Management) Act 2022.
[977] Adedeji Adekunle, "Proceeds of Crime in Nigeria: Getting Our Act Right", Inaugural Lecture, Nigerian Institute of Advanced Legal Studies, (2011) Lagos, Nigeria
[978] M.A. Ayoade, "Evaluating the legal architecture on corruption in Nigeria", Nigerian Journal of Contemporary Law, (2012) Vol. 18 No. 1, p. 51.
[979] Olushola Joshua Olujobi and Oluwatosin Olujobi, "Theories of corruption "public Choice-Extractive theory" as alternative for combating corruption" International Journal of Environmental Sustainability and Green Technologies (IJESGT), (2020) Vol. 11 No. 2, pp. 68-83
[980] See section 68 of the Proceeds of Crime (Recovery and Management) Act 2022

The South African Constitution did not in any way refer to NGO participation in the monitoring process.[981] However, the Constitution does provide for the possibility of class action and a platform for NGOs to act on behalf of victims whose rights have been violated or in situations where the government fails to fulfil its obligations.[982] This in turn allows for wider participation that will enhance the monitoring process. The participation of NGOs is vital to the long-term success of the monitoring mechanism.[983]

NGOs together with the Bar Association play a major role in Nigeria, their mandate is to educate, empower and mobilise to arrive to full realisation of human rights, socio-economic rights included. It is understood that the rate of poverty in Nigeria means that socio-economic rights cannot and must not be ignored at all. One of the known NGOs in Nigeria is Socio Economic Rights Initiative (SERI) formerly called Shelter Rights Initiative. This NGO is "*committed to the advancement of economic and social rights through promotion of the universal rights to health, housing, living environment, education, food, adequate standard of living, equality, security and the rule of law*".[984] They have been able to close the gap between citizens and government, overtime, they have played a significant role in ensuring that the voices of those whose rights have been violated are adequately heard.

Continuous bad governance and leadership can have a devastating impact on human rights particularly SERs.[985] NGOs are desirous of adopting a social welfare model in Nigeria, this is an incredibly significant approach to have in place as necessary improvements or adjustments can be made as circumstances change. They work towards complementing government's

[981] See Section 183(4) of the South African Constitution.
[982] Section 38 of the South African Constitution.
[983] Gwyn Bevan 'The Impact of the Different Conceptions of Socio-Economic Rights in South Africa' (1999) LLM thesis, University of Witwatersrand, Johannesburg at p62.
[984] Socio Economic Rights Initiative Website. Available at http://serifoundation.org/about-us/ Accessed 17 May 2020.
[985] UN Commission on Human Rights (''UNCHR'') ''Questions of the violation of human rights and fundamental freedoms in any part of the world: situation of human rights in Nigeria'' (report submitted by the special rapporteur of the commission on human rights, Soli Jehangir Sorabjee E/CN/4/1999/36, 14 January 1999) at para 59.

efforts in providing socio-economic services. They bridge the development gap in society by supporting government initiatives in the provision of good governance.

6.5 Conclusion

This thesis supports the fact that apart from the judiciary, other relevant bodies equally play a crucial role towards the realisation of SERs. The South African and Kenyan experience demonstrates that human rights institutions and NGOs have the capacity to support judicial institutions towards SERs realisation. It is evident that combination of litigation and applying both reasonable test and the minimum core approach will ultimately improve the status of SERs in Nigeria. This experience is borne out of how these approaches have proven useful in various jurisdictions. The aim for my recommendation is establishing a practical structure towards the realisation of SERs in Nigeria. The thesis stance is enlightened by the nature of the SERs provided for in the ICESCR. Looking at the domestic courts, this research has also considered how active the national courts can be concerning the achievement of this recommended model. It has been demonstrated that Nigerian courts can indeed, give impetus to SERs and statutes by adopting dynamic approaches to SERs litigation in Nigeria. SERs judicial precedents are gradually being formed and as the number of such authorities surge exponentially, stronger case laws will be at the disposal of litigants.

CHAPTER SEVEN: CONCLUSION

7.1 Introduction

This research sets out the challenges in realising SERs in Nigeria, most importantly, it contributes to knowledge by expanding on the academic debate in this subject area. The study has considered the extent to which the Nigerian Constitution and its established framework have transformed SERs enforcement. Accordingly, this study concurs that the Nigerian Constitution requires immediate reform, this can be demonstrated by discussions put forward in previous chapters. The argument that SERs should be non-justiciable, is successfully countered in this research. The originality of this thesis goes beyond academia, as it equally aims to recommend policy reformation to the Nigerian Government regarding the enforcement of SERs.

7.2 The Journey so far

Chapter II has some intriguing interpretative concerns. In the first place, the question may be asked if the apparent conflict between section 13 of the 1999 Constitution which imposes a duty on all arms of government, including the judiciary, "to conform, to observe and apply" the provisions of Chapter II, and section 6(6)(c) ousts the jurisdiction of the court. It is settled law that in the interpretation of the Constitution, the whole provisions must be considered together,[986] and that where there are two provisions, one enlarging the court's jurisdiction and the other restricting its jurisdiction, the courts will guard its jurisdiction jealously by adopting a liberal interpretation in favour of assuming jurisdiction.[987] The philosophical underpinnings of these judicial attitudes are to enable the courts to avoid injustice and absurdity. But it will be the height of injustice and profound absurdity to apply a restrictive interpretation of the

[986] Centre for oil pollution v NNPC(n834)
[987] Oba Adeyemi v. A.G. Oyo State (1984) 1 SCNLR 525 at 602.

provision of section 6(6)(c) of the Constitution to cage the provisions of Chapter II. This is particularly so in the face of the preamble to the Constitution which provides that the essence of the Constitution is "*for the purpose of promoting the good government and welfare of all persons in our Country*".[988] If Chapter II of the Constitution will help us to achieve these, then section 13 of the Constitution ought to be preferred to section 6(6)(c) of the Constitution.[989] In the second place, the words "except" and "otherwise" appearing in section 6(6)(c) collapses it. Generally, the word "except" is exclusionary in nature and takes the form of a proviso, while the word "otherwise" literally means opposite, what these two words signify in the context of section 6(6)(c) of the Constitution, is that the provision of that section will stand unless there is nothing to the contrary in any other provision of the Constitution. This view was endorsed by the Supreme Court in *Federal Republic of Nigeria v. Anache*.[990] Fortunately, Section 13 which imposes a duty on the three arms of government to comply with the provisions of Chapter II, effectively excludes the import of section 6(6)(c).[991]

However, conventional wisdom and practical realities dictate that the realisation of Chapter II and IV must be pursued simultaneously, because civil and political rights and SERs are not mutually exclusive categories but indivisible, interrelated and inter-dependent human rights. Of what use is the right to a fair hearing when the proverbial average person cannot fund the process of activating the court's jurisdiction.

Bhagwati, J. opinion on CPRs and SERs is that:

[988] Although the preamble does not form part of the Constitution in the sense that it cannot found a cause of action, it is a manifestation and articulation of the intention of the framers of the Constitution and provides the philosophical basis of the Constitution. The courts have recourse to it in constitutional interpretation. See Adesanya v. The President of Nigeria (1981) 2 NCLR 358; A.G. of Ogun State v. A.G. Federation (1982) 3 NCLR 166.
[989] Chris Okeke, *Towards Functional Justice: Seminar Papers of Justice* (Ibadan: Gold Press Ltd. 2007) p5.
[990] (2004) Vol. 14 WRN 1, S.C.
[991] Ibid

…Together they are intended to carry out the objectives set out in the preamble of the Constitution and to establish an egalitarian social order informed with political, social and economic justice, and ensuring the dignity of the individual not to a few privileged persons but to the entire people of the Country, including the have-nots and the handicapped, the lowliest and the lost...[992]

In the same vein, Chandrachud, J. is of the view that:

…Our decision on this vexed question must depend on the postulates of our Constitution, which aims at bringing about a synthesis between Fundamental Rights and the Directives of State Policy, by giving to the former a place of pride and the latter, a place of permanence. Together not individually, they know the core of the Constitution. Together, not individually they constitute its true conscience. If the State fails to create conditions in which the Fundamental Freedom could be enjoyed by all, the freedom of the many will be at the mercy of the freedom of the few, and then all freedom will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it…[993]

It is therefore clear that both rights form one organic unit with the same view to free citizens from unreasonable restrictions from the State and provide liberty to all.[994] In this sense, they strengthen one another as constituents intended for basic human dignity. The satisfaction of both is mandatory for the unifying concept of human dignity

[992] Minerva Mills v. Union India, AIR (1980), SC p1989
[993] Kesavenanda Barati v. State of Kerala AIR (1973) SC p1970
[994] Mohammed Uwais, Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospects in O. Okpara (ed); *Human Rights Law and Practice in Nigeria*, (Vol. 1) (Abakaliki: Publican International Nig. Ltd, 2007), p. 266

The state must continue to serve as an active guarantor of rights. [995] The struggle continues. Regardless of the challenges to the enforcement of SERs rights, it is evident that these rights consist of a major part of the legal system. The countries that have been used as case studies have included these rights in their constitutions, Nigeria must draw inspiration from them. There is a serious need to revisit the developmental programs and re-align them with human rights imperatives and principles. At the top of that process, is the adoption of policies which not only recognize SERs as genuine rights and not gifts of the state, but also ensures that there is a constant assessment, monitoring, and evaluation of their impacts. Such assessment must be accompanied by an analysis of the policy environment, examining the policies that exist and the gaps that need redress from a human rights standpoint. There is no doubt that good governance will be deemed to have been accomplished, if pragmatic steps can be taken to achieve these goals through governance. There will be less tension on the justification of SERs. Perhaps Nigeria may need to develop more case law in this area to facilitate and strengthen SERs claims. The flexibility of the reasonableness approach can be a useful feature as long as the courts are able to examine measures taken by the state in relation to the realisation of the basic aspects of each SER without recourse to the availability of resources because the expectation is that states should be able to meet their obligations in respect of each right.

Thus far, we have seen that the Constitution does not admit to express justiciability of Chapter II of the Constitution. The decision to make Chapter II of the Constitution non justiciable was informed by the exaggerated fear that investing the courts with the competence to make mandatory orders directing the government to provide specific social and economic rights "*would be palpably impudent as being fraught with the danger of destructive confrontation*".[996]

[995] Felix E Torres, Economic and Social Rights, Reparations and the Aftermath of Widespread Violence: The African Human Rights System and Beyond, *Human Rights Law Review*, Volume 21, Issue 4, December 2021, Pages 935–961, Available at: https://doi.org/10.1093/hrlr/ngab017 accessed 10th January 2022.
[996] Ben Nwabueze, "Fundamental Objectives and Directive Principles of State Policy: Its Nature and Functions", in W. I. Ofonagoro, et. al.(eds.) p49

This fear dissolves in the face of the more coercive power of judicial review of legislative and executive actions, the exercise of which has curtailed legislative and executive lawlessness, and shunted governments onto the path.

Therefore, a society that stifles the means to self-actualisation negates the first principle for the establishment of a political community and thereby discharges its citizens from any form of political obligation. As Professor Nwabueze asserted, "*It is a denial of the individuals worth as a human person, a manifestation by society of uncaring attitude towards him. An individual or group denied recognition by society cannot but feel alienated and disaffected*."[997]

It is pertinent to note that human rights cannot be restricted to a particular category of rights, both groups of rights discussed in this study must be it must be enjoyed together. Professor Maurice Cranston asserted that:

…I *believe that a philosophically respectable concept of human rights has been muddled, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category. The traditional human rights are political and civil such as the right to life, liberty, and a fair trial. What are now being put forward as universal rights are economic and social rights, such as the right to employment, insurance, old-age pensions, medical services and holidays with pay. There is both a philosophical and logical objection to this. The philosophical objection is that the new theory of human rights does not make sense. The political objection is that the circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights...*[998]

Admittedly, several uncertainties have continued to pose serious challenges to the protection of SERs, most especially the obligations that has been imposed on State Parties to the ICESCR,

[997] Ben Nwabueze, Ideological Foundation for Viable Political Order for Nigeria. Conference Paper (1986)
[998] Maurice Cranston, *What are Human Rights?* (London: The Brodley Head, 1973) p65

and the monitoring mechanism. It has become clear that the conclusion on the non-justiciability of SERs are essentially based on its comparison with CPRs.[999] The approach adopted in various states has demonstrated the unwelcoming desire towards the protection of SERs, as it has "*contributed to the existing timid and compromising attitudes to those rights*".[1000] The author's consideration of the concept of justiciability reveals the general incompatibility of transporting domestic law conceptions of justiciability to international law.[1001] In addition, the author suggests that a complete understanding of the concept of justiciability must consider the various procedures, mechanisms and reporting system.

This study has demonstrated that the Constitution does not consider SERs as justiciable rights, however, in other climes the situation is entirely different. However, legislation alone is not sufficient, without effective implementation.[1002] Section 13 of the Constitution enjoins all organs of Government to adapt to, observe and apply the provisions of Chapter II of the Constitution. This suggests that positive actions and steps must be taken towards the realisation of SERs. The seemingly slow but innovative approach adopted by the Nigerian courts in expanding the provisions of Chapter II of the Constitution showcases a desire to change the status of SERs. There still exists a wide gap between the Nigerian situation with what is obtainable in other African jurisdictions, most especially the countries discussed in this study.

This goes on to say that the protection of SERs remains the pillar of any economy. The robust approach taken by South Africa and Kenya allows Nigeria to draw some experiences from the

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[999] Micheal Addo, Justiciability Re-examined R. Beddard and D. M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement*. (London: Macmillan Academic and Professional Ltd, 1992) p99
[1000] Ibid p. 93
[1001] Ibid p. 97
[1002] Emmanuel Olugbenga Akingbehin, "The Justiciability of Right to Free Basic Education Conundrum in Nigeria, South Africa and India: From Obstacle to Miracle" ACTA UNIVERSITATIS DANUBIUS Vol. 17, no.1/2021 Available at: https://dj.univ-danubius.ro/index.php/AUDJ/article/view/834/1211 accessed 4 January 2022

way they have carefully and effectively been able to protect SERs. Progress is gradually being made in Nigeria, but more still needs to be done. Over time, this positive approach will result in a steady increase of case law which will in turn evolve and transform the society and reduce the poverty level. As it stands, there is a constitutional structure already in place to develop case law, what is required especially from the courts, is to expand the interpretation of SERs in the Nigerian constitution.

In conclusion, Constitutions that fail to adequately protect SERs or preclude the courts from doing so have marginalised SERs. This study has demonstrated that such constitutional impediments can be weakened through the judicial activism, Human Rights Institutions and NGOs. In this connection, the best practices in countries discussed in this study have been suggested as useful models in order to make Nigeria achieve their most desirable goal that will be beneficial to the common man.

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