TAX APPROACH TO CONSTITUTIONALISM AND JUSTICIABILITY ISSUES*

Abstract

The principle of constitutionalism states that every action of the institutions and persons within the country must conform to the provisions of the Constitution or be rendered void to the extent of its inconsistency. The Constitution under Chapter 2 enunciated the fundamental objective and direct principles of government; the role of the people in governance and social objectives; educational; environmental and foreign policy objectives. The principles are also regarded as socio-economic rights. The said constitution by section 6(6)(c) provides for the non-justiciability of the fundamental principles. Scholars have argued the justiciability of socio-economic rights as an intricate part of fundamental human rights. Other scholars have also argued in support of non-justiciability of socio-economic right. The argument is premised on the principle of constitutionalism: the constitution has made the socio-economic rights non- justiciable. Judicial attempts by Nigerian courts to navigate this huddle remain unsuccessful. This paper considers a Tax approach to the justicibility issues of socio-economic rights- wheather a taxpayer would have *locus standi* to challenge the government on the usage of the taxpayers' money. The tax money is meant to be used to provide socio-economic right. The research has adopted doctrinal methodology. It reviewed both primary and secondary sources of law. Particular attention was paid to case laws in search of judicial attitude to justiciability issues. The paper found that Nigerian courts lack activism furnace to confront the justiciability issues of socio-economics rights. The only promising approach to resolving the justiciablity issue lies with taxation, the determination of the dividend of tax payment and the *locus standi* of taxpayer to query same. The paper is relevant to both taxpayer and tax authority, it would incentivize tax compliance and maximize tax revenue.

1. Introduction

The Constitution is the fundamental law from which all other laws and institutions take departure. The Black's Law Dictionary defines constitution as "the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.[1] Institutions, organs, agencies and even government officials exist by virtue of the Constitution.[2]

The Constitution is the summation and codification of the accepted customs and will of the people and can be regarded as *volksgeist,* the spirit of the people. It is the fundamental law from which all other laws and policies take their validity. A constitution embodies the fundamental principles of a government. A constitution, once adopted by the sovereign power, is amendable by that power stated only therein. All laws, executive actions, public policies and judicial decisions must conform to the Constitution; it is the creator of the powers exercised by the departments of government and other bodies within the polity. Constitutions are indispensable for administration of a state.

In Nigeria, the supremacy of the constitution over all persons and institutions is indubitable. Section 1 of the 1999 Constitution states, *inter alia,* that the Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.[3]

Constitutionalism states that every action of the institutions and persons within the country must conform to the provisions of the Constitution, as a matter of necessity, or be rendered void to the

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[1]BA Garner (Ed.), *Black's Law Dictionary* (11th edition, Toronto :Thomas Reuters) 2019.

[2]A Babalola, *Constitution and Constitutionalism, a*vailable at <http://www.afebabalola.com/downloads /Constitution_and_con.pdf 30/3/14>, accessed on 28th November, 2022.

[3]Constitution of Federal Republic of Nigeria 1999 (as amended), Section 1.

extent of its inconsistency. To this extent, all government and non-governmental bodies are expected to equate the policies of their operations within the ambit of the Constitution and the purpose contained in the Constitution.[4] Essentially, the purposes of the Nigerian State are contained in Chapter II and tagged the Fundamental Objectives and Directive Principles of State Policy. Ordinarily, the Fundamental Objectives and Directive Principles of State Policy are the basic principles to guide the policies, which are expected to be variously utilised for Nigeria to realize the national ideals.[5]

However, despite the principles laid down therein considered fundamental in the governance of the country and which could have induced a duty from the state to apply these principles in making laws and policies for just and equitable administration of the country, these provisions are not justiciable by any court in Nigeria vide a counter-provision in section 6, sub-section (6), paragraph (c) of the Nigerian 1999 Constitution, as amended, which makes the objectives non-justiciable.
Lots of arguments have been made about justiciable and nun-justiciable of Chapter II of the Constitution. It has been argued from human right perspective, that chapter encapsulate the social-economic right of the citizen and should be justiciable like the counter-part in chapter IV.[6] Other scholars have argued that chapter is non-justiciable in view of the ominous provision of chapter 6(6)(c).[7] This paper takes a different approach to the justiciability issues in Chapter II. It considers the justiciability of Chapter II from a perspective of taxpayer's right to query the usage and expenditure of tax fund. The embodiment of chapter is the dividend of tax payment; a taxpayer has a locus to adjudicate the expenditure of tax fund.

2. The Contextual Domain of Public Policy and Fundamental Objectives

The 1979 Constitution of the Federal Republic of Nigeria was the first Constitution of Nigeria to ever incorporate the Fundament Objectives and Directive Principles of State Policy clause. Basically, the Constitution enunciated the fundamental obligations of government; the role of the people in governance and social objectives; educational; environmental and foreign policy objectives; directive on Nigeria, cultures; obligation of the mass media; national ethics and duties of citizen.

All successive Constitutions of the Federal Republic of Nigeria since 1979 have enshrined the Directive Principle of State Policy a critical ingredient in posting a road map for the governance of the people. Under the 1999 Constitution of the Federal Republic of Nigeria, section 13 of Chapter 2 clearly stated as follows:

> It shall be the duty and responsibility of all organs of government and all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provision of this Chapter of the Constitution.

Nigerian Judicial interpretation of Fundamental Objectives and Directive Principles of State Policy is anchored basically on the provisions of Section 6(6) (c) which reads as follows:

> The judicial powers vested in accordance with the foregoing provision of this section.... (c) shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this Constitution.

The interpretation given to the above constitutional provision is that Fundamental Objectives and

[4] *Ibid*.
[5] TA Olaiya, 'Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria', *Journal of Politics and Law* Vol. 8, No. 3; 2015, available at <http://dx.doi.org/10.5539/jpl.v8n3p23>, accessed on 18th May, 2025.
[6] See generally Christopher Mbazira, 'Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice' pub. PULP 2009.
[7] C Scott and P Macidem: 'Constitutional Ropes of Sand or Justiciable Gurantées?' 141 U. Pa. L. Rev. 1 at 66.

Directives Principles of State Policy are non-justiciable.

According to Duru, the whole essence of Fundamental Objectives and Directive Principles stipulated in Chapter II of the 1999 Constitution is reflected in the dictum of Justice Bhagwati's in *Minerva Mills v. Union*[8] *of India* that:

> …to a large majority of people who are living in almost subhuman existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty, though representing some of the cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them [is] to remake the material conditions and usher in a new social order where socio-economic justice [will] inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.[9]

Okeke[10] pointed out that as beautiful as these objectives are for the realisation of enduring policies against profligacy in Nigeria, the anti-thesis provided within the same constitution in section 6 most probably accounted for the recurring crisis of underdevelopment in Nigeria, despite numerous legislations and other regulations in the country. According to him:

> the drawback to the appropriation of these 'dreams' or objectives by citizens as of right is the provision in section 6, sub-section (6), paragraph (c) of the 1999 Constitution which makes the objectives non-justiciable. There is an urgent need to delete the above provision from the Constitution and subject the objectives to binding governmental obligations known as Constitutional Projects which would encourage the use of public fund for common good.[11]

This opinion becomes more robust considering the hallowed claim that a very important aim of governance is to ensure that government acts in the public's interest[12] and grounding the mechanism in justiceable constitutional provision would most definitely forestall government run as 'a closed viable system that produces itself' as an offshoot of the 'decision of a few representatives or officials' rather than a wise vigilance for collating informed public opinion.[13]

2.1 The Concept of Justiciability

The word 'justiciable' and its adjectival derivatives became a regular feature of Nigeria's legal lexicon after the introduction of the Fundamental Objectives and Directive Principles of State Policy into Chapter 2 of the 1979 Constitution of Nigeria. Justiciability can be said to mean two things in the context of this paper. It is the ability of a court to 'purposively' apply a legislation or a principle of law to a defined situation and secondly, the right of a person, whether natural or artificial, to request that the court make such a determination. This latter right is often called the right to have standing before the court or other similar body. These concepts of justiciability may be timidly or boldly asserted by the judiciary.

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[8] 1980 AIR 1789.

[9] OWC Duru, *The Justiciability of the Fundamental Objectives and Directive Principles of State Policy under Nigerian Law.* Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140361 on 31/01/2014.

[10] GN Okeke, Fundamental Objectives and Directives Principles of State Policy: A Viable Anti-Corruption Tool in Nigeria. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, 2*, 175-184, 2011.

[11] The public fund is centrally raised through taxation. Non justiciability issue has affected the extend to which tax fund can be put to common good.

[12] J H Little, (1996). Thinking Government: Bringing Democratic Awareness to Public Administration. In G. L. Wamsley, & J. F. Wolf (Eds.), *Refounding Democratic Public Administration: Modern Paradoxes, Postmodern Challenges* (pp. 327-351). Thousand Oaks: SAGE Publications, Inc. available at http://dx.doi.org/10.4135/9781452233505.n13.

[13] *Ibid*

However, judicial timidity to non-enforcement of socioeconomic rights is not hinged on absence of legislation alone. Some authors argue on behalf of the judiciary that since socio-econonic rights are linked to collective rather than individual claims, the Courts are not well suited to treat collective claims because of the multiplicity of interests that attend them.[14] However, this same challenge applies to claims regarding civil and political rights which are made justiciable and invariably impact collective rights yet the Courts adjudicate upon them. Secondly, it is commonly argued that socio-economic rights have budget implications and as such adjudicating on them would violate the separation of powers and bring the Courts into conflict with the legislature and executive that Constitutionally have the responsibility for the political decision making of how and what to allocate to each sector of the economy.[15] The third argument of a more general nature is that these rights are not inherently justiciable especially on the basis of judicial capacity because they are too complex and too vague for adjudication.[16]

The door to timidity or avoidance was opened in *Okogie and Others v. Attorney-General of Lagos State,*[17] where the applicant challenged the policy of the Lagos state government to abolish private schools within the state claiming that it was in violation of the right to education guaranteed under section 16 of the 1979 Constitution, which is similar to the same section of the 1999 Constitution. The Court held that by virtue of section 6(6)(c) of the 1979 Constitution which is the same as section 6(6)(c) of the 1999 Constitution) the provisions of Chapter 2 of the Constitution were not enforceable and that it was not in the power of the court to make any pronouncement on them. Rather, this should be done by either the Executive or the Legislative arm of government. The Court went further:

> it seems to me that the Directive Principles of State Policy in Chapter II of the Constitution have to conform to and run subsidiary to the Fundamental Rights under Chapter IV of the Constitution. If there is no infringement of any Fundamental Rights there can be no objection to the State acting in accordance with the directive principles set out in Chapter II, subject of course to the legislative and executive powers conferred on the state.[18]

By the position taken by the Court in this case the hope of advancing democracy, social justice and promoting the security and welfare of the people as anticipated in section 14 of the Constitution was dealt a deadly blow.

The year before *Okogie and Others v. AG Lagos* was decided, the Indian Supreme Court in the landmark case of *Minerva Mills Ltd. v. the Union of India*,[19] the India Supreme Court held thus:

> The importance of Directive Principles in the scheme of our Constitution cannot ever be overemphasized. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive Principles of State Policy are fundamental in governance of the country and there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realization of his aspirations. But to destroy the guarantees given by Part Ill in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique, place in the lives of civilized societies and have been variously

[14]See generally C Mbazira: "Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice" pub. PULP 2009.

[15]*Ibid.*

[16]C Scott and P Macidem: 'Constitutional Ropes of Sand or Justiciable Gurantées?' 141 U. *Pa. L. Rev*. 1 at 66.

[17][1981] 2 NCLR 350.

[18]At page 232.

[19]1980 AIR 1789.

> described as "transcendental", "inalienable" and "primordial" and as said in Kesavananda Bbarati they constitute the ark of the Constitution. [250B- C, 254H, 255A]. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, one no less important than the other. Snap one and, the education & other, Supreme Court held that a person affected by an act which also affected the general public can complain of a violation of his rights even though other persons affected do not want hi complain.

In spite of these cases, there would seem to remain an aura of uncertainty on the right to sue as the Supreme Court said in the recent case *Owodunni v. Registered Trustees of the Celestial Church of Christ and Others*[20] per Ogundare JSC who delivered the lead judgment thus: 'In my respectful view, I think Ayoola JCA (as be then was), correctly set out the scope of section (6) subsection (6)(C) of the Constitution when in *N.N.P.C. v. Fawehinmi & Ors*.[21] he said:

> In most written Constitutions, there is a delimitation of the power of the three independent organs of the government, namely: the executive, legislature and the judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the states in the court and defines 'the nature and extent of such judicial powers does not directly deal with the rights of access of the individual to the court. The main objective of section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of power between the judiciary on the one hand and the other organs of government on the other hand, in order to obviate any claim of the other organ of government, or even attempt by them, to share judicial powers with the Courts section 6 (6)(b) of the Constitution is primarily and basically deigned to describe the nature and extent, of judicial powers vested in the Courts. It is not intended to be a catch-all, all-purpose provision to be pressed into service for determination of question ranging from *locus standi* to the uncontroversial questions of jurisdiction.

That the sub-section does not lay down the plenitude of the Nigerian law on *locus standi* is borne out by the, decision of this court in *Fàwehinmi v. Akilu* [22] where this court recognized the right of a citizen to lay a criminal charge against anyone committing an offence or who he reasonably suspects to have committed an offence. The implication of this recent decision is that citizens do not have *locus standi* by automatic use of section 6(6)(b) of the Constitution. As such the last has not been heard on the matter and the pendulum of Justiciability could still swing one way or the other tomorrow.

2.2 Judicial Attitude to Justicibility of Directive Principles of State Policy

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

(i) The constitution which is the grundnorm provides expressly that the provisions of chapter II

[20][2000] 10 NWLR (Pt. 675) 315.

[21](1998) 7 NWLR (Pt.559).

[22](1987) 4 NWLR Pt. 67.

[23](2002) LPELR- 623 (SC).

are not justiciable; and

(ii) The provisions are new and therefore the courts are still in the process of learning to appreciate the purport of its adoption into the constitution. Therefore, the Nigerian courts can be excused on the level of their approach to the application of the justiciability of chapter II.

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

Thus by this judgment it is a settled proposition that the courts have no jurisdiction to entertain matters relating to the provisions of chapter II of the constitution.

In the case of *Attorney General of Ondo State v. Attorney General of the Federation and 35 ors,*[23] the Supreme Court upheld the powers of the National Assembly to legislate on the provisions of Section 15(5) which has to do with directive principles relating to combating corruption. Also in *Attorney General of Lagos State v. Attorney General of the Federation & ors.*[24] the Supreme Court upheld the competence of the National Assembly to make laws relating to environmental matter in furtherance to section 20 of the 1999 constitution – which is a directive principle.

Justice Niki Tobi had this to say in the case of *Federal Republic of Nigeria v. Anache & ors.*[25]:

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

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

(i) Where the constitution makes another provision on any of the subjects in the chapter which, being outside the chapter is justiciable; and

(ii) Where the National Assembly makes any legislation making any of the subjects of the chapter the subject of such an Act and thus justiciable, since the National Assembly cannot by any law oust the jurisdiction of the court.

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

[24](2004) LPELR – 10 (SC).

[25](2004) LPELR- 2553 (SC).

[26](2018) LPELR 44941- (CA).

v. Attorney-General Borno State[26], the Appellant/Plaintiff sought a relief against religious and educational discrimination of his children in the primary schools in Borno State that included the forceful teaching of Arabic and Islamic studies in the schools. The trial Judge held that the cause of action being relevant to section 18(1) of Chapter 2 of the 1999 Constitution was not justiciable. The Appellant/Plaintiff appealed to the Court of Appeal. Allowing the appeal, Oguntade JCA in the lead judgement said:

> Although by virtue of section 6(6)(c) of the 1979 Constitution, Chapter 2 of the Constitution is not justiciable; where the provisions of the Constitution defines a certain cause of action or enshrines certain rights, those provisions must be applied without inhibition emanating from Chapter 2. In other words, where any legislation for implementing the Fundamental Objectives or Directive Principles is in issue, the Courts shall not declare such legislation void unless the fundamental rights of any citizen is infringed or any other express provision is clearly infringed. Therefore, where a local authority as in the instant case, in the implementation of Fundamental Objectives of State Policy adopts a system which infringes in citizens fundamental right to freedom of religion and freedom from discrimination on ground of religion, that breach of the citizen's right is justiciable .

2.3 African Commission on Human and Peoples Rights.

Again chapter II could be indirectly justiciable by invoking the provisions of African Charter on Human and Peoples Rights, which has been domesticated making the said charter part and parcel of Nigerians domestic laws.[27] The charter guaranteed some socio-economic rights similar to the ones contained in chapter II of the 1999 constitution like equal pay for equal work, the right to health, right to education family rights, right to economic, social and cultural development right to satisfactory environment etc.[28] These rights are made justiciable before the African Commission on Human and Peoples Right.

In *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights v. Nigeria.*[29] the African Commission on Human and Peoples Rights held Nigeria liable for the violation of the rights to freedom from discrimination, right to health, right to life, right to property, right to housing, right to food, right to people to freely dispose of their wealth and resources and the right to safe environment, provided under Articles, 16, 18, 4, 24 of the African charter on Human and peoples Right 1981. The charter did not differentiate between civil and political rights and economic, social and cultural rights, and by article 45 of the charter all the rights enumerated therein are justiciable. Nigeria having signed, ratified and domesticated the charter is under obligation to respect, promote, protect and fulfill these rights.

Also in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. President Federal Republic of Nigeria and Universal Basic Education Commission*[30] the economic community of West African States Court of Justice held that the rights guaranteed by the African charter on Human and Peoples Rights are justiciable before the court, and further held that every Nigerian has a right to education which can be enforced before the court, as guaranteed by the African Charter on Human and Peoples Right.

The African Charter therefore could be used as another normative basis for justiciability of Directive

[27] OAU Doc. CAB/LEG/67/3 rev. 5, 2IL.M 58 (1982), entered into force 21 October, 1986.

[28] *Ibid*.

[29] Communication No. 155/96, available at <https://www.escr-net.org> caselaw>, accessed 22 July 2024.

[30] ECW/CCJ/ APP/09/11 (2014) ECOWASCJ, available at <https://africanlii.org> judgment>, accessed 22 July 2024.

Principles especially with respect to those economic, social and cultural rights that are replicated in both the constitution and the chapter, after all, the state parties are under obligation to respect, protect and fulfill all the rights in the charter whether they are civil, political, economic, social cultural or group rights.

In *Oronto Douglas v. Shell Petroleum Development Company Ltd.*[31] the court of Appeal upheld that the justiciability of an action brought pursuant to article 24 of the African charter on Human and Peoples Rights (Ratification and Enforcement) Act.
Following the decision in *Okogie v. AG Lagos State*[32] many citizens have not been bold to approach the Courts to enforce the educational, social and economic components of the Fundamental Objectives and Directive Principles of State Policy.
However, the Economic Community of West African States (ECOWAS) Community Court of Justice[33] has also ruled that every Nigerian child has a right to education[34]. In a case filed by a civil society organisation, the Socio-Economic Rights Accountability Project (SERAP) against the Federal Government and Universal Basic Education Commission on the right of the child to education based on the provision of the African Charter on Human and Peoples' Rights , the Court sitting in Abuja affirmed the position of the claimant and dismissed the claim of Government that the right to education is neither justiciable nor enforceable under Chapter 2 of the 1999 Constitution. The ECOWAS Court said Nigeria is bound by her obligations under the Charter and cannot use non-justiciability in defence.

The decision of the ECOWAS Court followed that of the Supreme Court in *Abacha v. Fawehinmi*,[35] where it was held that where an international treaty has been domesticated by an Act of the National Assembly as is the case with the African Charter, the treaty becomes binding and our Courts have a duty to give effect to it like all other laws falling within the judicial powers of the Courts. Ejiwunmi JSC[36] stated:

> The African Charter on Human and Peoples' Rights having been passed into our municipal law, our domestic Courts certainly have the jurisdiction to construe or apply the treaty. It follows then that any one who felt that his rights as guaranteed or protected by the Charted have been violated could well resort to its provisions to obtain redress in our domestic Courts.

3. Judicial Approach in other Jurisdictions

It must be acknowledged that the constraint on courts in most jurisdictions where the Directive Principles have been stated not to be justiciable is a general problem. Yet, there are few jurisdictions where the courts have consistently tried to be creative and more assertive with their judicial pronouncements.

In Sri Lanka, the Directive Principles are not expressly justiciable in a court of law and are intended to guide the legislature and the executive. Notwithstanding, the Sri Lankan Supreme Court has used the Directive Principles to interpret other justiciable provisions of the Constitution. *In R. Hap uthanrrige v. B.L. Karunawathie & Ors,*[37] the Court used Article 12(1) of the Constitution to strike down the Circular relating to admissions to. Grade 1 of Schools. The Court made use of the Directive Principles contained in Article 27(2)(h) of the Constitution to conclude that both from the perspective of the

[31](1998) LPELR – 6457 (CA).
[32]*Okogie v. AG Lagos State* (1981) 2 N.C.L.R. 337.
[33]Established by 3C6WAS Heads of State and Government vide protocol adopted on the 6th of July 1991.
[34]See The Guardian Newspaper 23 Nov. 2009 at p5.
[35](2000) 6NWLR. Part 660 at 228.
[36]*Ibid*, p 653.
[37]SC (FR) 10/07 S.C. Minutes 29.03.2007.
[38]B Thiele and P. Wickramaratne: The Legal Enforcement of Economic, Social and Cultural Rights in Sri link, (Centre on Housing Rights and Evictions,2007) available at <http://WWW. cohre. org/srore/attachnwflt5/El2f0Tc3 %2OESC%2ORightS %20in% 2OSri%20Laflka.Pdf>, accessed 21 February, 2010.

application of the equal protection of the law guaranteed by Article 12(1) and from the perspective of national policy, the objective of any binding process of regulation applicable to admission of students to schools should be that it assures all students equal access to education[38].

The Court held that the phrase "National Policy" should be interpreted together with the relevant provisions in Chapter VI of the Constitution which contains Directive Principles of State Policy. The Court was of the view that the limitation in Article 29 which states that the provision of Chapter VI are not justiciable would not be a bar against the use of the Directive Principles to interpret other provisions of the Constitution. The Court stated that Article 27 of Chapter VI lays down the 'Directive Principles of State Policy' contained therein shall guide 'Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society'. Hence, the restriction added at the end in Article 29 should not detract from the noble aspirations and objective contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert.

In *Bulankulame v. Ministry of Interior Development,*[39] the Supreme Court Sri Lanka also referred to the Directive Principles of State Policy set out in Article 27 (14) which provides that the State shall protect, preserve and improve the environment for the benefit of the community.

The Directive Principles have also been successfully used in India to broaden the scope of the right to life in such a way as to protect housing rights. Beginning with the case of *Maneka Gandhi v. Union of India*[40] the Supreme Court of India has tried to infuse into the constitutional provisions the spirit of social justice. The facts were that the government refused to issue a passport to the petitioner, thus, restraining her liberty to travel. In answering the question whether the denial could be sustained without a pre-decisional hearing, the Court proceeded to explain the scope and content of the right to life and liberty. The court departed from its decision in an earlier case[41] and asserted the doctrine of substantive due process as integral to the chapter on fundamental rights and emanating from a collective understanding of the scheme underlying articles 14[42], 19[43] and 21[44]. This approach broadened the power of the court to strike down legislation to include critical examination of the substantive due process element in statutes.[45] Subsequent to the above decision, when the case of *Francis Coralie v. Union Territory of India*[46] came before the court, it did not hesitate in declaring thus:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

The effect of the expanded interpretation is that the courts have felt freer to interfere in matters

[39](2000)1 Sri LR 243.
[40](1978)1SCC248.
[41]*A. K. Gopalan v. State of Mo.dras*, 1950 SCR 88.
[42]The right to equality
[43]The right to freedoms
[44]The right to life
[45]Using this approach, Art. 21 was interpreted to include a bundle of other incidental and integral rights, many of them in the nature of social and economic rights.
[46]AIR 1978 SC 597.
[47](1982)2SCC 273.

touching on the Directive Principles. *In Rajendran v. State of Tamil Nadu*,[47] the issue was in relation to regularizing the services of a large number of casual (nonpermanent) workers in the posts and telegraphs department of the government. In invoking the Directive Principles to direct the regularization, the court said:

> Even though the above directive principle may not be enforceable as such by virtue of Article 37 of the Constitution of India, it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination, it Is urged that the State cannot deny at least the minimum pay in the pay scales of regularly employed workmen even though the Government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. We are of the view that such denial amounts to exploitation of labour. The Government cannot take vantage of its dominant position, and compel any worker to work even as a casual labourer on starvation wages. It may be that the casual labourer has agreed to work on such low wages. That he has done because he has no other choice. It is poverty that has driven him to work on such low wages... We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of paying less than the minimum pay payable... is not tenable... It is true that all these rights cannot be extended simultaneously. But they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources, willingness of the people to produce and more than all the existence of industrial peace throughout the country. Of those rights the question of security of work is of utmost importance.[48]

It must be admitted that even for the courts in India, it has not been too easy getting Out of the shackle of non-justiciability. In *Olga Tellis v. Bombay Municipal Corporation*[49] the petitioners contended that since they would be deprived of their livelihood if they were evicted from the slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence be unconstitutional. The Court was not prepared to go that far. Thus, in denying the contention, the court held that no one has the right to make use of a public property for a private purpose without requisite authorization. If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorized.

In *Paschim Banga Khet Majoor Samily v. State of West Benga1*[50], the Supreme Court of India did not stop just at declaring the right to health to be a fundamental right and at enforcing the right of the labourer by asking Government of West Bengal to pay him compensation for the loss suffered, it further directed the government to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency.

In *Mofrzini Jam v. State of Karnataka*,[51] the question whether the right to education was a fundamental

[48] *Ibid*, para. 34 p. 294, See also *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

[49] (1985) 3 SCC 545. See also Municipal Corporation of Delhi v. Urnamkaur (1 989)1 SCC 101; Sodan v. Singh (1989) 4 SCC 155.

[50] (1996) 4 SCC 37. See also Ram Prasad v. Chairman, Bombay Port Trust, AIR 89, SC 1306 where the Supreme Court directed the relevant public authorities not to evict 50 slum dweller families unless alternative sites were provided for them.

[51] (1992)3SCC 666.

[52] (1993) 1 SCC 645.

right and enforceable as such was answered by the Supreme Court in the affirmative. Thereafter, the case of *Unnikrishflafl J.P. v. State of Andhra Pradesh*[52] provided the opportunity for a larger bench of five judges to examine the correctness of the decision in Mohifli Jam's case where the Court examined the nature of the right to education. The court refused to accept the non- enforceability of the Directive Principles thus held:

> It is noteworthy that among the several articles in part V, only Article 45 speaks of a time-limit; no other Article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the state flout the said direction even after 44 years on the ground that the article merely calls upon it to endeavour to provide the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44years more than four times the period stipulated in Article 45 - convert the obligation created by the article into an enforceable right? In this Context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. We clarify we are not seeking to lay down the priorities for the Government we are only emphasizing the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question.

The Court then proceeded to examine how this right would be enforceable and to what extent. It clarified the issue thus:

> The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV to Part III - we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State.

Another jurisdiction that has done a lot in the area of giving strength to Directive Principles is the Republic of South Africa. Almost all the social rights, namely, adequate housing, health care, food, water, social security and education have been the subject of full judicial proceedings.[53]What makes the South African situation unparalleled and revolutionary is that because of her political circumstances there is in place a Constitutional Court with broad constitutional and moral authority to advance the human rights goals of the post-apartheid South Africa. The Court therefore, was not so much constrained by non-justiciability issues as its broad authority allowed it extensive judicial review, authority to supervise the lower courts and to enforce the new constitutional values. In the words of former Chief Justice Chaskalson, 'the Court plays the role of chief architect of a society based, on democratic values, social justice and fundamental human rights'[54]

The plethora of cases canvassed above show the attempt of the Courts, within and outside Nigerian jurisdiction, to the justiciability of the Directive Principle. While the foreign jurisdiction finds a

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[53] See Erparte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) paras. 1-19, 76 — 78 (S. Afr.); T*hiagraj Soobramoney v. Minister, of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) para. 8 (S. Aft.)*; *Government of Republic of South Africa : Irene Grootboom & Others 2001 (1) SA 46 (CC) para. 2 (S. Afr);* and *Minister of Health v. Treatment Action Campaign (No. 2) (TAC) 2002 (5) SA 721 (CC) (S. Afr.).*

[54] See Arthur Chaskason, former Chief Justice of the Constitutional Court of South Africa in his farewell Speech (June 2, 2005) <http://wwW.cOILStitutiOnalcOurt.Org.za/Site /farewell.htm > accessed 21 February, 2025.

leadway in the constitutional interpretation of the Principle by allowing judicial review of social-economic rights, the Nigerian courts is still shredded in the murky water of section 6(6)(C) to the interpretation of the socio-economic rights. There is still, however, an irresistible pulse for the justiciability of socio-economic rights in other to ensure a healthy society in Nigeria.

4. Taxation Approach to Justiciability Issues

Taxation offers a new approach to the interpretation of chapter II of 1999 constitution of Nigeria. It seeks the enforcement of the socio-economic rights in a manner that will survive the section 6(6)(c) of the Constitution. The enforceability of socio-economic rights can survive under the crucible of tax right. The right is the judicial process of *locus standi* of taxpayer to sue against the government in failing to provide social services: the dividend of taxation. Whether, a taxpayer has the right to approach the court in this regard? Can a taxpayer have *locus standi* to institute action against the government for failing to utilize tax fund without offending the murky water of section 6(6)(c)?

Every scholar agrees on socicaila contarct theory of taxation but the mode of enforcing the contract remains an illusion. Arguably, social contract must be a conversation that goes beyond idealistic narratives to a practical investigation into how taxation can be applied as a tool for social good within a given society. The practical investigation is the judicial process of *locus standi* of taxpayer to sue against the liability of government in failing to provide social good and account for tax revenues. The accountability expected in this regard is not often ensured by the governments hence there is need for the taxpayer to monitor it. While citizens support government in its responsibilities through the provision of finance in form of tax payment, what is happening to the fund should be a concern to the taxpayers because they provided the fund. What happens to the fund should be usage of the fund to provide socio-economic rights as provided in chapter II of the constitution.

The question therefore is: how can the taxpayer monitor the use of tax fund in providing socioeconomic right? Does a taxpayer have the right to approach the court in this regard? Can a taxpayer have *locus standi* to institute action against the government for failing to utilize tax fund? The answer to these issues is muddled in the murky water of section 6(6)(c). In Nigeria, There is no statute or any other authority which confers *locus standi* on taxpayer to institute action in respect of tax fund. But, there is a provision of the Constitution which if properly construed tends to confer this right to a taxpayer in public interest litigation. Section 6(6)(b) of the Constitution(the non-justiciability section)[55] provides thus:

> The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or 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.

The provision was given a strict and narrow interpretation in the case of *Adesunya v.The President*.[56] In this case, the second respondent, Hon. Justice Victor Ovie-whiskey was appointed by the first respondent (President of the Federal Republic of Nigeria) as the Chairman of the Federal Electoral Commission, and the appointment was ratified by the senate, the plaintiff/appellant, Senator Abraham Adesanya challenged the appointment, claiming that the second respondent was a public officer (Chief Judge of the then Bendel State) both at the time of the appointment and the time of the confirmation, and as such ,he was disqualified from being appointed a member of the Federal Electoral Commission, and that such appointment was null and void.

[55] CFRN, 1999, as amended, 2011.

[56] (1981) NSCC.

The High Court of Lagos held in favour of the plaintiff. The respondent appealed to the Federal Court of Appeal, contending that the Plaintiff had no *locus standi* to institute such action since he had no personal interest in the matter. The matter was later referred to the Supreme Court for correct interpretation of section 6(6)(b) of the 1979 Constitution.[57] The Supreme Court unanimously held that the Plaintiff/Appellant lacked the requisite *locus* to institute the action. In the word of the Court, per Sowemimo, J.S.C:

> For an applicant or litigant to have the right of bringing an action, the claimant must have some justiciable interest which may be affected by the action or that he will suffer injury or damage as a result of the action.

The judgment of the court in the aforementioned case triggered sufficient interest principle as prerequisite for *locus standi* in public interest litigation. The basis for the enjoyment of such right became that the party must show that he has suffered personal injury over and above those suffered by the general public.

In view of the judgment in the Adesanya case, does a taxpayer have sufficient interest to institute public interest litigation especially as it concerns utilization of taxpayers' fund? Has he/she suffered injury over and above those suffered by the public? This issue arose again for determination in the case of *Gani v the President of the Federal Republic of Nigeria and Others.*[58] In this case, Dr (Mrs) Ngozi Okonjo-Iweala and Ambassador Olufemi Adenji were appointed the Minister of Finance and Minister of Foreign Affairs respectively pursuant to section 147 of the Constitution of Nigerian. On the instruction of the then President, Chief Olusegun Obasanjo, the two Ministers were paid in foreign currency, which is contrary to the provisions of Certain Political, Public and Judicial Office Holders (Salaries and Allowances, et cetera) Act.[59] Consequent upon the breach of the law by the President, Chief Gani sued the President, the Revenue Mobilization, Allocation and Fiscal Commission, Dr (Mrs) Ngozi Okonjo-Iweala- Minister of Finance , Ambassador Olufemi Adeniji-Minister of External Affairs for a declaratory order that the action of the president contravened the provision of the Constitution which he (Mr president) swore to defend, and for an injunction restraining the respondents from doing same.The Federal Government brought a preliminary objection challenging the *locus standi* of Gani to institute the suit. In the objection filled by Kola Awodein (SAN), counsel to the Federal Government, he contended that Gani has no *locus* since he has not been able to show sufficient interest or threat of injury he would suffer in the matter over and above those of the general public. He urged the position of the Supreme Court in the Adesanya's case upon the Court. The Counsel also argued that the Federal High Court lacked the jurisdiction to entertain the case, saying that the facts of the matter fell under section 16 of the 1999 Constitution which relates to Fundamental Objective and State Policy of the Constitution, and are not justiciable by the effect of section 6(6)(C) of the 1999 Constitution.[60]

Gani on his own part argued that he is a taxpayer and that he has *locus standi* to challenge the government on what it is using the tax payers' money to do. The trial court found for the Federal Government and struck out the suit on the ground that Gani had no *locus standi* to challenge the policy of the Federal Government. Undaunted, Gani appealed to the Court of Appeal, the Appeal Court,

[57] Similar to section 6(6) (b) of the 1999 Constitution.
[58] *(2007)14 NWL.*
[59] Act No 6 of 2002). The Act in Part I- IV of its Schedule itemized the annual basic salaries, allowances and benefi Section 6(6)(C) of the 1999 Constitution provides that: the Judicial Powers vested in accordance will the Foregoing Provision of this section 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 Objective and Directive Principles of State policy set out in Chapter II of this constitution.ts for certain political office holders.
[60] Section 6(6)(c) of the 1999 Constitution provides that: the Judicial Powers vested in accordance will the Foregoing Provision of this section 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 Objective and Directive Principles of State policy set out in Chapter II of this constitution.

remarkably and commendably held that the trial court was wrong to have declined jurisdiction. The Court further averred that if a taxpayer lack jurisdiction to challenge the action of the government, who would. According to the Court:

> …it will definitely be a source of concern to any taxpayer who watches the funds he contributed or is contributing towards the running of the affairs of the state being wasted when such funds could have been channeled into providing jobs, creating wealth and providing security to the citizens. If such an individual has no sufficient interest of coming to court to enforce the law and to ensure that his tax money is utilized prudently who else would have sufficient interest other than him.

The position of the Court enthroned new legal regime of *locus standi* of a taxpayer. The decision in the Gani's case represents a good position of a taxpayer's right concerning public interest litigation especially as it concerns expenditure of taxpayers' fund by extension the provision of socio-economic right. The court was not deterred by the clause of section 6(6)(c) of the Constitution which precludes the court from determining matters relating to Chapter II of the Constitution that contains provisions with regards to payment of salary of minister.[7373] The brevity of the Court was also not deterred by the sufficient interest principle propagated in the Adesanya's case. The exposition of the Court underscores the sacrosanct nature of tax fund. If every other fund can be misappropriated, it should not be tax fund; for it will amount to fraud and extortion of money from the citizen in the name of tax and misappropriate it. Consequent upon the court's decision in the above case, it is submitted that if Gani had *locus* in the case as a taxpayer, a prospective litigant would have *locus* to query why our roads are bad; why we do not have stable electricity; why we cannot have good and qualitative education; why unemployment; why insecurity yet we pay for them in over 50 kinds of taxes in different forms and names. This is how a taxpayer can monitor the uses to which tax revenue has been put. Section 6(6)(c) of the Constitution which relates to Fundamental Objective and Directive Principles, and contains the provision of the social services, the dividend of tax payment, should be construed as subject to tax payer's fund.

It is therefore submitted that *locus standi* should not be a bar to a taxpayer in any public litigation that concerns the appropriation of tax fund.[61] We may not have averted our minds to this because those who should have championed the course may not be able to produce evidence of tax payment. It is therefore expedient that we should pay our tax frequently so that we would not only have locus to institute action but courage to hold government accountable in respect of our taxes fund. The 10th OCED principle of fighting tax crime recognises the fundamental rights of a suspected tax offender in the prosecution of tax offence.[62] These rights are also acknowledged to include the social-economic rights. The absence of socio-economic rights could constitute a defense to a prospective case of tax offence. This is because one could derail from paying tax when the person does not see the essence of tax payment. Lack of evidence of payment could entitle the taxpayer to repudiate the tax contract.

[73] See section 16 of the Constitution.

[61] There is this argument that widening the *locus standi* of a tax payer would lead to floodgate of litigation against the government. This is not correct considering the nature of taxation as people's fund. What should rather be considered is the justice of a matter rather than the number of it. See the case of *Shell Petroleum Development Co. ltd & 5 Ors V EN. Nwawka and Anor, (2001) 10 NWLR (pt. 7200,)* where the Court of Appeal per Pats-Acholonu, J.C.A (as he then was and of the blessed memory) held that: the development of the law of *locus standi* has been retarded extensively due to fear of floodgate of persons meddling into matters not even remotely connected with them. In my opinion, let them inedc lie and let the court remove the wheat from the chaff.. .1 believe that it is the right of any citizen to see that law is enforced where there is an infraction of its being violated in matters affecting the public law and in some cases of private law such as where widows, orphans are deprived, and a section of the society will be adversely affected by doing nothing. The justice of a taxpayer's suit lies in granting him the purpose for which the tax is paid and not on the number at' suit that could be instituted thereto. The only way the issue of floodgate could be reasonable curtailed is ensuring judicious and judicial use of taxpayer's money. No taxpayer would go to court when he is seeing the dividend of his tax fund.

[62] Further information is available on the ATO website at: https://www.ato.gov.au/General/The-fight- against-tax-crime/News-and-results/Tax-crime-prosecution-results/.

For a taxpayers to remain in the contract of tax payment, they should enjoy the right to benefit from the tax system, where the payment is derailed, the right to investigate same inures.

The US tax system has recognized the *locus standi* standing of taxpayer to investigate tax expenditure The American Supreme Court, in the case of *Paschal v Secretary of Public Works*[7676] held that 'a taxpayer's suit is enough to confer *locus standi* to a party where the act complained of directly involve the illegal disbursement of public fund derived from taxation.' Also, in the case of Flast v. Cohen[7777] the American Supreme Court held that taxpayer's suit is an exception to the standard rule of requiring a party who invokes the exercise of judicial power to have a real and personal interest or a direct injury in the outcome of the controversy**.**

In the *Flast's* case, taxpayers sued to enjoin the expenditure of federal funds to purchase material's for parochial schools under the Elementary and Secondary Education Act of 1965 on the grounds that such expenditure was contrary to the establishment clause of the first amendment. The court ruled that the taxpayers in this case had standing, overruling what was thought to be broad prohibition on taxpayer standing from Frothingham, Chief Justice Warren noted thus:

> the decision in frothingham could read to express either a constitutional prohibition on taxpayer suits or pragmatic consideration of judicial self-restraint given the reason provided in Frothingham, that the taxpayer interest was minute or remote, and that allowing the suit to contain would open the floodgates of litigation, the latter was the more sound reading the court found no general constitutional bar to taxpayer suits but laid out two factors, which must be satisfied for such suits to proceed to address the concerns expressed in Frothingham.

Also, In the Philippine case of *Municipal Corporation v Govind Laxman Savent*[7878], it was held that the right of a taxpayer against local bodies even in the absence of personal injury had been permitted because the taxpayer has a special interest on the function of the local body.

5. Conclusion

The justiciability of socio-economic right has dominated the space of legal research in human right law. The argument has taken two perspectives. One argument is for the justiciability of socio-economic right while the other is in support of non-justiciability. The African Commission on Human and Peoples right have also upheld the justiciability of socio-econimic right as an intricate aspect of human right. Nonetheless, the legal regime of justiciability of socio-economic right is unsettled. The Nigerian court is very relevant in judicial activism when it concerns socio economic right. The paper has found a tax approach to surmount the huddle of justiciability of socio-economic right. Taxation provides a new legal regime that will secure the enforcement of the socio-economic right. The court has held that a taxpayer has the right to maintain an action against the usage and expenditure of tax fund. The Court reasoned that a taxpayer has a right to query the usage of his tax fund. Tax funds are meant to be used to provide socio-economic rights. It means that a taxpayer can have the *locu standi* to query the provision of socio-economic right. Socio-economic right though non justiciable as a human right can be justiciable as a tax right. The new legal approach promises a better legal regime in the nation's legal space on the justiciability issues.

[7676] 110 phil. 331.

[7777] *392u.s 83.*

[7878] Unreported, available at <*www.pinoykwyer.ore taxpayer*>, accessed 5 June 2025.