

JUSTICIABILITY OF CHAPTER II OF THE NIGERIAN CONSTITUTION: A NEED FOR JUDICIAL ACTIVISM IN ITS INTERPRETATION

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Abstract

The rise in the debate for the inclusion of Socio-economic rights in the statute books of various Nations, saw the emergence of international and regional treaties embodying these rights. Nigeria in following the trend made socio-economic rights a part of the Nation's constitution, but unfortunately made those rights unjusticiable, by the same constitution that codified these rights. Despite several evolutionary trends in the Nigerian Society, the Nation has been on constant decline with successive governments reducing the standard of governance. All round, from security to the economy, successive Nigerian governments fail to perform their core responsibility to the members of the society that they lead. These core responsibilities as are encapsulated under Chapter II of the Constitution of the Federal Republic of Nigeria were made unjusticiable leaving the masses unable to enforce those provisions and allowing the ruling class to behave irresponsibly. The essence of this article is to again highlight the core responsibility of government in relation to the society that they govern and to point out the role the judiciary can play in bringing accountability to governance by making Chapter II justiciable through its interpretative law-making powers. This article highlights the need for a change in judicial attitude, placing reliance on judicial activism and propelling social change by interpreting Chapter II in such a manner that makes it justiciable.

Keywords: Socio-economic rights, Judicial Activism, Governance, Interpretation of Statutes, Jurisprudence, Constitution

1. Introduction

The judiciary as an arm of government is saddled with the responsibility of interpreting laws. While interpreting these laws, they close the gaps made by the legislature and give flesh to the various legislative interventions, in a manner that can be appreciated by the common man, made applicable to contemporary vicissitudes of life and frictions from human interactions. The Courts in playing their interpretative role therefore make laws. Judicial attitude invariably determines how these laws are interpreted, whether in the literal sense, regardless of the harm it does to the society, or propelling positive change as the core of each interpretative exercise. The legislature, in enacting laws has a reason behind such enactment, ranging from curing existing mischief, protecting the elites in the society or pandering to the wishes of the masses who have called for change.

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Regardless, the law is meant to engender societal cohesion, create a safe environment for the actualization of individual lawful aspirations and provide several forms of protection for members of the society. The law is a tool for social engineering.

The inclusion of socio-economic rights as a constitutional provision in the Nigerian State, seems to be a scam by the elites, since on one hand, it embeds the socio-economic rights of the Nigerian and directs the government to ensure that provisions are made to protect these rights, yet, on the other hand, make these socio-economic rights unenforceable. The Nigerian Courts have in some instances declared that these aspects of the Constitution can still be interpreted in such a manner that will make these rights enforceable. Yet, the reality is that most Courts still find it difficult to cause these socio-economic rights to be enforceable against the various governments and their agencies.

This paper focuses on the essence of governance, the current attitude of the courts in interpreting Chapter II of the Constitution of the Federal Republic of Nigeria and makes a case for reliance on judicial activism in the interpretation of chapter II of the constitution as a way of ensuring that the socioeconomic rights of citizens and residents of Nigeria are enforceable and protected, thus fulfilling the essence of governance.

2. The Essence of governance: Social Contract

According to the theory of social contract, individuals come together to form a society, live peacefully, respect each other's rights, conform to the laws of the state or community and in turn agree to give up some of their rights in order to enjoy the protection, comforts, and developments the society offers.¹ Proponents of the Social Contract theory posit that before the agreement, the individuals born with their natural rights, live in a state of nature, having no obligations to society and not enjoying any protections from the society.¹ As a result of the rights given up in favour of the society, the society owes the individuals certain protections in return.

The society in providing cohesion and proper organization in managing the affairs of the members of the society who have given up their rights propels the emergence of a class of individuals and institutions that will bring about the actualization of the expectations of the members of the society. The emergence of these class of individuals and institutions lead to the formation of governments and their agencies to give vent to the aspirations of the members of society. It therefore implies that the individuals who make up the society, give up their natural rights and dispense with the state of nature, believing that the society will provide them with adequate protection necessary to make their individual and collective existence meaningful, and also hoping that the government saddled with the corresponding responsibility will fulfil its part of the bargain. The corresponding responsibility expected from the government forms the major fulcrum of the essence of governance.

According to Gbogborosi, the essence of politics and governance is to ensure resource mobilization, engender equitable distribution of those resources and to pursue the maximization

¹ *Ibid.*

of happiness for the citizens.² The purpose of Government revolves around serving the interest of the people, making policies that will protect and provide a sustainable livelihood for members of the society, providing security and a safe environment for its citizens, promoting the rule of law, ensuring proper delivery of essential services, creating employment and the enabling environment for businesses to thrive, building infrastructures that will assist in the general welfare of citizens, and protecting the individual rights of its citizen. Oraegbunam added that a major purpose for state formation, is to ensure the adequate provision of basic social amenities since individuals willingly give up their natural rights because of the extreme difficulty in realizing individual goals and destiny while setting up amenities for the use of everyone.³ Oraegbunam posited that these “social infrastructure consists in facilities for sufficient food production, good access roads, adequate housing, clean water and steady electricity, cost-effective and reliable health facilities, integral educational structure, habitable and healthy environment”.⁵ Ene submitted that the responsibility of government to the citizens includes the provision of security, taking care of the welfare of the citizenry, provision and promotion of economic activities and provision of social amenities.⁴

It is submitted that the essence of state formation and the emergence of government structures set up in lieu of individual natural rights, is to protect the individual rights of members of the society and to provide an enabling environment for the members to succeed and achieve their aims while living a life of dignity, making the reliance on individual dexterity that could give rise to a state of nature and/or survival of the fittest, less attractive.

3. Importance of Chapter II of the Nigerian Constitution in fulfilling the essence of governance

Most governments, in giving expression to the aspirations of the individuals that donated and surrendered their rights in lieu of protection from the State, have taken steps to ensure that the essence of governance is the core of their activities in the act of governance. Consequently, most societies have codified these responsibilities that form the essence of governance, while those who seek to occupy government positions make promises that seek to improve the welfare of the citizens in the hope of being handed the reins of power and governance within the society/state.

The conclusion of World War II and the attendant devastation prompted an increased debate and desire to ensure that countries took more efficient steps in promoting socio-economic rights.⁵ International treaties⁶ and regional treaties⁷ codified socio-economic rights prompting more States to either adopt the treaties or allow the treaties influence their constitution-making and other

² Gbogborosi L “The essence of politics and governance” The Essence of Politics and Governance - Vanguard News (vanguardngr.com) (Accessed 29 October 2022).

³ Oraegbunam I “Citizens’ Rights to basic social infrastructure in Nigeria today: The imperative of genuine enforcement” (1) Citizens’ Rights to Basic Social Infrastructure in Nigeria Today: The Imperative of Genuine Enforcement | Ikenga Oraegbunam - Academia.edu (Accessed 30 October 2022). ⁵ *Ibid.*

⁴ Ene P “Duties and responsibilities of government to the citizens” Duties and Responsibilities of Government to the Citizens - Walyben (Accessed 30 October 2022).

⁵ Ahmed D and Bulmer E “Social and Economic Rights” 2nd Ed., International IDEA Stockholm, 2017.

⁶ For example the Universal Declaration of Human Rights (UDHR), 1948, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 and the Convention on the Rights of the Child (CRC), 1989.

⁷ For example, the African Charter on Human and Peoples Right (ACHPR), 2007.

legislative interventions, in effectively protecting the socio-economic rights of members of the society.⁸ These socio-economic rights although varying between countries revolve broadly around the right to universal public services (education, health care and other public services), rights that support the provision of decent living conditions (including access to food, water and other forms of subsistence), labour rights, rights to natural resources, property rights.⁹

The United Nations in championing and compelling Nations to ensure the protection of these Socio-Economic rights, created an obligation on the States to ensure the progressive full realization of these rights over a period of time, ensure the immediate enjoyment of minimum essential levels of each right, prohibit the emergence of factors that can diminish the current enjoyment of the rights, ensure that discriminations in the enjoyment of these rights are eliminated especially when the resource are limited.¹⁰ The United Nations which created the obligation in 1948 established the right to adequate housing, education which shall be free to at least the elementary or fundamental stages,¹¹ health care, wellbeing, social security,¹² adequate food, water and sanitation, right to take part in cultural life¹³ and to work.¹⁴ Thus on education, the United Nations Declaration on Human Rights of 1948 obligates States to ensure amongst other obligation that “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”.¹⁵ It further obligates States to ensure that “Parents have a prior right to choose the kind of education that shall be given to their children”.¹⁶ Article 25 in creating obligations on States regarding the right to a standard of living, mandates States to ensure 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”.¹⁷ It further protects Motherhood and Children by directing States to ensure that “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”.¹⁸ Article 23 in creating an obligation on the States to provide the right environment to enable the citizens to work, directed that “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”.¹⁹ It further mandated States to ensure that everyone works without discrimination, enjoying the right to equal pay for equal work, just and favourable remuneration that will ensure the citizen and his family’s existence

⁸ Ahmed D and Bulmer E “Social and Economic Rights” 2nd Ed., International IDEA Stockholm, 2017.

⁹ Ahmed D and Bulmer E “Social and Economic Rights” 2nd Ed., International IDEA Stockholm, 2017.

¹⁰ “Economic, Social and Cultural Rights” A United Nations Human Rights Office of the High Commissioner Website (Accessed 2 November 2022).

¹¹ Article 26 of the United Nations Declaration of Human Rights.

¹² Article 22 of the United Nations Declaration of Human Rights.

¹³ Article 27 of the United Nations Declaration of Human Rights.

¹⁴ “Economic, Social and Cultural Rights” A United Nations Human Rights Office of the High Commissioner Website (Accessed 2 November 2022).

¹⁵ See Article 26 (1) of the United Nations Declaration of Human Rights.

¹⁶ See Article 26 (3) of the United Nations Declaration of Human Rights.

¹⁷ See Article 25 (1) of the United Nations Declaration of Human Rights.

¹⁸ See Article 25 (2) of the United Nations Declaration of Human Rights.

¹⁹ See Article 23 (1) of the United Nations Declaration of Human Rights.

worthy of human dignity, with the right to form and to a join trade union to protect the citizen's interest.²⁰

The African Charter on Human and Peoples Rights also obligates member states including Nigeria to ensure amongst other rights, the protection of socioeconomic rights including the right to property, work, health, education, protection of the family and vulnerable groups, and general satisfactory environment.²¹

Interestingly, in codifying these socio-economic rights, Nigeria made these rights a part of the Nation's grundnorm by devoting an entire chapter in its Constitution to the protection of these rights. The chapter is named the Fundamental objectives and directives of state policy, which implies that the objectives within the chapter are ultimate and provide the compass that defines and directs policies of the State. The essence of governance and its activities are meant to revolve around these objectives and principles. Unfortunately, successive Nigerian governments seem to make it their policy to rather derogate from these objectives and principles.

Chapter 2 of the constitution of the Federal Republic of Nigeria, 1999 (as amended), houses Sections 13-24 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) (hereinafter referred to CFRN), which provides for the protection of the citizen's socio-economic rights, as well as stipulates duties the citizen owes the state.

Section 13, imposes an obligation on the organs of government, all authorities and persons to conform, observe and apply the provisions of Chapter II of the CFRN 1999.

Section 14, places sovereignty on the people of Nigeria; makes the security and welfare of the people the primary purpose of government, mandates the State to ensure the participation of the citizenry in government, demands that the composition of government should reflect federal character while promoting national unity and commanding national loyalty.

Section 15, provides for the motto of Nigeria, and mandates the government to encourage national integration, through the provision of adequate mobility of people, goods/services, inter-marriage, and formation of association. **Section 15 (5)**, provides for the abolition of corrupt practices and abuse of power. **Section 16**, mandates the government and its agencies to harness the resources of the nation, promote national prosperity and engender a self-reliant economy, and control the national economy in a manner that engenders maximum welfare, freedom and happiness for the citizenry through social justice and equality.

Section 16 (1) obligates the State to ensure that a planned and balanced economic system that harnesses and distributes the Nation's material resources for the common good, is operated in a manner that ensures that the system is not concentrated in the hands of a few, and providing suitable and adequate shelter, food, a reasonable national minimum living wage, old age care/pension, employment, sick benefits, and welfare of the disabled; is put in place. **Section 17**, mandates the State to ensure that a social order built on freedom, equality and justice, ensuring that equality of rights and opportunities before the law, recognition and maintenance of the sanctity of the human person, humane government activities, exploitation of human or natural resources for the common good, independence and impartiality/integrity of the courts of law; are

²⁰ Articles 23 (2) – (4) of the United Nations Declaration of Human Rights.

²¹ Articles 14, 15, 16, 17, 18, 24 of the African Charter on Human and Peoples' Rights, 1981.

attained. **Section 17 (3)** in ensuring the citizens' access to quality means of livelihood, mandates the State to direct its policies towards ensuring that all citizens have the same opportunity for means of livelihood and suitable employment with just and humane conditions of work, providing the right environment that safeguards the citizens' health safety and welfare in employment, with equal pay for equal work. The subsection also mandates the States to provide adequate medical and health facilities for all, adequate protection for children, young or aged from moral and material neglect, and the promotion of family life.

Section 18, mandates the government, to ensure equal and adequate education and opportunities at all levels; to take steps to eradicate illiteracy and as is practicable provide free compulsory universal primary education, free secondary education, free university, and adult literacy programs.

Section 19, provides for the State's foreign policy objectives.

Section 20, mandates the State to protect the environment and safeguard the air, water, land, forest and wildlife. This will benefit human beings.

Section 21, directs the government to protect and promote the Nigerian culture and the attendant cultural values.

Section 22, mandates the government to allow the mass media the freedom to uphold the fundamental objectives which is the essence of governance, and to hold the government accountable in the performance of their constitutional duties.

Section 23, provides for national ethics such as discipline, integrity, dignity of labour, social justice, religious tolerance, self-reliance, and patriotism. **Section 24**, stipulates the duties expected of the citizen in abiding by the ethos of the Constitution and its ideals.

It is submitted that the various provisions of Chapter II of the Constitution of the Federal Republic of Nigeria constitute the essence of governance since the strict observance of those provisions will ensure that the welfare and happiness of the members of the society are taken care of, while the right environment to eke out meaningful means of livelihood and fulfil their aspirations is provided. For example, a safe environment as provided for by Sections 14 and 20 is the foundation of a prosperous society, while the promotion of fairness as stipulated by Section 14 reduces agitations over marginalization. A prosperous Nation that ensures the welfare, freedom and happiness of the citizenry, as stipulated by Section 16, makes the lives of the citizens worth living. According to Falana, an individual needs his socio-economic rights in order to realize and enjoy the right to live and exist.²² He further opined that the right to health is linked to political, social and fiscal welfare and safety for all Nigerian nationals, and its enforceability is crucial to the sustenance of the Nation.²³

The implication, therefore is that the provisions of Chapter II of the Constitution being an embodiment of the essence of governance, the adherence to the obligations is essential and pivotal to the fulfilment of the aspirations of the members of the society, and its enforceability is the only plausible means of giving effect to these provisions.

²² Falana F "Justiciability of Chapter Two of 1999 Constitution (as amended): Need for the Nigerian judicial system to be more proactive" Justiciability of Chapter Two of 1999 Constitution (as amended): Need for the Nigerian judicial system to be more proactive - Vanguard News (vanguardngr.com) (Accessed 19 December 2022).

²³ *Ibid.*

4. The Current attitude of the courts in interpreting Chapter II of the Constitution

Section 6(6)(c) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) declares that Chapter II of the CFRN, which embodies the Socio Economic Rights, and is the essence and core of governance, is not justiciable. It provides thus “The judicial powers vested in accordance with the foregoing provisions 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 II of this Constitution”. Thus, most Courts have in line with the principles of judicial passivity²⁴ ruled that the provisions of Chapter II of the Constitution of the Federal Republic of Nigeria, are not justiciable and cannot be enforced against the various strata of government. The members of the Society, who gave up their natural rights believing that in exchange they will receive adequate protection from the Nigerian State are unfortunately left without protection. The pertinent question is why have a government that cannot be held responsible regarding the main essence of its existence? It is submitted that it is absurd to make unenforceable laws.

The Supreme Court when presented with an opportunity, in *Archbishop Olubunmi Okogie & Ors v. Attorney General of Lagos State*,²⁵ to pronounce on the justiciability of Chapter II of the CFRN, ruled that in line with Section 6(6)(c) of the CFRN, Chapter II was not justiciable. It held that “The Fundamental Objectives identify the ultimate objectives of the Nation and Directive Principles lay down the policies which are expected to be pursued in the efforts of the Nation to realize the National ideals. 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 Directives Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable.”

Fortunately, despite the provisions of Section 6(6)(c) and some decisions of the Court affirming that Chapter II of the CFRN is non-justiciable, a number of Jurists and several scholars are of the view that the courts can still find a way around the issue in interpreting the said Chapter II as being justiciable. In the case of *FEDERAL REPUBLIC OF NIGERIA V. ANECHE & 3 ORS*,²⁶ Niki Tobi JSC observed that “section 6 (6) (c) of the Constitution is neither total nor sacrosanct as the section provides a leeway using 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.”

²⁴ Judicial passivity in interpretation of the laws and statute is a laid back approach to the interpretation of the law. Seeking to give vent to the mere letters of the law without adding innovations that would propel change. According to Lord Jowith (the Lord Chancellor from 1945-1951) at the Seventh Legal Convention of the Law Council of Australia (1951), he pleaded thus “please do not get yourself into the frame of mind of entrusting to the judges the working out of a whole new set of principles which does accord with the requirements of modern conditions. Leave that to the Legislature, and leave us to confine ourselves to trying to find out what the law is”. (1951 25 Aust). L.J. st. p. 296

²⁵ (1981) 2 NCLR 337, 350.

²⁶ (2004) 1 SCM P. 36 at 78.

In **ATTORNEY-GENERAL, ONDO STATE V ATTORNEY-GENERAL, FEDERATION OF NIGERIA**,²⁷ the Supreme Court held that “notwithstanding the non-justiciable nature of the provisions of Chapter two, it would amount to a deficiency of obligation on the part of the branches of governments if they acted in contempt of the fundamental objectives and directive principles of state policy.”

In **ARCH. BISHOP OLUBUNMI OKOJIE V. A. G. LAGOS STATE**³⁰, the Court of Appeal stated that it will enforce the provisions of Chapter II of the Constitution or any social legislation implementing Chapter II in so far as it does not conflict with any express provisions of the Constitution or infringe on the Fundamental Rights of citizens.

In **ATTORNEY GENERAL OF ONDO STATE VS. ATTORNEY GENERAL OF THE FEDERATION & ORS**²⁸, the Supreme Court held that considering the provisions of Section 15(5) and item 60(a) the National Assembly can make Laws to combat corruption in the country.

In **LAFIA LOCAL GOVERNMENT VS. THE EXECUTIVE GOVERNOR NASARAWA STATE & ORS**²⁹, the Supreme Court held that by virtue of Section 14(4) of the Constitution of the Federal Republic of Nigeria 1999, the composition of the Government of a State, a Local Government Council or any of the agencies of such Government or Council and the conduct of the affairs of the Government or Council or such agencies shall be carried out in such manner as to recognize the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the peoples of the Federation.

Equally, Falana argued that by virtue of Section 12 of the CFRN, international treaties upon ratification and enactment into law by the National Assembly, have a force of law, therefore the African Charter on Human and Peoples Rights which embodies socio-economic rights, having by ratified by the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004, is a valid piece of legislation, enforceable by the Court.³⁰

However, most Courts “are reluctant to decide on cases arising out of socioeconomic rights claims because they believe that these rights relate to questions of social policy which best fall within the power and competence of politicians and policy makers. Because of this judicial reluctance, socio-economic rights are often characterized as non-justiciable”.³¹ Falana pointed out that most High Courts have a proclivity for dismissing cases seeking to enforce Socio-Economic Rights, and imposing heavy fines on the Applicant “for dragging the Government to Court to account for

²⁷ [2002] 9 NWLR (Pt. 772), 222. ³⁰ (1981) 2 NCLR 337.

²⁸ (2002) FWLR (Pt. 111) 1972.

²⁹ (2012) 17 NWLR (Pt. 1326) 94 at 143.

³⁰ Falana F “Making Chapter II of the Constitution Justiciable” Making Chapter II of the Constitution Justiciable – THISDAYLIVE (Accessed 23 November 2022).

³¹ Ibe S “Beyond justiciability: realising the promise of socio-economic rights in Nigeria” (2007) 1 *AHRLJ* 225-248.

official impunity”.³² For example, the Court dismissed a suit challenging the appointment of Court of Appeal Judges in contravention of federal character, as stipulated by section 14 CFRN, on the grounds that the Plaintiff lacked the legal right to lacked the locus standi to institute the suit.³³ According to Ezechukwu, the “Courts have paid deaf ears to the plight of the deprived/underprivileged in the society who are at the receiving end of the violations of their social and economic rights by corrupt politicians/leaders, who always rely on the non-justiciability provisions making Chapter II of the Nigerian Constitution to escape accountability in and out of office”.³⁴ Ezechukwu further opined that duty without accountability makes corruption inevitable.³⁵

The Supreme Court of India in recognizing the justiciability of socio-economic rights, on the other hand, had held that socio-economic rights are tied to the right to life. In *OLGA TELLIS & 2ORS V. BOMBAY MUNICIPAL CORP. & ORS*,³⁶ the court held that the right to life includes the right to livelihood because where a person is denied his means of livelihood, he is denied his right to life, and where there is an obligation on the State to safeguard the means of livelihood it would be pedantry to exclude the right to livelihood from the right to life.³⁷ The Court was of the opinion that the easiest means of depriving someone of his life is to deprive the person the right to livelihood which will be deployed in sustaining the life.

As Ogun pointed out, the non-enforceability of the socio-economic rights as encapsulated under Chapter II of the 1999 constitution (as amended) has negative effects on the development of Nigeria and unfortunately, the judiciary’s passivity has aided this irresponsible attitude towards the realization of these socio-economic rights which are tied to the existence of the members of the Nigerian State.³⁸ Ogun pointed out that the non-enforceability of these socioeconomic rights is an attempt by the ruling class to “hoodwink the unsuspecting citizens of Nigeria”.³⁹ Despite the directives in Section 16 of the CFRN, as at November 2022, 63 percent of Nigerians live in poverty,⁴⁰ while the level of terrorism, kidnap, insecurity is alarming despite the provisions of Section 14(1) (b) of the CFRN,⁴¹ and government and its agencies outdo each other in their disregard for human rights and respect for the rule of law, despite the directives in Section 17 of the CFRN.

³² Falana F “Making Chapter II of the Constitution Justiciable” Making Chapter II of the Constitution Justiciable – THISDAYLIVE (Accessed 23 November 2022).

³³ Are J “Court strikes out suit seeking to quash appointment of appeal judges” Court strikes out suit seeking to quash appointment of appeal court judges (thecable.ng) (Accessed 23 November 2022).

³⁴ Ezechukwu PO **Critique of socio-economic rights provisions under chapter two of Nigerian Constitution and their non-justiciability**, LL.M Dissertation, University of Pretoria, Pretoria, South Africa, 2017, p. 74.

³⁵ *Ibid.*

³⁶ (1986 AIR 180, 1985 SCR Supl. (2) 51).

³⁷ *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51. | ESCR-Net (Accessed 19 December 2022).

³⁸ Ogun F “Non-Justiciability of Chapter Two of the 1999 Constitution: A hindrance to Nigeria’s development” Non-Justiciability of Chapter Two of the 1999 Constitution: A Hindrance to Nigeria’s Development by Festus Ogun :: SSRN (Accessed 20 December 2022).

³⁹ *Ibid.*

⁴⁰ Izuaka M “133 Million Nigerians living in poverty – NBS” 133 million Nigerians living in poverty – NBS (premiumtimesng.com) (Accessed 20 December 2022).

⁴¹ Obiezu K “Insecurity in Nigeria’s rural communities” INSECURITY IN NIGERIA’S RURAL COMMUNITIES – THISDAYLIVE (Accessed 20 December 2022).

5. The Law as an instrument of Social Engineering

The law is a veritable tool for propelling social engineering. According to Omote R, “the end of the law is for the society as the society fashions the law. Thus, society creates the law and the law exists for the society”.⁴² He further opined that “the law ought to be a corrective instrument of social change and not a clog”.⁴³ The law is meant to address and advance the society as new challenges emerge and the society evolves. The making and interpretation of the laws should be a propelling factor that eliminates all forms of hurdles in the society, by creating positive differences in the society, and not allowing a group to suffocate others with their dominance. This is in tandem with Roscoe Pound’s theory of social engineering, positing that law is “social engineering which means a balance between the competing interests in society” and a means to shape society and regulate the behaviours of the people.⁴⁴ In other words, balancing the interest of members of the society and the State with the help of the law is the essence of social engineering.

It is submitted that since the law ought to be a tool that propels social change, it is imperative that the makers of the law and the interpreters of the law, must perform their duty, ensuring that the laws being made or interpreted are not made/interpreted in a way that is inimical to the society they claim to protect. The Courts being the interpreters of the law and makers of the law, while interpreting the law,⁴⁸ must carry out their duty with the main aim that each set of rules they seek to interpret must be interpreted in a way that shows that law is a corrective instrument that must engender social change. It is further submitted that any interpretation of a statute that ends up clogging societal progressive wheels ends up not fulfilling the essence of the law. Denying the Nigerian masses the ability to demand accountability, and hampering their ability to bring an action against the government that should in fact provide socio-economic protection is an aberration and such denial under the Chapter II of the CFRN, simply gives the political class the powers to keep whipping the masses while the masses are restrained from complaining. Obviously, the political class would want to have their dominance unchecked and the directives under Chapter II unjusticiable, thereby making a balance of the differing interests of the individuals and the State, ineffective. The enduring reluctance of most Courts to find a way to interpret the provisions of Chapter II of the CFRN is an abdication of the role of the law in engendering social change through social engineering.

Unfortunately, it can be deduced that the major reason why most Courts still find it difficult, in line with current realities, to interpret socio-economic rights as a justiciable one may be the lack of appreciation that law is a veritable tool for social engineering.

⁴² See Viyon OO “Law: A strategic tool for Social engineering” LAW: A STRATEGIC TOOL FOR SOCIAL ENGINEERING (9jalegal.com.ng) (Accessed 11 December 2022).

⁴³ Omote R “Law ought to be an instrument of social engineering” Microsoft Word - Document1 (nigerianlawguru.com) (Accessed 11 December 2022).

⁴⁴ See Gochhayat SA “Social engineering by Roscoe Pound: Issues in legal and political philosophy” <http://dx.doi.org/10.2139/ssrn.1742165> (Accessed: 20 December 2022). ⁴⁸ The Courts in the process of interpreting legislations make laws. Primarily the Legislative arm of government make laws for the Nation or States, however the Executive arm of government sometimes through its various agencies make rules without the Legislative arm of government and in most cases, the Legislature when making laws, leave some gaps for the Executive arm of government to fill. Equally, the Judiciary also makes laws while performing its primary role of interpreting the law. A Judge while interpreting the law can decide to give the law a literal interpretation or to read further meaning into same by finding the spirit and intentions of the Law makers in line with Justice. While interpreting same, the Judiciary expands and gives meaning to the law in order to make that law just.

6. A case for reliance on judicial activism in the interpretation of chapter 2 of the constitution

According to Bhagwati, “the responsibility of providing life and infusing blood into a structure of legislation to create a living element that can meet the needs of the society, lies on the judges”.⁴⁵ Thus the law can be used as an instrument of social change when properly wielded by the Judges who interpret the law.⁴⁶

Interpretation of statutes depends on several factors ranging from the dependence on the literal meaning of the statute, trying to find the intentions of the makers of the law in question, determining the mischief the statutes was enacted to cure and a host of other reasons. Interpretation may also depend on the posture or inclination of the Judges that interpret the statutes. Consequently, while some Judges may want to interpret a statute literally by taking the law as they find it and not as the law ought to be,⁴⁷ others elect to interpret statutes in a way that provides remedies to the wide range of social wrongs, ensuring proper justice.⁴⁸ Similarly, while some Judges merely give vent to the mere letters of the law without adding innovations that would propel social change, others are innovative and sensitive in their pursuit of justice and are creative in their application of the law. Judges who belong to the first spectrum are known as judicial passivists while those on the other divide are referred to as judicial activists.

The legislature in making the laws has an intention, but the intention must be propelled by the desire to protect the members of society. The Courts on the other hand must also interpret the law, not only to find the intendment of the legislature but mainly to meet the needs and aspirations of members of the society. That is a major path in the attainment of a just society. Lord Denning in espousing the need for Courts to interpret laws in a manner that protects the members of the society stated thus “We sit here to find out the intention of parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis”.⁴⁹

According to Robert Kennedy “the glory of justice and the majesty of law are created not just by the Constitution – nor by the Court – nor by the officers of the law- nor by the lawyers – but by

⁴⁵ See Banerji O “How can the law be used as an instrument for creating social change” How can the law be used as an instrument for creating social change - iPleaders (Accessed 10 December 2022).

⁴⁶ *Ibid.*

⁴⁷ This judicial attitude is referred to as Judicial Passivity. Judicial passivists believe that the Courts cannot usurp the functions of the legislature by legislating from the bench but must interpret statutes literally and that going beyond this basic function, the Court will be deemed to have behaved improperly by straying beyond the limits of judicial function. See, Okere BO “Judicial Activism or Passivity in Interpreting the Nigerian Constitution” *The International and Comparative Law Quarterly* Vol. 36 No. 4 (Oct. 1987) Pgs. 788-816.

⁴⁸ This judicial attitude is referred to as Judicial Activism. According to Justice V. R. Krishana Iyer, judicial activism is a device to accomplish the cherished goal of social justice. He said, “After all, social justice is achieved not by lawlessness process, but legally tuned affirmative action, activist justicing and benign interpretation within the parameters of Corpus Juris”. See Mane AD “Judicial activism: A theory of judicial philosophy” Microsoft Word - 1999-speech - Judicial Activism - Theory of Judicial Philo– (nigerianlawguru.com) (Accessed 10 December 2022).

⁴⁹ *Magor v Newport Corporation* 1951 AC 189 213.

the men and women who constitute our society – who are the protectors of the law as they are themselves protected by the law”.⁵⁰

Similarly, Okere pointed out that in interpreting the laws with an understanding of judicial activism, the Court assume that every legislation has a purpose and that a constitution is a charter of a dynamic society based on certain ideological or philosophical presuppositions, then the Court seeks to ascertain these underlying principles, implements and gives effect to them.⁵¹

Even though most Courts in Nigeria are reluctant to lean on the principles of judicial activism, the Supreme Court had held, per Per IGNATIUS CHUKWUDI PATS-ACHOLONU JSC that “It is the wisdom of the law that a court should as much as possible have an active mind to expound the horizon of law, and such activism should make the court focus on the reality of the issues before it and not allow too much technicality to affect its mind”.⁵² A Lacobucci J. of the Supreme Court of Canada further stated that “Democratic values and principles under the Charter demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate... Judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the Charter”.⁵⁷

Any law that does not protect the men and women of the society and cannot be enforced by those it’s meant to protect is merely a hoodwink. The Courts in interpreting Chapter II of the Constitution of the Federal Republic of Nigeria should make that chapter justiciable and enforceable against the Nigerian Government. Anything short of that is complete deceit on the members of the Nigerian State, and the provisions of Chapter II become irrelevant, only fit to be expunged from the Constitution or relegated to an insignificant portion of the Constitution.

⁵⁰ See Robert Kennedy - The glory of justice and the majesty of... (brainyquote.com) (Accessed 19 December 2022).

⁵¹ Okere BO “Judicial Activism or Passivity in Interpreting the Nigerian Constitution” *The International and Comparative Law Quarterly* Vol. 36 No. 4 (Oct. 1987) Pgs. 788-816.

⁵² *B.B.N (NIG) LTD v. ALHAJI S. OLAYIWOLA & SONS LTD. & ANOR* (2005) LPELR-806(SC). ⁵⁷ *Vfriend V. Alberta* (1998) 1SCR 493, 566-7.