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Poverty in the Human Rights Jurisprudence of the Nigerian Appellate Courts (1999–2011)

Obiora Chinedu Okafor*
York University, Toronto, Canada
ookafor@yorku.ca

Basil Ugochukwu**
Centre for International Governance Innovation, Waterloo, Canada
ugochukwubc@yahoo.com

Abstract

The major objective of this article is to examine the extent to which the human rights jurisprudence of the Nigerian appellate courts has been sensitive and / or receptive to the socio-economic and political claims of Nigeria's large population of the poor and marginalized. In particular, the article considers: the extent to which Nigerian human rights jurisprudence has either facilitated or hindered the efforts of the poor to ameliorate their own poverty; the kinds of conceptual apparatuses and analyses utilized by the Nigerian courts in examining the issues brought before it that concerned the specific conditions of the poor; and the key biases that are embedded in and shape Nigeria's jurisprudential orientation. The line of cases analysed in the article indicate that the Nigerian appellate courts, as elsewhere, possess great capacity, for good or ill, to impact public policy in the field of poverty reduction.

Keywords

Poverty, Nigeria, human rights, jurisprudence, appellate courts

INTRODUCTION

The main objective of this article is to examine the extent to which the corpus of human rights jurisprudence of the Nigerian appellate courts has been sensitive

* York research chair in international and transnational legal studies, Osgoode Hall Law School, York University, Toronto, Canada. Chair of the UN Human Rights Council Advisory Committee; and most recently the Gani Fawehinmi distinguished visiting professor of human rights law at the Nigerian Institute of Advanced Legal Studies, Abuja, Nigeria. PhD, LLM (the University of British Columbia, Vancouver, Canada); LLM, LLB (hons) (the University of Nigeria, Enugu Campus).

** Post-doctoral research fellow, Centre for International Governance Innovation, Waterloo, Canada. PhD (Osgoode Hall Law School, Toronto, Canada); LLM (Central European University, Budapest, Hungary); and LLB (hons) (Abia State University, Uturu, Nigeria).

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and / or receptive to the socio-economic and political claims of Nigeria's large population of the poor and marginalized. The research covers the period from 1999 (when Nigeria restored civil rule after several years of military dictatorship) to 2011 (when the third post-transition general elections were held).

A more detailed clarification of the particular framing of the concept of poverty that grounds this investigation and how this is reflected in the jurisprudence of the Nigerian appellate courts for the stated period is offered later in the article. Nonetheless, it should be stated at the outset that, as used in this article, "poverty" denotes the condition of those whose need for social protection is greatest, who are society's most vulnerable and who survive at the bottom end of the UN scale of human freedom from want and deprivation.[1]

The article is grounded in the theoretical insights offered by a range of critical legal scholarship,[2] which has, among other things, demonstrated most convincingly that we cannot simply assume that the politics of a given body of *human rights* jurisprudence is pro-poor without first testing that assumption, preferably in a concrete way, such as against a specific body of case law.[3] This is so despite the fact that it is also necessary not to overlook the possibility that, in certain specifiable contexts, such jurisprudence may be able to advance the causes of particular poor populations.[4] In particular, the article engages and builds on aspects of David Kennedy's hypotheses on the difficulties that exist in the relationships among mainstream human rights discourses or praxis (on the one hand) and the claims of the poor / marginalized (on the other),[5] as well as Upendra Baxi's theory on the emergence to dominance in our time of a trade-related, market-friendly (TREMF) paradigm of human rights that is steadily eroding the hitherto defining grounding of the discipline in the consuming focus on human welfare of the Universal Declaration of Human Rights.[6] In sum, Kennedy argues, among other things,

1 See TW Pogge *World Poverty and Human Rights* (2002, Polity Press); U Baxi "Voices of suffering and the future of human rights" (1998) 8 *Transnational Law and Contemporary Problems* 125, describing (at 128) the poor as the "deprived, disadvantaged, and dispossessed".

2 U Baxi *The Future of Human Rights* (2006, Oxford University Press); J Fudge and H Glasbeek "The politics of rights: A politics with little class" (1992) 1 *Social and Legal Studies* 46; J Fudge "What do we mean by law and social transformation?" (1990) 5 *Canadian Journal of Law and Society* 47; B Rajagopal "Pro-human rights but anti-poor? A critical evaluation of the Indian Supreme Court from a social movement perspective" (2007) 18 *Human Rights Review* 157; A Sarat "'…The law is all over': Power, resistance and the legal consciousness of the welfare poor" (1990) 2 *Yale Journal of Law and Human Rights* 343.

3 See for example PJ Williams "Alchemical notes: Reconstructing ideals from deconstructed rights" in R Delgado and J Stefancic (eds) *Critical Race Theory: The Cutting Edge* (2000, Temple University Press) 84.

4 For example, see O Okafor *The African Human Rights System, Activist Forces and International Institutions* (2007, Cambridge University Press).

5 D Kennedy "The international human rights movement: Part of the problem?" (2002) 15 *Harvard Human Rights Journal* 101.

6 Baxi *The Future of Human Rights*, above at note 2 at 132. See also id "Market fundamentalism: Business ethics at the altar of human rights" (2005) 5 *Human Rights Law Review* 1.

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that the narrowness, formalism, west-centrism, individualist, capitalist and even superficial underpinnings and orientations of mainstream human rights norms, praxis and discourses have made them part of the problem of the subordination and impoverishment of the subaltern, rather than part of the solution.[7] In his view, this is in large measure because the human rights movement is significantly narrower in provenance and scope, and shallower in depth, than the kind of politics or praxis that would be required to emancipate the very subalterns in whose interests it aims to act. He also queries whether, as a result, human rights (as we now know and experience them) are adequate for the task of improving the socio-economic and political conditions of the poor and subordinated around the world.

A largely consistent argument is advanced by Baxi, who has developed a number of intimately related main sub-claims of his TREMF theory.[8] The first sub-claim is that the emergent TREMF paradigm (unlike the Universal Declaration of Human Rights (UDH) paradigm which it supplants) insists on promoting and protecting the collective rights of various formations of global capital, mostly at the direct expense of subaltern human beings and communities. The second sub-claim is that, much more than in the past, the progressive state, or at least the progressive "Third World" state, is now conceived as one that protects global capital against political instability and market failure, usually at a significant cost to the most vulnerable among its own citizens. The third Baxian sub-claim is that, in the new global order, a progressive state is also conceived under the TREMF paradigm as a state that is market efficient in suppressing and de-legitimizing the human rights based resistance practices of its own citizens, if necessary in a violent way. The last sub-claim is that, unlike the UDH paradigm, the TREMF paradigm denies a significant redistributive role to the state. This article analyses some of these sub-claims.

Keeping these contexts and arguments in mind, the main questions that this article tackles are: To what extent has Nigerian human rights jurisprudence either facilitated or hindered the efforts of the poor to ameliorate their own poverty? What kinds of conceptual apparatus and analyses did the Nigerian courts utilize in examining the issues brought before them concerning the specific conditions of the poor? What key biases are embedded in and shape Nigeria's jurisprudential orientation?

In order to examine these questions in a systematic way, the article is organized into nine sections. After this introduction is an explanation of the conception of poverty that animates the article. The article then discusses the treatment of poverty in the Nigerian Constitution (the Constitution), using

7 The authors are grateful to the anonymous reviewer for highlighting these aspects of Kennedy's argument.

8 O Okafor "Assessing Baxi's thesis on an emergent trade-related market friendly human rights paradigm: Evidence from Nigerian labour-led struggles" (2007) 1 *Law, Social Justice and Global Development Journal*, available at: <http://www.go.warwick.ac.uk/elj/lgd/2007_1/okafor> (last accessed 6 December 2015).

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non-justiciable fundamental objectives and introducing the directive principles of state policy, before considering the normative significance of these fundamental objectives and directive principles, and the attitude of the Nigerian appellate courts to their implementation, or lack thereof, as enforceable rights. It then explores a Baxian anxiety about the attitude of the Nigerian appellate courts to the enjoyment of certain aspects of the right to work, before discussing the tensions that have arisen in the jurisprudence of these Nigerian courts between encouraging grassroots developmental efforts with restrictive implications for poverty alleviation (on the one hand) and the fuller enjoyment of certain human rights (on the other). There follows an examination of the extent to which the relevant courts have or have not utilized the non-discrimination clause in the Constitution in a way that can aid efforts to ameliorate poverty. Before concluding, the article offers a brief discussion of the way in which at least one international human rights treaty that has been ratified and domesticated by Nigeria could usefully be deployed to support efforts to ameliorate poverty.

POVERTY AND HUMAN RIGHTS: A MARRIAGE OF CONVENIENCE

This section examines, and hopefully clarifies, the concept of poverty that animates this article and how that concept could be related to the cause of human rights. The main question here is: what could poverty mean in a human rights context, in human rights terms? For instance, it could be conceptualized merely in terms of a state of material deprivation, as measured quantitatively by institutions like the World Bank. Doz Costa refers to this as "income poverty".[9] The poor in this regard are comprised of those living on either one or two dollars or less a day.[10]

Others have also defined "income poverty" in a fashion that recognizes material deprivation as a significant component but with less emphasis on the dollar value of that state of being. Martha Jackman for example describes poverty in relation to Canadian society as comprising mainly "substandard housing, inadequate diet, reduced health, poor education and employment prospects, social stigma, and political marginalization".[11] Okafor in turn once described poverty as "any incidence of the fundamental deprivation, or

9 F Doz Costa "Poverty and human rights: From rhetoric to legal obligations: A critical account of conceptual frameworks" (2008) 9 *Sur – International Journal on Human Rights* 81 at 83.

10 See Pogge *World Poverty*, above at note 1; R Alsop (ed) *Power, Rights and Poverty: Concepts and Connections* (2005, World Bank); D Narayan and P Petesch (eds) *Voices of the Poor: From Many Lands* (2002, World Bank); and CM Robb *Can the Poor Influence Policy?* (2002, World Bank and International Monetary Fund).

11 M Jackman "Constitutional contact with the disparities in the world: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law" (1994) 2 *Review of Constitutional Studies* 76 at 77.

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the serious lack of basic needs (such as food, water, shelter, education, clothing and essential medicines)".[12] When examined closely, these definitions tend to be formulated in such a way as to emphasize elements of what are recognized in international human rights instruments and some national constitutions as social and economic rights.[13] This is so despite the fact that some such definitions (for example Jackman's) also include political marginalization, an aspect of civil and political rights.

Yet poverty in relation to human rights could be conceptualized in even broader terms. Following Amatya Sen,[14] Doz Costa describes this as "capability poverty" because it moves beyond the income criterion to the concept of overall well-being.[15] According to this approach, poverty is, in addition to being an issue of material lack, also conceivable as a capability deprivation. Sen defines capability as "the opportunity to achieve valuable combinations of human functionings – what a person is able to do or be".[16] He submits that this perspective allows for account to be taken of the "parametric variability in the relation between means, on the one hand, and the actual opportunities, on the other".[17]

This paradigm therefore recognizes that equal income may not translate to the equal enjoyment of goods and services and that "deprivations in basic freedoms … are associated not only with shortfalls in income but also with systematic deprivations in access to other goods, services and resources necessary for human survival".[18] Central to this conceptualization of poverty is its unifying quality in terms of linking socio-economic concerns (that is the materialistic aspect) to issues of freedom and access, as in access to justice and rights (embodying the capability dimension).[19]

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12 OC Okafor "Poverty, agency and resistance in the future of international law: An African perspective" (2006) 27 *Third World Quarterly* 799 at 800.

13 See for example arts 11 (right to food), 12 (right to health) and 14 (right to education) of the International Covenant on Economic Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See also the Constitution of Kenya 2010, sec 43.

14 A Sen "Human rights and capabilities" (2005) 6 *Journal of Human Development* 151; A Sen *Resources, Values and Development* (1997, Harvard University Press) at 307.

15 Doz Costa "Poverty and human rights", above at note 9 at 84.

16 Sen "Human rights", above at note 14 at 153.

17 Id at 154; see also D Banik (ed) *Rights and Legal Empowerment in Eradicating Poverty* (2008, Ashgate).

18 J Dreze and A Sen *India: Development and Participation* (2002, Oxford University Press), cited in P Vizard *Poverty and Human Rights: Sen's Capability Perspective Explored* (2006, Oxford University Press) at 3.

19 A Donald and E Mottershaw "Poverty, inequality and human rights: Do human rights make a difference?" (2009), available at: <http://aaps.org.ar/pdf/donald_mottershaw.pdf> (last accessed 11 February 2016), defining poverty to encompass "not only a low income but also other forms of deprivation and a loss of dignity and respect". See also D Chong *Freedom from Poverty: NGOs and Human Rights Praxis* (2010, University of Pennsylvania Press); I Khan *The Unheard of Truth: Poverty and Human Rights* (2009, WW Norton & Co).

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Doz Costa formulates a third dimension in the conceptualization of poverty, which she calls the poverty of social exclusion.[20] This category takes into account the conditions of those who are kept outside the mainstream of society, whether or not they are income-poor.[21] This is a situation that is particularly true of women in most societies, including Nigeria, where overt and subtle patriarchal stereotypes condemn them to exclusion at various levels including political, economic and cultural. Even where the impact of such exclusionary practices may not have huge income implications, they could still harm women's capability potential. Additionally, cases where the income poverty of a woman interacts with her capability poverty tend to produce two layers of deprivation. This phenomenon has been long explained by the theory of intersectionality, put forward by scholars like Kimberley Crenshaw.[22] This theory is in essence a critique of the then prevalent view of subordination as almost always "occurring along a single categorical axis".[23] Instead, subordination is treated by this theory as something that occurs all too often along more than one axis. It is, in part, in this way that the increasing feminization of poverty in Nigeria could also be considered part of the broader concern of this article.[24]

With this understanding of how poverty occurs and is perpetuated, its relationship to human rights can be imagined in two different ways. First, it can be viewed in a constitutive sense, such that poverty *in and of itself* is conceived as a form of human rights violation that requires a legal remedy.[25] Secondly, it can be imagined in an instrumental sense, in which the application of aspects of human rights law could be helpful in the amelioration of poverty.[26] While there is on-going academic debate on how best to fit questions of poverty into the human rights framework, much of that debate is frozen as to whether to

20 Doz Costa "Poverty and human rights", above at note 9 at 84.

21 Ibid.

22 K Crenshaw "Demarginalizing the intersection of race and sex: Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics" (1989) *The University of Chicago Legal Forum* 139.

23 Id at 140.

24 PI Ozo-Eson "Law, women and health in Nigeria" (2008) *Journal of International Women's Studies* 285. See also F Eboiyehi, A Bankole and A Eromosele "Work, women, employment and feminization of poverty in Nigeria" (2006) 4 *Gender and Behavior* 642; J Jiggins "How poor women earn income in sub-Saharan Africa and what works against them" (1989) 17 *World Development* 953; N Aniekwu "Gender and human rights dimensions of HIV / AIDS in Nigeria" (2002) 6 *African Journal of Reproductive Health* 30; D Ugwu "Socio-economic impact of HIV / AIDS on farm women in Nigeria: Evidence from Enugu State" (2009) 6 *World Applied Sciences Journal* 1617.

25 See Doz Costa "Poverty and human rights", above at note 9 at 81; Vizard *Poverty and Human Rights*, above at note 18; A Sengupta "Poverty eradication and human rights" in T Pogge (ed) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007, Oxford University Press) 323.

26 L Arbour "Using human rights to reduce poverty" (2006) *Development Outreach* 1.

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apply a constitutive or instrumental paradigm as a way of ensuring clarity in the relationship and achieving human rights protection.

NIGERIA: POVERTY OF RIGHTS, POVERTY OF THE CONSTITUTION

As with almost every legal system in the world, Nigerian law does not treat poverty in and of itself as a human rights violation. This suggests that this article should rather focus on the alternative kind of relationship between human rights and poverty, that is, the instrumental one. In other words, the broad question that is really at issue here is: how can Nigerian human rights law be applied to ameliorate poverty? Thus, in the specific context of this article, the main question is: how have the Nigerian appellate courts instrumentalized the human rights norms applicable in the country towards the amelioration of the socio-economic claims of the country's poor?

While having this goal in the background, the literature recognizes some difficulty in translating social and economic rights into justiciable demands before adjudicatory fora.[27] Such demands are said by some to belong more appropriately in the domain of policy rather than legal rights.[28] With its relegation of social and economic rights to the non-enforceable portion of the

27 B Porter "Judging poverty: Using international human rights law to refine the scope of charter rights" (2000) 15 *Journal of Law and Social Policy* 117, stating (at 123): "Cold war rhetoric and an aggressive campaign by the US against the recognition of social and economic rights led to a separation of what was originally a unified conception of rights in the Universal Declaration of Human Rights into two separate Covenants … Both Covenants affirm in their preambles, the interdependence of civil, political, economic, social and cultural rights and there is no explicit differentiation in either covenant with respect to whether the rights they contain are amenable to adjudication. Nevertheless, the two sets of rights were often distinguished in the first years of the Covenants on the basis that social and economic rights were somehow not amenable to adjudication, findings of violations or effective legal remedies." See also KD Ewing "Constitutional reform and human rights: Unfinished business?" (2001) 5 *Education Law Review* 297 at 305; G Van Bueren "Combating child poverty: Human rights approaches" (1999) 21 *Human Rights Quarterly* 680 at 683; A Kirkup and T Evans "The myth of western opposition to economic, social and cultural rights? A reply to Whelan and Donnelly" (2009) 31 *Human Rights Quarterly* 221; JW Nickel "Rethinking indivisibility: Towards a theory of supporting relations between human rights" (2008) 30 *Human Rights Quarterly* 984; F Dallmayr "'Asian values' and global human rights" (2002) 52 *Philosophy East and West* 173; O Okafor and B Ugochukwu "Have the norms and jurisprudence of the African human rights system been pro-poor?" (2011) 11 *The African Human Rights Law Journal* 396; N Udombana "Between promise and performance: Revisiting states' obligations under the African Human Rights Charter" (2004) 40 *Stanford Journal of International Law* 105.

28 A Pillay "Courts, variable standards of review and resource allocation: Developing a model for the enforcement of social and economic rights" (2007) *European Human Rights Law Review* 618; C Steinberg "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" (2006) 123 *South African Law Journal* 265; D Bilchitz "Towards a reasonable approach to the minimum core obligation:

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Constitution, the Nigerian legal system cannot claim any kind of immunity from this debate, and tends heavily toward the latter position.[29]

Therefore, while at the heart of this article lies an analysis of the use (or the lack thereof) to which the Nigerian appellate courts have put constitutional human rights norms towards the amelioration of poverty, it is also important to assess the sensitivity and response of these courts to objections to judicial intervention in this regard. Given the socio-economic core of the conception of poverty employed in this article, the portions of the Constitution that are most relevant to the discourse about poverty and human rights are found in its second chapter, described as Fundamental Objectives and Directive Principles of State Policy (Directive Principles). Most of these Directive Principles would ordinarily be seen as socio-economic rights. The problem is that, while chapter IV of the Constitution, which guarantees fundamental human rights, makes provision for the enforcement of the rights contained within it, this is clearly not the case with chapter II, as there is no corresponding provision for the enforcement of the Directive Principles. It should be noted though that, as argued later, Nigerian courts seem to have begun to accommodate *indirect* enforcement of the Directive Principles. They have begun to do so through the adoption of a doctrinal approach that treats these norms as deriving domestic legal "force" as a result of Nigeria's ratification of certain international human rights treaties.

Instructively, as is widely acknowledged, there is a similar bifurcation at the international level between civil and political rights (on the one hand) and economic, social and cultural rights (on the other). Not only are these kinds of norms contained in two separate treaties (ie the two international covenants), they are also conceptualized as belonging to two different "generations" of rights.[30]

Nigeria is one of the many countries where this attitude has, beyond mere symbolism, had deep and salient consequences. For, while the fundamental rights provisions in chapter IV of the Constitution are clearly justiciable in the sense that violation of any of the guaranteed rights contained within

contd
Laying the foundations for the future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1.

29 The Constitution, chap II; S Ibe "Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities" (2010) 10 *African Human Rights Law Journal* 197; S Ibe "Beyond justiciability: Realising the promise of socio-economic rights in Nigeria" (2007) 7 *African Human Rights Law Journal* 225; D Olowu "Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees" (2006) 69 *Saskatchewan Law Review* 56; KSA Ebeku "Constitutional right to a healthy environment and human rights approaches to environmental protection in Nigeria: *Gbemre v Shell* revisited" (2007) 16 *Review of European Community and International Environmental Law* 312.

30 C Scott "The interdependence and permeability of human rights norms: Toward a partial fusion of the international covenants on human rights" (1989) 27 *Osgoode Hall Law Journal* 769.

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that chapter could trigger a claim for a judicial remedy, the Directive Principles are described in the Constitution and treated by most lawyers / judges as being non-justiciable in and of themselves (in their constitutional form).[31]

THE RIGHTS OF THE POOR VERSUS THE DIRECTIVE PRINCIPLES OF THE CONSTITUTION

As the enjoyment of the socio-economic rights contained in chapter II of the Constitution is an issue of significant concern in this article, it is necessary to examine the judicial attitude to the Directive Principles and their normative significance under the 1999 Constitution. This issue was considered in the case of *Olafisoye v Federal Republic of Nigeria* (*Olafisoye*).[32] The appellant in this case was charged with receiving a bribe of 3.5 m Naira while in public office. His action contravened various provisions of the Independent Corrupt Practices and Other Related Offences Commission Act of 2000 passed by the Nigerian National Assembly. At his trial, the appellant objected to the High Court's jurisdiction to try him. On appeal, the Court of Appeal noticed several constitutional questions arising from the indictment, which it referred to the Supreme Court for clarification. While the accused argued that the federal government lacked the power to legislate against corruption for the entire federation, the federal government argued, for its part, that it had such powers. In its view, this power derives from section 15(5) of the Constitution, which is one of the Directive Principles of state policy. This provision enjoins the state to abolish all corrupt practices and abuse of power.

Apart from the issue of the proper delineation of the scope of the law-making powers of the federal and state governments, the Supreme Court also faced the question of whether the federal government could rely on section 15(5) of the Constitution, located in the non-justiciable chapter II of the Constitution, as a basis on which to pass anti-corruption legislation. In its decision, the Supreme Court recognized that the judicial powers of the courts, granted under section 6(6)(c) of the Constitution, "shall not, except as

31 See for example *Okogie (Trustees of Roman Catholic Schools) and Others v Attorney General, Lagos State* [1981] 2 NCLR 337 [Ng Ct App]. In this case, filed under the equivalent section of the 1979 Constitution, the Court of Appeal held: "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 on any decision as to whether any organ of the government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made Chapter II of the Constitution justiciable. I am of the opinion that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of the Constitution or any other statute in such a way that the provisions of the Chapter are observed, but this is subject to the express provisions of the Constitution."

32 [2004] 4 NWLR (pt 864) 580 [Ng Sup Ct].

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otherwise provided by the 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 the Constitution".[33]

The court did not, however, end its reasoning with this assertion. It continued by holding that the non-justiciability of the Directive Principles is neither total nor sacrosanct, having regard to the proviso "except as otherwise provided by this constitution". In the court's reasoning, this proviso preserved the power of the National Assembly to make justiciable the non-justiciable Directive Principles of state policy. It therefore held that: "[i]t is clear therefore that although section 15(5) of the 1999 Constitution is, in general, not justiciable, as soon as the National Assembly exercises its power under section 4 of the Constitution with respect to Item 60(a) of the Exclusive Legislative List, the provisions of section 15(5) of the Constitution become justiciable."[34]

As there are only a few instances in which the National Assembly has made specific laws directed at enforcing the Directive Principles in the Constitution, it is little wonder that Nigerians (though hopeful) are generally cautious to seek judicial protection of such non-justiciable constitutional provisions. Yet, those provisions enshrine the most basic socio-economic rights, the enjoyment of which is in high demand among ordinary Nigerians. Such rights include the rights to social benefits,[35] healthcare,[36] education[37] and environmental protection.[38]

It is trite knowledge that the full promise of these Directive Principles cannot be realized via the overly formalistic approach that the Supreme Court adopted in this case. For, although such strict legal formalism is hardly in opposition to the Supreme Court's tendency to conform with the plain language of the relevant Nigerian Constitutions, it tends to divert the court from the widespread and systematic violations of socio-economic rights that occur in Nigeria. It also stands in stark contrast to the warning of Pats-Acholonu JSC (as he then was): "I make bold to state that strict adherence by the law courts to the Austinian theory of legal positivism was what brought about the 2nd World War where a villainous and devilish dictator succeeded in emasculating the courts and the people by spewing out laws that had

33 Id at 659, paras D–E.
34 Id at 664, paras F–H.
35 The Constitution, sec 16(2)(d).
36 Id, sec 17(3)(d).
37 Id, sec 18(1).
38 Id, sec 20. See generally EP Amechi "Litigating right to healthy environment in Nigeria: An examination of the impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in ensuring access to justice for victims of environmental degradation" (2010) 6 *Law, Environment and Development Journal* 320; Olowu "Human rights", above at note 29; Ebeku "Constitutional right", above at note 29 at 312.

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horrendous effects not only on the Germans but more particularly on the Jews."[39]

Given Justice Pats-Acholonu's valid observation and the widespread poverty that characterizes Nigerian society, of a kind that demands concerted remedial action, would it have been out of place to expect the Supreme Court to act far more creatively and boldly in interpreting the Constitution in ways that breathe life into the socio-economic rights provisions that lie virtually comatose in chapter II of that basic law?

It would only have been legitimate to expect the court to act in this fashion. However, that would risk not acknowledging Kennedy's concerns regarding the dangers of the over-juridification of suffering and of efforts to assuage such pain: what he saw as the rapid migration from a world of "rights" to "remedies" and then to "basic needs" and on to "transnational enforcement".[40] There is a problem, he says, when "emancipatory objectives", such as poverty reduction, "are reframed in human rights terms" and that this "reflected less a changing set of attitudes among international legal elites about the value of legal formalism".[41] Instead, he argues, there has been more growth in the human rights field (more conferences, documents, legal analysis, opposition and response) than there has been a significant decrease in violence against women, poverty and so forth. This, he argues, has negative effects if it discourages political engagement or encourages reliance on human rights for results they cannot achieve.[42]

Although the authors do not disagree with almost all of Kennedy's thesis, this specific aspect could be challenged at some level, including on the ground that some of it may be read as underestimating the value that formal legal engagement can have in certain narrow contexts for the substantive protection of human rights. Were this to be Kennedy's intent, most frontline human rights activists and advocates would be loath to buy into such a theory.[43] In the end, it must be noted that Kennedy's apprehension is very useful, especially because of the light it shines on the kind of ingrained attitude to poverty and subordination that appears to have informed the position adopted by the Supreme Court in the case just discussed.

The question of the wisdom or otherwise of the constitutional or judicial instrumentalization of human rights in the service of the poor, raised by Kennedy's challenge to the human rights movement, is also relevant to the consideration of the ideological, practical and other underpinnings or

39 See *Victor Ndoma-Egbe v Chukwuogor and Others* (2004) 6 NWLR (pt 869) 382 at 433.

40 Kennedy "The international human rights movement", above at note 5 at 118.

41 Ibid.

42 Ibid.

43 See for example D NeJaime "Winning through losing" (2011) 96 *Iowa Law Review* 941; GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (2008, The University of Chicago Press); MJ Klarman "Rethinking the civil rights and civil liberties revolutions" (1996) 80 *Virginia Law Review* 7.

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implications of the inclusion of property rights in the judicially enforceable portion of the Constitution. The article discusses this next.

RIGHTS IN WORK AND A BAXIAN ANXIETY

Apart from the protection of property rights, discussed in the last section as a component of the protection that the human rights regime can already offer to the poor, another right that is further engaged along similar lines is the right to work. The nature of this right implied here does not require the government to provide full employment, although this could be possible if the governmental / private economic praxis were re-imagined and would certainly go a long way towards reducing poverty. However, in the world that we currently inhabit, even the richest economies with strong social welfare protection have not been able to offer jobs to all those who want them, but instead provide benefits for those who cannot find work. Thus, what is envisaged here are some components of the right to just and favourable working conditions, limited to protecting those already in the workplace from undue exploitation.

Under the Constitution some of the elements of this right, such as the right to freedom of association and assembly and the right not to be discriminated against, are justiciable within the fundamental rights provisions in chapter IV. Others, like the right to a minimum wage, to health insurance and to work in safe environments, are less so. However, in analysing the pro- or anti-poor stance of the human rights jurisprudence of the Nigerian appellate courts in relation to these various elements of this right, they are discussed together as capable of judicial affirmation, regardless of whether they are rendered constitutionally enforceable or could be inferred from the Directive Principles. This attitude is adopted because, in almost all of the cases in which certain elements of this right cannot be enforced under the Constitution as other "fundamental" rights can, Nigeria's ratification of certain international instruments that enshrine those same elements of that right in one form or another, it will be argued, makes them amenable to some measure of enforcement in Nigerian courts.[44] In analysing the cases considered relevant to the discussion, this article endeavours, as much as possible, to show their relationship to the socio-legal status of the poor under the Constitution.

As should be expected in a situation where workers' rights collide with the greed of private capital, this is one area where the Baxian TREMF thesis has glaring resonance. As argued in a previous article,[45] one of the pillars of

44 This could derive from art 27 of the Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), which states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". See also C Nwapi "International treaties in Nigerian and Canadian courts" (2011) 19 *African Journal of International and Comparative Law* 38; T Maluwa "The incorporation of international law and its interpretation in municipal legal systems in Africa: An exploratory survey" (1998) 23 *South African Yearbook of International Law* 45.

45 Okafor "Assessing Baxi's thesis", above at note 8.

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Baxi's thesis is that the contemporary progressive state is conceived as one that is market efficient in suppressing and delegitimizing the human rights based practices of resistance of its own citizens. It is also seen as one that is capable of unleashing a reign of terror on some of its citizens, especially those who actively oppose the government's excessive softness towards global capital.[46] It will therefore come as no surprise that almost all the cases to be evaluated in this section implicate the struggles of the Nigerian labour movement to protect workers (most of whom fall within the low income bracket) from the oppression of agents of global capital and the governments that enabled these excesses.

The first case to be examined is *Bureau of Public Enterprises v National Union of Electricity Employees*.[47] The major question before the court in this case was whether action taken by the body charged by government to privatize public corporations aimed at averting a strike by workers was a trade dispute within the meaning of the Nigerian Trade Disputes Act 1990. The other question was which court in Nigeria has jurisdiction under the Constitution to entertain trade dispute cases. The appellant was the government agency charged with privatizing government corporations, while the respondents were employees of the National Electric Power Authority, one of the corporations to be privatized at the time (and which has now been "unbundled" into several companies and is private). The respondents threatened strike action should the appellant continue with plans to privatize the authority. The appellant filed the suit to forestall the planned strike action. The respondents objected on grounds that the appellant lacked *locus standi* [standing before the court] to institute it because there was no employer / employee relationship. After hearing the objection, the trial court ruled that the suit belonged to the National Industrial Court and struck it out. The appellant contended on appeal that no trade dispute was disclosed and therefore that the High Court had jurisdiction to decide the case. The respondents filed a cross-appeal.

The Court of Appeal held that, by virtue of section 47(1) of the Trade Disputes Act 1990, a "trade dispute" is defined as any dispute between employers and workers, or between workers and workers that is connected with employment, non-payment, or the terms of employment and physical conditions of work of any person. With this definition in mind, it concluded that this case did not arise from a trade dispute within the meaning of the statute. It was also the court's decision that the dispute was neither between the employer and employees nor between employees themselves.

On the question of the correct forum for determining a trade dispute, the court held that, by virtue of section 1(a)(1) of the Trade Disputes (Amendment) Decree of 1992, no person shall commence an action concerning a trade dispute or any inter- or intra-union dispute in a regular court of law. The decree abates and renders void any action already commenced before

46 Id at 4.
47 [2003] 13 NWLR (pt 837) 382.

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it came into effect. However, the court went further to hold that this is subject to the provisions of the new section 20(3) of Trade Disputes Act (as amended by the decree), which at the relevant time established the nature and functions of the National Industrial Court, the special court set up to deal with labour disputes. As it had decided that this was not a trade dispute, the court found that the High Court's jurisdiction to entertain it was not ousted.

Although this decision could be read as a victory for the workers' movement involved in the case, it could have serious consequences for the rights of workers in Nigeria, especially when placed in opposition to the government privatization programme that often produces harsh outcomes for workers. If the matter is not, as the court ruled, a "trade dispute", then on what solid legal basis could the workers' union call a strike, as opposed to a mere protest march? Thus, in one sense, the court's judgment in this case appears too literal in its assumptions regarding the correct context for judging when a dispute could be considered pertinent to matters of labour and work. To decide that a privatization scheme does not involve trade or work would seem to be to deny the obvious. This conclusion is unavoidable because workers' interests are often the first casualty in any privatization process where pure capitalist imperatives confront best labour practices. Privatization usually gives way to staff rationalizations, intolerance of unionization, reduced pay and increased redundancy. Where these are the consequences of privatization, it would seem that they are at the heart, rather than the margins, of labour disagreements or, in the language of the law, "trade disputes". At least in this sense, the court did not quite make the right call when holding in this case that no trade dispute was engaged.

In this sense, this decision contrasts with what is generally known to be the major fallout of privatization processes, not only in Nigeria but around the world.[48] Even multilateral institutions like the World Bank that are at the forefront of prescribing privatization measures, including in situations of acute poverty, recognize the negative impact that this process may have on job growth.[49] The decision also engages the fourth arm of the TREMF theory that states that the values of the Universal Declaration of Human Rights, which assigns responsibilities to states to construct a just social order that meets basic human needs, have been displaced by a TREMF paradigm that denies any significant redistributive role to the state. Instead, states are now

48 E Nwagbara "The story of the structural adjustment programme in Nigeria from the perspective of the organized labour" (2011) 1 *Australian Journal of Business and Management Research* 30; AB Tajudeen "Privatization of public enterprises in Nigeria: Valuation issues and problems" (2004) 5 *Journal of Business Economics and Management* 193; JP Tuman "Organized labor under military rule: The Nigerian labor movement, 1985–1992" (1994) 29 *Studies in Comparative International Development* 26 at 29; AO Britwum and P Martens "The challenge of globalization, labor market restructuring and union democracy in Ghana" (2008) 10 *African Studies Quarterly* 1.

49 See S Kikeri *Privatization and Labor: What Happens to Workers When Governments Divest?* (1998, World Bank) at 3.

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called upon under the TREMF imperative to free up as much space for capital as possible by pursuing rather too vigorously the three Ds of contemporary globalization: deregulation, de-nationalization and disinvestment, which are all components of the dominant version of the privatization paradigm.[50]

On the contrary however, it is also possible to argue that this decision allows the workers' union involved and all similar bodies to protest against the Nigerian government's policy of privatization, without the necessity of formally declaring a strike and without having to be subjected to the relative rigours and alleged pro-government leanings of Nigeria's industrial dispute resolution framework and apparatus. Perhaps the decision is neither a total loss nor a total victory for the workers, and may in fact provide a marginal counter-argument to the Baxian TREMF thesis, one that shows that the courts in this third world state (Nigeria) have not been as amenable as one might ordinarily suspect to the touted imperative of freeing up as much space for capital as possible by pursuing rather too vigorously the three Ds of the neo-liberal privatization paradigm.

DEVELOPMENT AND COERCION: HORIZONTALITY AND THE SUBALTERN QUESTION

What standard should be used when analysing development processes with implications for poverty amelioration? Should it be the constitutional Bill of Rights, the customs of a particular locality or the practices of an imposed legal system? These are some of the questions that ordinary Nigerians sometimes have to ponder in seeking to improve their socio-economic conditions, especially in the face of the government's relative failure to live up to its duties.

These questions were also central to the Supreme Court decision in *Okoroafor Nkpa v Jacob Nkume*.[51] The major issue in this case was whether a compulsory levy could be imposed on a Nigerian citizen by other Nigerians of a particular community, on the ground that such a levy would be used for community development. The court also grappled with the related question of what the relationship should be between customary practices and the constitutional provisions protecting citizens' human rights. An important reason for examining this case is that it arose in a community in rural Nigeria, where a disproportionate majority of the poor live and where local customs tend to hold sway. Another reason is that it illustrates the issue of horizontal human rights claims: claims made by sub-state entities such as communities and individuals against each other.

The facts were that the appellant and respondent belonged to the same local community. The appellant is a member of the Jehovah's Witness religious sect whose beliefs, he claimed, did not allow his participation in community

50 Okafor "Assessing Baxi's thesis", above at note 8 at 4.
51 [2001] 6 NWLR (pt 710) 543.

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development activities. In this part of the country, in the absence of government intervention in many critical areas of socio-economic development, communities often organize themselves through self-help efforts to deal with the most serious developmental challenges facing them. As such, in this case the respondents sought to compel the appellant's wife to join the women's association in their community and also to contribute to ongoing developmental activities. When the appellant refused, the respondent enlisted the assistance of armed soldiers who used force to extract a levy and fine from the appellant. At the High Court, the judge ruled in favour of the members of the community, leading to this appeal.

The Court of Appeal upheld the appeal, deciding that, as much as development projects are desirable in any community, citizens' fundamental rights must not be trampled upon in pursuit of the assumed interests of the community. The court recognized that constitutionally enshrined human rights have superiority over the customs of any local community. As such, it continued, "any customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our courts".[52]

The Court of Appeal thus found that the trial court was wrong to have endorsed the resort to self help by the respondent in extracting the payment of a levy by the appellant, contrary to his claimed religious belief. On the appellant's claim that compelling his family to participate in community development activities amounted to forced labour, the appeal court held that, under section 31(2)(d)(i) of the 1979 Constitution (under which this action was commenced), forced or compulsory labour does not include labour or service that forms part of ordinary communal or other civic obligations for the wellbeing of the community. According to the court, the kind of labour that is prohibited by this provision must involve some sort of compulsion to physical labour, such as requiring every able bodied member of the community to participate in clearing the bushes along community roads or generally keeping the village clean. That was not what transpired in this case. Therefore, while the imposition of an arbitrary levy in lieu of participation in community development might have involved some form of compulsion, it did not meet the definition of forced labour envisaged by the constitutional provisions. However, the court concluded that employing the services of armed soldiers to intimidate the appellant into paying money for community development violated his constitutional rights.

Viewed from a strictly constitutional standpoint, it could be asserted that this decision meets the justice of the dispute from which it arose. If a particular community practice is offensive to an individual on grounds of conscience or religious belief, then that individual should be excused from it.

52 Id at 562, paras C–D.

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In this view, coercing that individual into participating cannot be constitutionally justified. That is one way of looking at it. This position offers protection for the weak in the community against a majority that may sometimes be as powerful within that context as the government is within the larger scheme of things.

But this particular understanding and interpretation of that constitutional provision might seem to others as departing significantly from the social context of the dispute and even the overall conception of the relationship between poverty and human rights. When the government fails in its duties and the community is organized to intervene to remedy aspects of that governmental failure, could that kind of communal intervention not have a positive impact on poverty reduction? By what significant measure does the behaviour of the relevant community differ from the imposition and extraction of taxes by the post-colonial African state and would the court be prepared to outlaw the latter? It has to be said that this is a major problem in Africa: the failure of the government and the intervention of the community. There is a poverty mitigation dimension in such situations that would have to be judged by the standards of the community in question, not by some values borrowed from contexts that are not commensurate.

It may in fact be puzzling to some as to how a community based, self help project could possibly infringe significantly on the right to conscience and religion. Who determines when a particular religious belief hurts the community much more than it advances any reasonable belief? This case, in the authors' opinion, offered the court an opportunity to balance the community's urgent and palpable need for self-improvement by mass participation against rights claimed under the Constitution. This opportunity was important, since in this case only a shaky basis existed for the religious belief claimed.

While the community's resort to military force to coerce the appellant's participation in the community self-improvement scheme cannot be excused, however well motivated it was, the issue was significantly more complex than the court acknowledged.

FIGHTING POVERTY THROUGH NON-DISCRIMINATION

One of the ways through which the superior courts in Nigeria could help the struggle to ameliorate the prevalence of poverty in the country through their human rights jurisprudence might be to offer a more expansive interpretation of the Constitution's anti-discrimination provision. The right to be free from discrimination is guaranteed by section 42 of the Constitution. That section prohibits discrimination on the basis of ethnicity, place of origin, sex, religion or political opinion. However, rather than state that the anti-discrimination right is guaranteed to all "persons", the provision only protects Nigerian citizens.

This provision has two other important features. First, it provides that no law in force in Nigeria, executive or administrative action shall impose disabilities or restrictions on any person when such restrictions do not apply to

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persons of other ethnicities, sex, etc.[53] Secondly, it enshrines the norm that no citizen of Nigeria shall, through law, or an executive or administrative action, be accorded any privilege or advantage to which citizens of other communities, ethnicities, sex, etc are not accorded.[54] The only limitation placed on this guarantee is that it shall not invalidate any law by reason only that the law imposes restrictions with respect to the appointment of persons to any office under the state or as a member of Nigeria's armed forces or police force, or to an office in the service of a body corporate established directly by any law in force in Nigeria.[55]

There are various ways through which discrimination manifests itself in Nigeria, making it an endemic socio-legal problem. Many customary practices discriminate against women.[56] Religious minorities tend to be discriminated against in various parts of the country.[57] There is also discrimination in employment, as many of the federating states often deny job opportunities to so called non-indigenes of those states and could, in discriminatory fashion, sack those of them who are already employed.[58] This is a country-wide problem. Even in the context of access to educational opportunities, it is a well-known fact that some states charge "non-indigenes" higher fees than they do their "indigenes". As was profoundly articulated by Isumonah:

> "Generally, non-indigenes 'are discriminated against in the provision of vital government infrastructure and services such as schools, health care and even roads'. In most cases, they are charged higher school fees, and denied scholarship and employment in government establishments. This Article aims to show the impact of the manner of administration of economic rights as indicated above on political rights, specifically, the rights to seek elective

53 See the Constitution, sec 42(1)(a).

54 Id, sec 42(1)(b).

55 Id, sec 42(3).

56 C Okemgbo, A Omideyi and C Odimegwu "Prevalence, patterns and correlates of domestic violence in selected Igbo communities of Imo State, Nigeria" (2002) 6 *African Journal of Reproductive Health* 101; SE Merry "Transnational human rights and local activism: Mapping the middle" (2008) 108 *American Anthropologist* 38; R Howard "Human rights and personal law: Women in sub-Saharan Africa" (1982) 12 *Issue: A Journal of Opinion* 45; P Okeke "Reconfiguring tradition: Women's rights and social status in contemporary Nigeria" (2000) 47 *Africa Today* 49.

57 E Osaghae "Managing multiple minority problems in a divided society: The Nigerian experience" (1998) 36 *Journal of Modern African Studies* 1; U Ukiwo "Politics, ethno-religious conflicts and democratic consolidation in Nigeria" (2003) 41 *Journal of Modern African Studies* 115 at 125; RC Uzoma "Religious pluralism, cultural differences and social stability in Nigeria" (2004) *Brigham Young University Law Review* 651; I Zarifis "Rights of religious minorities in Nigeria" (2002) 10 *Human Rights Brief* 22; S Ilesanmi "Constitutional treatment of religion and the politics of human rights in Nigeria" (2001) 100 *African Affairs* 529.

58 F Ludwig "Christian-Muslim relations in northern Nigeria since the introduction of Sharia in 1999" (2008) 76 *Journal of the American Academy of Religion* 602.

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> office and demand political accountability, which neither economic reforms nor political reform initiatives have accorded necessary attention."[59]

These various discriminatory practices could precipitate poverty or lead to its perpetuation. And the poor often bear the negative effects of such official discrimination. Most of the consequences are also directly related to the denial of socio-economic benefits to individuals or groups, a situation that exacerbates conditions of poverty among the ranks of the discriminated group(s). Isumonah mentions a study on discriminatory practices in three Nigerian states (Kano, Kaduna and Plateau) which tend to prove that the poor are more likely to be their main victims. These practices become evidenced in various ways.

> "One category of discrimination concerns government employment or retirement pensions. Non-indigenes are employed on 'contract' rather than on a pensionable basis by local and state governments. Some contract civil servants have been sacked after two or more decades in service without any forms of compensation. The federal government for its part practices discrimination in recruitment into its establishments supposedly in pursuit of fairness to all geo-ethnic groups. It explicitly bars non-indigenes of the location of its establishment from seeking employment into the lowest cadres, Grade Levels 01–07."[60]

In addition to these categories, women in Nigeria (as elsewhere) tend to suffer an added discriminatory burden based on the simple fact of their femininity. Across Nigeria's many ethnic communities, women have been historically marginalized, a situation which accentuates the level of poverty to which they are routinely exposed. Not only does this kind of discrimination cause poverty, it could also accentuate it by making already bad situations worse.[61]

Cases challenging such widespread discriminatory practices would be expected to be as rampant as those practices tend to be. This, however, does not seem to be the case. Despite the prevalence of official and unofficial discrimination in Nigerian society, and taking into account that a number of different factors may be at play here, not as many cases as one would have expected have been filed challenging the practice. One of the relatively few cases on this subject ever litigated in Nigeria was actually commenced

59 VA Isumonah "An issue overlooked in Nigeria's reforms: The continuation of government discriminatory practices" (2006) 10 *African Sociological Review* 116 at 117.

60 Id at 120–21.

61 See for example Okeke "Reconfiguring tradition", above at note 56; UU Ewelukwa "Post-colonialism, gender, customary injustice: Widows in African societies" (2002) 24 *Human Rights Quarterly* 424.

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while the military was in power in the 1990s.[62] However, the final appeal decision was not delivered by the Supreme Court until immediately after civil rule was restored in 1999. Instructively, the case arose not by way of a human rights enforcement claim. Instead, it was subsidiary to a claim seeking to enforce a custom prevalent in Nnewi town in south eastern Nigeria.

Not only was this case related to private property and the incidence of rural poverty, it was also significant because of its impact on the relationship between constitutional rights and custom, as well as the reach of the Constitution's anti-discrimination provision. It should therefore be added that the decision has implications for a possible expansion of the conception of poverty through the filter of human rights.

The case arose from the interpretation of two customary practices, each of which seemed to discriminate against women in relation to the inheritance of family property. The first customary practice was *nrachi*, which enabled a man without male children to keep a daughter unmarried under his roof in order to produce male children to inherit his property upon his death. A daughter who performed the *nrachi* practice took the position of a man in her father's house and therefore could inherit her father's property. The claim in this case was that, having performed this custom, the claimant had become entitled to inherit her late father's property. The second custom was *ili ekpe*, where, if a man died without male issue and had no daughter for whom *nrachi* had been performed, even if the man had a daughter or daughters who had not performed the custom, they could not claim their father's estate. Instead the deceased's estate would devolve on his brother or the latter's male issue.

In this case, though *nrachi* was performed for the dead man's daughter, she too had died childless. Apparently, his second daughter did not go through the customary practice. Five male members of the dead man's brother claimed to be entitled to inherit his property over and above the argument of the surviving daughter for whom *nrachi* had not been performed. While the women involved in the case did not claim any legal entitlement to inherit their late father's property, the claim was that one of the dead man's sons who had predeceased him actually had a son who they claimed should inherit. The major question before the court was whether the *nrachi* and *ili ekpe* customs were repugnant to natural justice, equity and good conscience and therefore could not coexist with the constitutional prohibition of discrimination based on sex.

The High Court found for the dead man's daughters and the son on whose behalf the case was commenced. On appeal, the Court of Appeal went even further. After holding that the applicable customary law dispensed with the relevance of a male heir in the relevant relationship, it decided that the *ili ekpe* custom was repugnant to natural justice, equity and good conscience. It was also held to be contrary to the human rights provisions of the 1999

62 *Mojekwu v Mojekwu* [1997] 7 NWLR 283; *Mojekwu and Others v Ejikeme and Others* [2000] 5 NWLR 402; *Mojekwu v Iwuchukwu* [2004] 11 NWLR (pt 883) 196.

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Constitution, as well the UN Convention on the Elimination of all Forms of Discrimination against Women.[63]

However, the Supreme Court subsequently agreed with the appeal court on the applicable custom but went further to hold on grounds of the applicable procedure that the appeal court exceeded its remit by declaring the *ili ekpe* custom repugnant. The court's objection was the language that the appeal court deployed in striking out the custom, which it said was "so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognize a role for women".[64] It went further to hold that communities with such customary practices could "be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities".[65]

This Supreme Court decision could be criticized for exactly the same reasons that it overruled the court of appeal. Its own language is as sweeping as that which it condemned. But that is beside the point. While the Supreme Court's reasoning that fair hearing demanded that the court hear from the community before outlawing the custom appears to be a plausible argument against the Court of Appeal's dictum, it is still in the authors' view incorrect. It must be remembered that, aside from the repugnancy principle (which is a colonialist relic), the standard upon which to judge any custom should be the provisions of the Constitution.

In the end, the overarching point being urged here is that one reason that many women in rural societies in Nigeria are poor (and tend to be poorer than the men) is that customs like *ili ekpe* that deny women their inheritance and socio-economic rights are still being enforced in many (though not all) such places in the country.

Using human rights law to remedy discrimination against women is one area where Rajagopal's judicial governance framework could work wonders for the human rights project rather than perpetuate the biases inherent in the governance process. By "judicial governance" he meant "the emergence of governance functions assumed by the Court in the face of a failing or failed state apparatus that proves unwilling or incapable of carrying out its mandate under the law

63 See N Nzegwu *Family Matters: Feminist Concepts in African Philosophy of Culture* (2006, State University of New York Press) at 115; B Ugochukwu (ed) *Update on Human Rights Litigation in Nigeria* (2003, Legal Defence Centre, Lagos) at 57; A Oba "Broaching the limits of gender equality in Nigeria: *Augustine Nwafor Mojekwu v Mrs Theresa Iwuchukwu*" (2007) *Indian Journal of International Law* 289; RN Nwabueze "Securing widows' sepulchral rights through the Nigerian Constitution" (2010) 23 *Harvard Human Rights Journal* 141; RA Onuoha "Discriminatory property inheritance under customary law in Nigeria: NGOs to the rescue" (2008) 10 *International Journal of Not for Profit Law* 79.

64 *Mojekwu* [2004], above at note 62 at 217, para D.

65 Id, para E.

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and the Constitution".[66] The kind of customary discrimination evident in the *Mojekwu* case[67] often thrives because of government inaction. While Rajagopal views judicial intervention by way of governance in such cases mostly negatively (because it favours some rights while ignoring others or is caught up in class and / or urban bias), judicial action in such cases is all too often necessary to ameliorate the serious failures of the other arms of government.

This is what the Nigerian appellate courts attempted to do in this case but failed to complete. This is notwithstanding the fact that it is not at all difficult to link poverty and femininity in the Nigerian context. Neither is it hard to connect the significant incidence of discrimination against gender and the serious violations of socio-economic rights that women tend to endure. As such, female headed households in Nigeria (as elsewhere) are more likely to be poor for a variety of reasons.[68] Rural women, many of whom are insufficiently literate, also tend to be disproportionately afflicted by extreme poverty.[69] Further, more women than men are likely to be affected by HIV/ AIDS infections.[70] However, by looking seriously at the issue of discrimination and using the constitutional prohibition against it, these manifestations of poverty against women would most likely be reduced.

HUMAN RIGHTS AND THE POOR: BETWEEN THE LOCAL AND THE GLOBAL

Given that, under the Constitution, socio-economic rights do not appear to be amenable to judicial enforcement, the question is whether any reasonable case can be made for their realization through the judicial process. For one, the country has signed and ratified several international treaties and instruments guaranteeing socio-economic rights to all of its citizens. For example, not only did Nigeria sign and ratify the African Charter on Human and Peoples' Rights (African Charter), it was in fact promulgated into domestic legislation as well. As such, the many socio-economic rights contained in that treaty could be enforced before Nigerian courts in much the same way

66 Rajagopal "Pro-human rights", above at note 2 at 165. This has also been described as "political jurisprudence"; see M Shapiro "Political jurisprudence" (1963–64) 52 *Kentucky Law Journal* 294 at 296: "The core of political jurisprudence is a vision of courts as political agencies and judges as political actors."

67 Above at note 62.

68 See for example C Okojie "Gender and education as determinants of household poverty in Nigeria" (WIDER discussion article no 2002/37), available at: <http://www.econstor.eu/bitstream/10419/52915/1/34630590X.pdf> (last accessed 6 December 2015).

69 F Ogwumike "An appraisal of poverty reduction strategies in Nigeria" (2002) 39 *Central Bank of Nigeria Economic and Financial Review* 1; MA Okoji "Rural women and poverty in Akwa Ibom State, Nigeria" (2001) 25 *Atlantis* 62.

70 N Aniekwu "Gender and human rights dimension of HIV/AIDS in Nigeria" (2002) 6 *African Journal of Reproductive Health* 30. See also N Ezumah "Gender issues in the prevention and control of STIs and HIV/AIDS: Lessons from Awka and Agulu, Anambra State, Nigeria" (2003) *African Journal of Reproductive Health* 89.

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as any domestic statute.[71] Having said this, it must be noted, however, that the related question of the hierarchy of norms in Nigeria (ie the question of the superiority of the Constitution over the domesticated version of the African Charter, or vice versa) has not been satisfactorily settled, and may even have been decided in favour of the Constitution.[72]

Almost needless to say, the African Charter (and its domestic incarnation) do guarantee almost all the rights provided in chapter 2 of the Nigerian Constitution as Directive Principles. If the Supreme Court's decision in *Olafisoye*[73] is extrapolated, this means that the components of socio-economic rights in the African Charter and their equivalents in the constitutional Directive Principles are all rendered justiciable, albeit only in their sub-constitutional incarnation in the statute that domesticated the African Charter. They are therefore amenable to protection by judicial means in much the same way as the fundamental rights provisions in chapter 4 of the Constitution.

CONCLUSION

Do human rights law and jurisprudence have any role to play in the amelioration of poverty? This is the broader theme explored in this article, albeit in the specific Nigerian context. The line of cases analysed in this article indicates that the Nigerian appellate courts, as elsewhere, possess great capacity to impact public policy in the field of poverty reduction, and could even do so with a pro-poor human rights adjudicatory orientation. However, as some of the cases examined suggest, the court's jurisprudence could also help re-inscribe, augment and perpetuate the socio-legal and other conditions that make poverty thrive in Nigeria.

The controversy regarding the justiciability or otherwise of socio-economic rights, the significant enjoyment of which is crucial to the mitigation of poverty, does tend to give the impression that the question is largely unsettled, at least in Nigeria. Nevertheless, the courts could still exert significant influence on anti-poverty struggles by exploring and exploiting various ways, many of which have been indicated in this article, through which these rights can be judicially enforced and vindicated. If the Nigerian appellate courts are able to rise to this challenge, they will play their own (positive) part in efforts to mitigate poverty in Nigeria (even to end poverty as we know it). Thus far, it is difficult to forecast the orientation of the courts going forward. The evidence gleaned from the human rights jurisprudence that was interrogated in this study is mixed, at best, in its orientation.

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71 See *Abacha v Fawehinmi* [2000] 4 NWLR (pt 660) 228. See also OC Okafor and U Ngwaba "Economic and social rights: A century of constitutional subordination in Nigeria" in E Azinge (ed) *Nigeria: A Century of Constitutional Evolution 1914–2014* (2013, Nigerian Institute of Advanced Legal Studies Press), chap 23.

72 See *Abacha v Fawehinmi*, ibid.

73 Above at note 32.

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