

Social and Economic Rights and Transformative Constitutionalism in Africa: Imperative of Expanding the Frontiers of Judicial Activism

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Social and economic rights have undergone tremendous transformation over the years. Initially regarded with disdain and contempt, and as rights only to be realized progressively, these rights have increasingly become the cornerstone of activism in the quest for the protection of human rights in Africa. This stems from recognition of the importance of these rights in the lives of the ordinary African, particularly because they deal with issues concerning the basic necessities of life. The enforcement of such rights can therefore be a useful catalyst in the transformation of African societies. There is no doubt that in striving towards egalitarian transformation of society and the achievement of social justice, the constitution serves as a veritable touchstone and provides guiding principles for the effective governance of societies. This is where judicial activism comes in since mere constitutional stipulation of these rights is insufficient to guarantee their enjoyment. It is therefore imperative for African judges to be conscious of the challenges inhibiting the enforcement of these rights and interpret constitutional and legal instruments in a manner that will promote their enforcement. Using some well-known cases in South Africa, the African Commission on Human and Peoples' Rights, as well as the West African Court of Justice and Human Rights, the paper argues for an expansive interpretation and application of the constitutional provisions on these rights in order to enhance positive transformation of African States and make the constitutional provisions on these subjects meaningful to the ordinary African.

Keywords: Africa, social and economic rights, constitutionalism, judicial activism

Introduction

There is no doubt that social and economic rights occupy a central position in the social ordering and organization of human affairs. They command this importance because they are rights which pertain to the basic existential needs of humans (Davis, 2008). This underscores the increasing recognition of their salience in contemporary society. They are now seen as rights, the enforcement of which can promote the social and

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economic development of societies. This contrasts with the earlier position in the middle of the 20th century when social and economic rights were regarded with disdain by Western capitalist and most African States. Today, even West European States have adopted various constitutional and policy measures to ensure the enforcement of social and economic rights.¹ It may be argued that this new interest and focus on the enforcement of social and economic rights is as a result of the demands of societal development which buttresses the progressive realization principle for such rights. From this perspective, it can be said that at this point in the development of these Western States it has been found imperative to enforce social and economic rights. In the same vein, African States would later progress to this level of enforcement of such rights. The truth however, is that this change in orientation and focus was achieved through social activism; and recognition of the indispensable nature of these rights in the developmental process.

With the low level of development in Africa after over 50 years of political independence, the need for enhanced constitutional and policy measures for the enforcement of these rights is all the more important. Three categories of states can be identified in Africa in relation to their approaches to the enforcement of social and economic rights. The first category comprise States where the Constitutions have enhanced provisions for these rights in their legal systems while the second are those States where these rights are specified as non-enforceable rights. The third category relates to those States that do not have specific constitutional provisions on social and economic rights. Whatever the constitutional provision and approach, African judges have a large role to play in ensuring the enforcement of these rights. The judges can play this role effectively through the interpretation of such constitutional and international instruments with the concept of judicial activism as their handmaid. The purport of this paper therefore is to examine how the frontiers of judicial activism can be expanded to enrich the constitutional landscape and promote the development of African States. It will be shown that through this mechanism, social and economic rights can be given enhanced recognition in the constitutional frameworks of African States.

In order to buttress the argument advanced here the paper is divided into four parts. The first part after this introduction will examine the concept of judicial activism and the various nuances of the term while the second part will look at the nature and the normative basis of social and economic rights and their relevance in the organization of human affairs. The third part will examine the constitutional interpretation of these rights by the judiciary in selected African States. The States namely, South Africa, Nigeria, and Kenya represent various regions in the continent. The final part of the paper which is the conclusion will proffer suggestions on how the constitutional provisions on social and economic rights will be enhanced with a more activist approach by judges in Africa.

Judicial Activism

Although the practice of judicial activism has been with humanity for several centuries, the term was brought to academic prominence by Arthur Schlesinger, Jr. in 1947 (Kmiec, 2004).² Since the term assumed prominence in legal and political discourses, it has been a subject of intense controversy (Imam, 2012). To be sure, some of the controversies have arisen due to the various perspectives concerning the concept in

¹ In this connection, reference may be made to the increasing progressive interpretation and application of the European Convention on Human Rights and the adoption of the European Social and Economic Charter.

² This was in a January 1947 Fortune Magazine article titled "The Supreme Court, 1947". An analysis of the origin and meanings of judicial activism is contained in Kmiec (2004).

contemporary society. Not surprising, it has been opined that the concept can be likened to “public policy” in jurisprudence, usually described with the metaphor of an unruly horse which, once ridden on, one cannot predict the extent it will carry its occupant (Sand, 1972).³ Part of the controversy surrounding the subject arises from the fact that the label “activism” is susceptible to several interpretations depending on the ideological orientation of the person making the assessment. Thus, while one group may consider a decision of a judge as activist, another group may consider the same judgment as inactive or conservative.⁴ This is largely understandable, since in the normal current of events, there are many competing rights and conflicting interests of various sections of the society which become the subject matter of judicial decisions. Even the judge himself also has his/her views on policy decisions and actions of government as well as his/her preferences and worldviews, which may be adumbrated in the judgment. Thus, apart from a few exceptions, it is difficult *a priori*, to label a judge as an activist judge, since the judge’s decision in one case may be categorized as activist and conservative in another.

It is obvious from the above analysis, that judicial activism is incapable of precise definition. Nevertheless, in order to properly appreciate the purport of the argument advanced in this paper, it is necessary to have an understanding of the prevailing notions of the concept in contemporary society. *Black’s Law Dictionary* defines judicial activism as:

A philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent. (Garner, 2009, p. 1015)

From an ideological perspective, judicial activism has been defined by Upendra Baxi as “the way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes” (Baxi, 1985, p. 10). According to him, judicial activism is the use of judicial power to articulate and enforce counter-ideologies which when effective, initiates significant re-codifications of power relations within the institutions of governance (Baxi, 1985). This is because the ideology of the ruling class requires the maintenance of the status quo in legal rules and principles. This status quo may not be in the best interest of the majority of the population or may not represent the interest of the masses. The activist judge thus acts as a gauge of the feelings of the people and articulates this in his or her judgments. Basically, it can be said that judicial activism refers to court rulings and decisions that are partially or fully based on the judge’s political or personal considerations, rather than existing laws. Judicial activism occurs when a judge presiding over a case allows his/her personal or political views to guide his/her decision when rendering judgment on a case. It has also been argued that judicial activism is underpinned by the failure of political governance in States resulting in the judiciary having to step in to make political or policy-making judgments (Adhyarujina, 1992).

The concept of judicial activism was deployed in the famous case of *Brown v Board of Education of Topeka*⁵ on segregation of schools in the United States of America. The American Supreme Court did not

³ See the famous observation of Burrough, J., in *Richardson v Mellish* (1824) 2 Bing 229, 252. The concept has been further elaborated upon by John Sand in his article Sand (1972).

⁴ This is not surprising since any given set of facts may be looked at from different angles. What is important is for the critical analyst to recognize these various perspectives and situate the viewpoints in their proper contexts.

⁵ 347 US 483 (1954).

follow the previous decision in *Plessy v Ferguson*⁶ which had upheld state laws requiring segregated transportation on trains.

Judicial activism can take one of two forms. The extreme model of judicial activism is operational when a court is so intrusive and ubiquitous that it virtually dominates the institutions of government. The moderate or conservative model of judicial activism recognizes the strict separation of powers and claims only to be filling the gaps in legislation in efforts to attain justice or the true purpose of the legislative enactment.

From these two broad approaches to judicial activism, one can discern two theoretical positions on the concept. These are: (i) theory of vacuum filling; and the (ii) theory of social want.

The theory of vacuum filling seeks to assist in fulfilling the purpose of a legislative enactment through filling the gaps that may be identified in the legislation while the theory of social want uses the judicial function as a tool of expressing and fulfilling the aspirational needs of the people. For instance, in relation to the Indian experience, Justice Bhagwati has argued that through activism, the Indian judiciary has developed their human rights jurisprudence and brought help and succor to the masses of the Indian people (Kmiec, 2004). He contends that through this process, judges take part in the law making process. This view is also taken by Lord Reid. In the same vein, Lord Denning remonstrated that judges cannot afford to be timorous souls. They cannot remain impotent, incapable, and sterile in the face of injustice.

It must be acknowledged however, that judicial activism has received scathing criticism from some writers (Roosevelt, 2006). One of the major complaints against the concept is that it seriously violates the principle of separation of powers as it promotes the practice of judicial law-making. It is contended that delving into the arena of law-making confers enormous powers on the courts which make them more powerful than the other organs of government. This is said to be unhealthy in view of the fact that the judges are not elected and therefore lack political legitimacy. Secondly, it is argued that embracing unbridled judicial activism could unnecessarily promote the views, idiosyncrasies, and positions of judges to the detriment of the rule of law and the interest of the larger society. This could undermine the confidence of the people in the judiciary.

Notwithstanding these strictures, which are often overstated, judicial activism remains an important instrument in the hands of the judges for the actualization of the transformation of African societies that is so badly needed. Indeed, its application has, contrary to such suggestions, promoted the best interests of the large majority of citizens in any society. Having clarified the notion of judicial activism, it is now appropriate to explore the nature and normative basis of social and economic rights before examining the application of the concept in the interpretation of constitutional provisions. The crucial consideration is to ascertain how judicial activism can be deployed to facilitate the enforcement of social and economic rights and enhance the transformation of our societies.

Nature and Normative Basis of Social and Economic Rights

Social and economic rights are part of the body of human rights. They are rights which also belong to us by virtue of our humanity (Tomuschat, 2003; Donnelly, 2006). These rights are held by all human beings irrespective of any other rights or duties that they may have in any other capacities, for example, as workers,

⁶ 163 US 537 (1896); see also *Roe v Wade* 410 US 113 (1973) where the American Supreme Court ruling decriminalized abortion. In the same category must be placed the recent controversial decision in the case of *Obergefell v Hodges* 576 US 2015 where the Supreme Court declared same-sex marriage as a right guaranteed under the Due Process Clause and the Fourteenth Amendment of the American Constitution.

members of families, or associations. They include the right to education, right to social security, right to work, right to an adequate standard of living including food, clothing and housing, the right to physical and mental health, and the right to a healthy environment.

These rights are either embodied directly in national constitutions or included as part of the fundamental objectives and directive principles of state policy in such constitutions. Due to the importance of these rights, they have also been included in some international instruments. These include Convention on the Rights of the Child,⁷ Convention on the Elimination of all Forms of Discrimination Against Women,⁸ African Charter on Human and Peoples' Rights, among others. Furthermore, socio-economic rights are so crucial that even in times of crisis, they are still necessary and have to be respected and enforced (Bilchitz, 2014).

However, as important as socio-economic rights are, issues surrounding their enforcement have been hugely problematic in human rights jurisprudence. They are usually indicated to be non-enforceable in some national constitutions and as rights which require progressive realization. It would appear that the non-justiciability clause in the constitutions of several African countries draws inspiration from the progressive realization standard set in Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights, 1966 where the concept of progressive realization is mentioned. The adoption of this "progressive realization" phrase is predicated on the assumption that the realization of social and economic rights requires positive actions on the part of the government in terms of the deployment or provision of enormous financial resources and infrastructure. It is argued that these resources may be difficult to provide especially for developing countries, already saddled with the responsibility of meeting the basic needs of their people (Igwe, 2017). On this score, it is thus believed that social and economic rights should be kept unenforceable until such a time in the future when the government will be in a position to ensure their realization. It is this line of reasoning which informed the provision declaring the fundamental objectives and directive principles non-justiciable in most African States.

However, this argument has been proven to be based on wrong and unsupportable premises. First, the assertion that civil and political rights do not require positive actions on the part of the government to ensure their realization is largely incorrect. For example, for the right to freedom of movement or association to be meaningful, there must be well-furnished courts and judges to adjudicate on such rights. Moreover, it has now been realized that there is an inseparable interdependence of rights, namely, civil and political rights and social and economic rights. The reality is that in practice, civil and political rights are meaningless in the absence of social and economic rights. Of what benefit, one may ask is the right to vote when the citizen is hungry and cannot even afford the basic means for his/her subsistence (Howard, 1983)? Furthermore, an uneducated farmer in the village can hardly appreciate the essence of political choice because of his/her poor educational status. The indivisibility of rights is also recognized by the African Charter on Human and People' Rights⁹, which proclaims in its Preamble that:

It is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the

⁷ Adopted 20 November 1989 and it came into force on 2 September 1990.

⁸ The Convention was adopted on 18 December 1979. It came into effect on 3 September 1981 and has been ratified by 189 States.

⁹ The African Charter on Human and Peoples' Rights was adopted in 1981 and came into force on 21 October 1986 upon its ratification by the required number of States.

satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.¹⁰

This point was equally emphasized by the Vienna Declaration and Programme of Action (1993) where it was expressly proclaimed by the international community that human rights are universal, interdependent, and interrelated.¹¹ Accordingly, it is now generally recognized that the interdependence of rights compels states to take measures to enforce both sets of rights in order to guarantee the holistic development of their countries. Needless to mention, that for a state to effectively tackle its developmental challenges, it must be concerned about the realization of the whole gamut of rights, including civil and political rights and social and economic rights of its citizens. This is because it is now generally accepted that development itself is a holistic concept embracing social, economic, and political processes. In the words of paragraph 2 of the Preamble of the Declaration on the Right to Development adopted by the United Nations in 1986:

Development is a comprehensive economic, social, cultural, and political process, which aims at constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

It is therefore imperative for states to take measures to ensure the realization of both civil and political rights and social and economic rights in order to guarantee the kind of beneficial development appropriate for their countries.

Judicial Activism and the Enforcement of Social and Economic Rights Provisions

It is important to re-emphasize the point that judges play a crucial role in the interpretation and application of constitutional provisions. Their role in this respect has assumed greater prominence in contemporary times especially in constitutional democracies. In a way, this has led some writers to examine the scope and dimensions of an emerging phenomenon termed “Juristocracy” (Hirschl, 2004)? Indeed, the function of the judiciary is so central that a realist philosopher famously defined law by reference to the role of judges. According to Wendell Holmes (1897), “the prophecies of what the courts will do in fact and nothing more pretentious are what I mean by law” (p. 457). Although this definition of law has its fundamental drawbacks (Lloyd, & Freeman, 1985), it acknowledges the central role of judges in the interpretation and application of constitutional and legal instruments. This interpretive power of the courts is equally recognized in the constitutions of several African States. In the case of Nigeria, S.6(1) of the Constitution declares that the judicial powers of the Federation are vested in the courts established under the Constitution. It goes further to provide in S.6(6)(b) that the judicial powers so vested in the Courts

shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

In the same vein, Section 165(1) and (2) of the South African Constitution provides that the judicial authority of the Republic is vested in the courts which are independent and subject only to the Constitution and the law. This role of the judiciary is even more germane in relation to the enforcement of rights enshrined in written Constitutions.

¹⁰ Preamble to the Charter.

¹¹ See Paragraph 5 Part 1 of the Declaration.

On this score, it may be mentioned that the incorporation of rights in national instruments and constitutions can be traced to the American Declaration of Independence in 1776 and subsequently the French Declaration of the Rights of Man and the Citizen (1789). Sadly, these instruments were only concerned with what has come to be seen as civil and political rights. It was only after the Second World War in 1945 that social and economic rights became objects of international and national constitutional and legislative provisions. Indeed, it was the United Nations Organization that galvanized this new perspective through the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 (Steiner, 1988).¹² This Declaration contained elements of both civil and political rights, and social and economic rights. Although it served as inspiration to other national instruments and constitutions on human rights, the non-binding character of the Declaration has been its greatest drawback. The extreme politics of the Cold War era led to the eventual adoption of two Covenants, one on Civil and Political Rights and the other on Economic, Social, and Cultural Rights in 1966. While the former was stated to be enforceable, the latter was declared to require progressive realization.¹³ This proclamation of progressive implementation as and when resources are available has been used by African States as a justification for the non-enforcement of social and economic rights in the continent. The contention being that since African countries are faced with enormous developmental challenges, social and economic rights will be implemented as and when the resources are available. In this connection, the South African position represents a welcome exception because social and economic rights are constitutionally declared enforceable in the country.

In a decision that significantly demonstrates judicial activism; the Indian Supreme Court widened the scope of the right to life in the well-known case of *Carolie v Union Territory of India*.¹⁴ According to the Court:

The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings.¹⁵

Based on this expansive interpretation of the right to life, the court held that slum dwellers should not be arbitrarily evicted by the government agency concerned as such a measure was capable of violating their guaranteed right to life under the Indian Constitution.¹⁶ The court creatively clothed the rights to shelter, education, and means of livelihood, which are all part of the non-justiciable Directive Principles with interpretations which widened the reach and ambit of the enforceable right to life.

Significant parallels can be drawn between this line of cases and those from South Africa where social and economic rights are justiciable under the 1996 Constitution.¹⁷ This innovative and forward-looking approach of the Constitution has been complemented by the activist positions taken by the courts. The transformative

¹² Not surprisingly, the UDHR has been described as the “Spiritual parent” of the human rights system in Steiner (1988).

¹³ Progressive realization has meant tying its implementation to the availability of resources. This is because the implementation of social and economic rights is said to require state resources unlike civil and political rights which are negative in conception.

¹⁴ ALL IR (1981) Sup Ct 746, 5.

¹⁵ Ibid 8.

¹⁶ The same decision was reached in the case of *Olga Tellis v Bombay Municipal Corporation AIR (1981) Sup Ct 746 (APP 55)*; See also *Mahimi Jain v State of Karnataka AIR (1992) Sup Ct 1864 (APP 6)* where the court held that the right to education is part of the right to life and invalidated a policy whereby medical schools charged expensive tuition fees which could deprive poor students of the opportunity of studying medical science.

¹⁷ See *Subramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765: Government of the Republic of South Africa & Others v Grootboom and Others (2001) (1) SA 46*.

nature of the South African Constitution (Fombad & Kibet, 2017) has been the basis for the decisions of the courts as can be seen from the decision in a number of cases.

In relation to the issue of housing, the High Court was faced with a situation regarding the plight of 900 women and children living in an informal settlement under cold and wet conditions who were facing eviction by the government agency. This was in the case of *Government of the Republic of South Africa v Grootboom*.¹⁸ The Court relying on the suffering of the children and the “immediacy” of the language in which the children’s rights was couched in the Constitution, ordered the provision of emergency shelter to the children and their parents. The State appealed to the Constitutional Court, arguing that it had a logical plan for the provision of housing in an orderly and systematic manner and that the effect of the High Court order would disrupt the plans through privileging certain groups over those patiently waiting on a housing list and entail expenditure of scarce resources. The Constitutional Court, whilst acknowledging the difficulties of the situation pointed to the absence of mechanisms for dealing with the emergency needs of those in dire straits as a flaw to the plans and confirmed the order. In reaching this conclusion, the court clearly went out of its way to look at the massive social needs for public housing and was willing to hold the executive accountable for the way it was dealing with the problem.

The approach adopted in this case was taken further in a series of cases one of which is *President of the Republic of South Africa v Modderskip Boerdery (Pty) Ltd (Agri SA and others, amici curiae)*.¹⁹ Due to acute overcrowding in an informal settlement in Johannesburg, thousands of people moved over to a neighbouring farm land and erected basic shelters in which to live. The landowner failed through various lawful means to evict the squatters and went to the High Court seeking confirmation of his/her property rights and an acknowledgment that the State had an obligation to resolve the issue. The Constitutional Court in confirming the novel remedy of constitutional damages that had been awarded by the High Court held that the State was obliged to provide effective dispute-resolution mechanisms for its citizens and had failed to do so in this case. The Court once again recognizing the gravity of a social problem made it clear that the State was under a duty to take action.²⁰ Furthermore, the Constitutional Court in *Minister of Health and Others (No.2) v. Treatment Action Campaign and Others*²¹ in elaborating its approach to the justiciability of socio-economic rights in South Africa made the following declaration:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section I. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.

While these cases have not necessarily led to the full enjoyment of social and economic rights in South Africa (Bilchitz, 2007),²² they have pointed the way to a proper enforcement of these rights in a manner that will constrain the government to do the needful. There is also room for the expansion of these activist positions of the judges to ensure fuller enforcement of these rights.

¹⁸ 2001 (1) SA 46 (CC).

¹⁹ 2005 (5) SA 3 (CC).

²⁰ See also, *Minister of Health v Treatment Action Group (TAC) (No. 2)* 2002 (5) SA 721 (CC).

²¹ 2002 (5) SA 674.

²² For instance, the reasonableness approach of the South African Constitutional Court has been severely criticized as limiting the full enforcement of socio-economic rights in the country in Bilchitz (2007).

This activist approach on the interpretation of social and economic rights provisions was also manifested at the regional and sub-regional levels. In *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*,²³ the African Commission on Human and Peoples Rights made express pronouncement on the responsibility of States to enforce the social and economic rights of their citizens. The Communication had alleged massive violations of social and economic rights of the Ogoni people by the Nigerian government in collusion and connivance with an international oil company, Shell Petroleum Development Company Limited. The violations ranged from environmental degradation and violation of the right to health through contamination of the environment by their activities to the destruction of their means of livelihood, namely fishing and farming. The Commission came to the conclusion that the Nigerian government violated several rights of the Ogoni people, such as right to life, right to health right to a satisfactory environment among others, and directed the clean-up of Ogoni land.²⁴

Similarly, the West African Court of Justice and Human Rights in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*²⁵ held that the right to education is justiciable under the Nigerian legal system notwithstanding the provision in S.6(6)(b) which makes the Fundamental Objectives and Directive Principles of State Policy non-justiciable.²⁶ In arriving at this conclusion, the Court made the following noteworthy pronouncement.

It is trite law that this Court is empowered to apply the provisions of the African Charter on Human and Peoples Rights and Article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.²⁷

In Kenya, the nullification of the re-election of President Uhuru Kenyatta by the Supreme Court and the ordering of a bye-election is remarkably significant in underscoring the bold, courageous, and activist stand of the court to ensure the rule of law and the protection of the overall interest of the country. This was in the case of *Raila Odinga & Anor v Independent Electoral and Boundaries Commission & 2 Ors*²⁸. There is no doubt that the approaches adopted by the courts of these countries are commendable and represent the deployment of creativity and innovativeness in the performance of their judicial functions.

In respect of States without specific enforceable provisions on social and economic rights, the need to deploy a more activist role by the judges is all the more important. They can do this by taking a cue from the position of the Indian judges, those of the African Commission on Human and Peoples' Rights, and the West

²³ Communication 155/96, (2001) AHRLR 60.

²⁴ It is sad to note that this ruling of the Commission is yet to be fully implemented by the Nigerian Government, which is now in partnership with the United Nations Environment Programme (UNEP) for the clean-up exercise.

²⁵ Suit No. ECW/CCJ/APP/08/08 2009. See also *SERAP and 10 Others v Federal Republic of Nigeria and 4 Others* ECW/CCJ/APP/10/10 a case of alleged violations of the right to housing by the Rivers State Government consequent upon the demolition of the Bundu Waterfront in Port Harcourt.

²⁶ S 20 of the Constitution of the Federal Republic of Nigeria 1999 (Chapter II Fundamental Objectives and Directive Principles of State Policy), provides for the obligation of the State to protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

²⁷ Ibid (n 41).

²⁸ Delivered on 1st September 2017, EP No. 1, 2017.

African Court of Justice. For instance, in underscoring how social and economic rights can be enforced under the umbrella of the Fundamental Directives of State Policy in India, Bhagwati, J. of the Indian Supreme Court declared in *Minerva Mills v Union of India*²⁹ as follows:

Directive Principles impose an obligation on the State to take positive action to creating socio-economic conditions in which there shall be an egalitarian social order with social and economic justice, justice for all, so that individual liberty would become a cherished value for all, and the dignity of the individual a living reality not only for a few privilege persons but for the entire people.

It can be said that this dictum provides

the philosophical foundation that has guided the courts in India in their activist disposition on the question of giving functionality to the non-justiciable Bills of Rights (Ashi, 2008). On this score, a commentator could easily proclaim that the Indian courts 'have abandoned an attitude of narrow legalism in favour of a harmonious approach'³⁰

by examining the enforceable rights in conjunction with the supposedly unenforceable Directive Principles.

Recognizing and Enforcing the Rights of People in African Constitutional Frameworks

One other avenue through which the transformation of African States can be achieved through constitutionalism is the expansive recognition, incorporation, and enforcement of the rights of peoples in the continent. The novel approach of the African Charter on Human and Peoples' Rights in providing not just for the rights of individuals, but also the rights of "peoples" has been recognized world-wide. It is a provision which acknowledges the peculiar cultural values of African societies. It may be recalled that one of the fundamental principles on which African culture is anchored is the concept of communal life and the care for members of the community. For instance, the concept of a nuclear family is unknown in Africa because the family in the African context includes the immediate family in the Western sense, plus relations of both spouses, their uncles, cousins, nieces, and nephews (Gyekye, 2003). Within this web of relations, each member of the family has specific duties and responsibilities towards other members, and he or she can also lay claim to certain rights and privileges in return. While this African communalism is increasingly under severe threat from commercialization and globalization (Okogbule, 2012), the fact remains that the daily lives and activities of a large majority of Africans are still regulated by these traditional norms and practices.

The challenge then for constitutionalism is how these traditional communal norms of living and behaviour can be translated into constitutional principles and entrenched in African constitutions to make the constitutions relevant to their peoples. As Kwasi Wiredu (1996) pointed out, "how to devise a system of politics that, while being responsive to the developments of the modern world, will reflect the best traditional thinking about human rights (and other values) is one of the profoundest challenges facing modern Africans" (p. 171). In this connection again, much can be learnt from the South African approach where these norms are stated in the constitution. The constitutions of African countries must reflect these cultural norms and values to be relevant to the African reality. This is because in the absence of these communal rights in the identity of the African people would be lost. It is submitted that our constitutional frameworks should reflect these aspirations and values. The courts should toe the path taken by the African Commission on Human and Peoples Rights in recognizing the centrality of cultural rights to the existence of a people. In the case of *Centre for Minority*

²⁹ AIR (1980).

³⁰ Ibid.

Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Republic of Kenya,³¹ the long struggle by the Endorois people for their rights against the actions of the government driven by the forces of globalization was eventually pursued through legal action at the African Commission on Human and Peoples' Rights. The complainants in the Communication alleged violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands; the failure to adequately compensate them for the loss of their property; the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

The Endorois had prior to their dispossession established, and for centuries, practiced a sustainable way of life which was inextricably linked to their ancestral land, but had since 1978 been denied access to their land. The African Commission on Human and Peoples Rights' declared that by forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter.³²

The central task for constitutional lawyers is how to ensure that this recognition of the importance of cultural rights as adumbrated by the Commission can be used to advance constitutional engineering in the continent.

Conclusions: Towards Expanding the Frontiers of Judicial Activism in African Constitutionalism

From the above analysis, it can be said that the constitutions of most African States in either not providing directly for socio-economic rights, or in precluding the courts from inquiring into whether such rights have been violated by any person or authority, have clearly marginalized social and economic rights. It has been argued that such constitutional impediments can be overcome through creative deployment of the concept of judicial activism by the judiciary in Africa. This position is informed by three overriding considerations. First, the judiciary occupies a central position in the area of constitutional rights adjudication as it serves as arbiter in disputes concerning alleged infringement of the rights of citizens by governments or their agencies. Second, the previous conservative role of judges in adjudication is gradually giving way to a new and dynamic approach with emphasis on the centrality and relevance of the judicial function in the development of society. Third, one other compelling reason why the courts in Africa as a whole should adopt this activist approach in their decisions especially when issues of human rights are involved is the low level of literacy, high level of poverty and the other indices of underdevelopment in the continent. These circumstances make it imperative for more attention to be given by the courts on how human rights can be enforced in the continent. Speaking about

³¹ Communication 276/2003. The decision was given during the 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11-November 25, 2009 and was adopted by the African Union in February 2010.

³² Ibid Para 251.

Nigeria, Kayode Eso, JSC in the case of *Ariori v Elemo*³³ underscored this point as follows:

Having regard to the nascence of our constitution, the comparative educational backwardness, the socio-economic and cultural background of the people of this country and the reliance that is being placed and necessarily have to be placed, as a result of this background on the courts, and finally, the general atmosphere in this country, I think the Supreme Court has a duty to safeguard the fundamental rights in this country.³⁴

In this connection, the best practices in countries such as India, South Africa and Kenya from diverse constitutional frameworks have been suggested as useful paths to be followed in order to make the Constitutions of African countries achieve their most desirable goals for the overall benefit of the people. On this score, the adoption of a new judicial approach to adjudication is therefore imperative in order to conform to the changes in societal norms and aspirations. In order to do this effectively, “a judge must shake off all the inhibiting legacy of the past and assume a dynamic role in interpreting the law to meet the realization of all the human rights of our oppressed and disadvantaged citizenry” (Oputa, 1996, p. xvi).

There is no doubt that through judicial activism the frontiers of human rights and social justice can be expanded for the benefit of the large majority of Africans. It bears mentioning that as the organic law of the land, the constitution merely describes in broad terms the rights enshrined therein. It is the bounden duty of the courts to fill the fundamental rights provisions with the required contexts to make them fulfill their purpose. In other words, the courts have the onerous duty of breathing life to the constitutional provisions on human rights and even those on directive principles in order to make them fulfill the purpose of their inclusion in the constitution. As Justice Bhagwati points out, “the judge infuses life and blood into the dry skeleton provided by the legislature and creates a living organism appropriate and adequate to meet the needs of the society”.³⁵ They can play this creative and innovative role to ensure that the constitutional provisions on these subjects lead to the positive transformation of African societies. This is the only way that constitutionalism can be strengthened in Africa and be relevant and in tandem with the living experiences of the African people to promote the development of the continent.

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³³ (1983) 1 SCNLR 18, 42.

³⁴ See *Ariori v Elemo* (1983) 1 SCNLR 18, 42.

³⁵ Ibid (n 30).

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