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

Obiora Chinedu Okafor* and Basil Ugochukwu**

I. INTRODUCTION

The major 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 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) and 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 will be offered much later in the Article. Nonetheless, it should be stated at the outset that, as it is 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-style scale of human freedom from want and deprivation.¹

The Article is grounded in the theoretical insights offered by various forms 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, and doing so 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/praxis (on the one hand) and the claims of the poor/marginalized (on the other hand),⁵ as well as Upendra Baxi's theory on the emergence to dominance in our time of a trade-related, market-friendly (TREM) paradigm of human rights that is

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

² U Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2006); J Fudge & H Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 *Soc & Leg Studs* 46; Judy Fudge, "What do we mean by Law and Social Transformation?" (1990) 5 *Canadian Journal of Law & 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 & 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* (Philadelphia, Temple University Press, 2000) 84

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

⁵ D Kennedy, "The International Human Rights Movement: Part of the Problem?" (2002) 15 *Harvard Human Rights Journal* 101.

steadily eroding the hitherto defining grounding of the discipline in the consuming focus of the Universal Declaration of Human Rights on human welfare.⁶ In sum, Kennedy argues – among other things – that the narrowness, formalism, West-centrism, individualist, capitalist and even superficial underpinnings and orientations of mainstream human rights norms, praxis and discourses have made it a part of the problem of the subordination and impoverishment of the subaltern, rather than a part of the solution.⁷ In his view, this is in large measure because the movement is significantly narrower in provenance and scope, and shallower in depth than the kind of politics/praxis that would be required to emancipate the very subalterns in whose interests it aims to act. He also queries whether in the result, human rights (as we now know and experience it) is adequate for the task of uplifting 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 such sub-claim is that the emergent TREMF paradigm (unlike the UDH paradigm which it is supplanting) 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 practices of resistance of its own citizens, if necessary in a violent way. And the last such sub-claim is that, unlike the UDH paradigm, the TREMF paradigm denies a significant redistributive role to the state. A number of these sub-claims are engaged by the case analysis conducted in this Article.

Keeping these contexts and arguments in mind, the main questions that this Article responds to 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 apparatuses and analyses did the Nigerian courts utilize in examining the issues brought before it that concerned the specific conditions of the poor? What key biases are embedded in and shape its jurisprudential orientation?

II. POVERTY AND HUMAN RIGHTS: A MARRIAGE OF CONVENIENCE

In this section, the concept of poverty that animates this Article, and how that concept could be related to the cause of human rights, are examined and hopefully clarified. 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

⁶ U Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2002) at 132; See also U Baxi, “Market Fundamentalism: Business Ethics at the Altar of Human Rights” (2005) 5 *Human Rights Law Review* 1.

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 & Global Development Journal* (LGD), on-line: http://www.go.warwick.ac.uk/elj/lgd/2007_1/okafor

“income poverty.”⁹ The poor in this regard are comprised of those either living on a dollar a day or less or on two dollars a day or less.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 the 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 did once describe poverty as “any incidence of the fundamental deprivation, or 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 e.g. Jackman’s) do include political marginalization (an aspect of civil and political rights) within them.

Yet poverty in relation to human rights could be conceptualized in even broader terms. Following Amartya 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 an 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

⁹F 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.

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

¹¹M 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.

¹²O C 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 Articles 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, s 43.

¹⁴A Sen, “Human Rights and Capabilities” (2005) 6 *J Hum Dev* 151 (“Capabilities”); A Sen, *Resources, Values and Development* (Cambridge, MA: Harvard University Press, 1997) at 307.

¹⁵ Doz Costa, *supra* note 9 at 84.

¹⁶Sen (“Capabilities”), *supra* note 14 at 153.

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

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

¹⁹A Donald & E Mottershaw, *Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?* (York, U.K.: Joseph Rowntree Foundation, 2009) Online: <<http://www.jrf.org.uk/sites/files/jrf/poverty-human-rights-full.pdf>> (defining poverty to encompass “not only a low

Dos Costa formulates a third dimension in the conceptualization of poverty which he 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 the capability potentials of women. Additionally, in cases where the income poverty of a woman interacts with her capability poverty, this tends to produce two layers of deprivation. This phenomenon has been long explained by the theory of intersectionality that was 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 a part of the broader concern of this Article.²⁴

With this understanding of how poverty occurs and is perpetuated, its relationship to human rights could be imagined in two different ways. The first is that it could 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 The second way in which the relationship between poverty and human rights may be imagined is 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, a lot of that debate is frozen on whether to apply a constitutive or instrumental paradigm as a way of ensuring clarity in the relationship and achieving human rights protection.

III. NIGERIA: POVERTY OF RIGHTS, POVERTY OF THE CONSTITUTION

Like 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

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*, (Philadelphia: University of Pennsylvania Press, 2010); I Khan, *The unheard of Truth: Poverty and Human Rights*, (New York: WW Norton & Co, 2009)

²⁰ Doz Costa, *supra* 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 *Ibid.*, at 140.

²⁴ P Ozo-Eson, “Law, Women and Health in Nigeria” (2008) *Journal of International Women’s Studies* 285. See also F Eboiyehi, A Bankole & A Eromosele, “Work, Women Employment and Feminization of Poverty in Nigeria” (2006) 4 *Gender & 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, *supra* note 9 at 81; P Vizard, *Poverty and Human Rights: Sen’s Capability Perspective Explored* (Oxford: Oxford University Press, 2006); ASengupta, “Poverty Eradication and Human Rights” in Thomas Pogge, ed, *Freedom from Poverty as a Human Right: Who owes what to the very Poor?* (Oxford: Oxford University Press, 2007) 323.

²⁶ L Arbour, “Using Human Rights to Reduce Poverty” (2006) *Development Outreach* 1 online: <<http://www.esc-rights.org/upload/XPOXKFOXX572PXkC8UryfiZKU.pdf>>.

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

Therefore, while an analysis of the use (or the lack thereof) to which the Nigerian appellate courts have put constitutional human rights norms in the amelioration of poverty is at the heart of this Article, 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 that is employed in this Article, the portions of the Constitution of Nigeria that are most relevant to the discourse about poverty and human rights are found in the second chapter which is described as Fundamental Objectives and Directive Principles of State Policy (hereafter: "Directive Principles"). Most of these directive principles would ordinarily be seen as socio-economic rights. The problem is that while the Chapter four 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 two. There is no corresponding provision for the enforcement of the directive principles contained in this last chapter. It should be noted though that, as will be argued later, the Nigerian courts seem to have begun to accommodate the *indirect* enforcement of these 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.

²⁷ B Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *Journal of Law & Social Policy* 117 at 123 ("Cold war rhetoric and an aggressive campaign by the U.S. 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 & 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; J W Nickel, "Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights" (2008) 30 *Human Rights Quarterly* 984; Fred Dallmayr, "Asian Values' and Global Human Rights" (2002) 52 *Philosophy East and West* 173; O Okafor & 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: Laying the Foundations for the Future Socio-Economic Rights Jurisprudence" (2003) 19 *South African Journal on Human Rights* 1.

²⁹ Chapter II, *Constitution of the Federal Republic of Nigeria*, 1999; 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.

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 (i.e. the two 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 four of the Constitution are clearly justiciable in the sense that violation of any of the guaranteed rights contained within 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

IV. THE RIGHTS OF THE POOR VERSUS THE DIRECTIVE PRINCIPLES OF THE NIGERIAN CONSTITUTION

As the enjoyment of the socio-economic rights that are contained in Chapter two of the Constitution is an issue of significant concern in this Article, it is necessary to examine at this early stage the judicial attitude to the directive principles and their normative significance under the 1999 Constitution. This issue came up for consideration in the case of *Olafisoye v Federal Republic of Nigeria*.³² The appellant in that case was charged with receiving a bribe to the tune of Three Million Five Hundred Thousand 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, appellant objected to the jurisdiction of the High Court to try him. On appeal, the Court of Appeal noticed several constitutional questions arising from the indictment and referred those questions 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 own 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 question 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 whether the federal government could rely on section 15(5) of the constitution which is located in the non-justiciable Chapter two of the Constitution as a basis on which to pass the anti-corruption legislation. The Supreme Court in its decision recognized that the judicial powers of the courts, granted under section 6(6)(c) of the constitution:

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.

³¹ See for example *Okogie (Trustees of Roman Catholic Schools) and others v Attorney General, Lagos State*, [1981] 2 NCLR 337 [Ng Ct App]. The Court of Appeal in that case filed under the equivalent section of the 1979 Constitution 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].

“...shall not, except as 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 the above 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:

“It 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 (SCN) adopted in this case. For although such strict legal formalism is hardly in opposition to the SCN’s tendency to conform with the plain language of the relevant Nigerian Constitutions, it tends to take the court’s hands and eyes off the widespread and systematic violations of socio-economic (ESC) rights which occur in Nigeria. It also stands in stark contrast to the warning of Pats-Acholonu, JSC (as he then was), which was issued in these words:

“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 horrendous effects not only on the Germans but more particularly on the Jews.”³⁹

Given Justice Pats-Acholonu’s valid observation, and given the widespread poverty that characterizes Nigerian society, of a kind that screams for concerted remedial action, would it have been out of place to expect the SCN to act far more creatively and boldly in interpreting the Constitution in ways that breathe life into the ESC rights provisions that lie virtually comatose in Chapter II of that basic law?

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ s 16(2)(d).

³⁶ s 17(3)(d).

³⁷ s 18(1).

³⁸ s 20. See generally E P 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 & Development Journal* 320; 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: *Gbenre v Shell* Revisited” (2007) 16 *Review of European Community and International Environmental Law* 312.

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

It would only have been legitimate to expect the court to act in this fashion. But that would also be at the risk of not acknowledging Kennedy's concerns regarding the dangers of the over-judification 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" [like 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 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 it cannot achieve.⁴²

Although we do not disagree with almost all of it, this specific aspect of Kennedy's thesis could be challenged at some level by others, including on the ground that some of it may be read as the 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 the light it shines on the kind of ingrained attitude to poverty and subordination that appears to have informed the position adopted by the SCN in the case that was just discussed.

The question of the wisdom or otherwise of the constitutional or judicial instrumentalization of human rights in the service of the poor that is raised by Kennedy's challenge to the human rights movement is also relevant to the consideration of the ideological, practical, and other underpinnings/implications of the inclusion of property rights in the judicially enforceable portion of the Nigerian Constitution. This is discussed in the next section.

V. RIGHTS IN WORK AND A BAXIAN ANXIETY

Apart from the protection of property rights, which was discussed in the last section as a component of the protection that the human rights regime could offer to the poor, another right that is further engaged along similar lines is the right to work. The nature of this right that is implied here is not one requiring the government to provide full employment (though this could be possible if governmental/private economic praxis were to be re-imagined, and would certainly go a long way in 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 it but instead provide benefits for those who cannot find work. Thus, what is envisaged here instead are some components of the right to just and favorable conditions of work (which is limited to the protection of those already in the workplace from undue exploitation).

Under the Nigerian 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

⁴⁰ Kennedy, *supra* note 5 at 118.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ See for example D NeJaime, "Winning through Losing" (2011) 96 *Iowa Law Review* 941; G N Rosenberg, *The Hollow Hope: Can Courts bring about Social Change?* (Chicago: The University of Chicago Press, 2008); M J Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions" (1996) 80 *Virginia Law Review* 7.

provisions in its Chapter four. Others like the right to a minimum wage, to health insurance and to work in safe environments are less so. But in analyzing 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 rather 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 like other “fundamental” rights, Nigeria’s ratification of certain international instruments which 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 analyzing the cases considered relevant to the discussion in this section, effort will be made to, as much as possible, show their relationship to the socio-legal status of the poor under the Nigerian Constitution.

As should be expected in a situation where the rights of workers collide with the greed of private capital, this is one area where the Baxian TREMF thesis has glaring resonance. As has been argued in a previous article,⁴⁵ one of the pillars of 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 that actively oppose the government’s excessive softness toward global capital.⁴⁶ It would therefore come as no surprise that almost all the cases to be evaluated in this section implicate the struggles of the Nigerian labor movement to protect workers (most of who fall within the low income bracket) from the oppression of agents of global capital and the governments that enabled these excesses.

The first case up for consideration in this regard is that of the *Bureau of Public Enterprises v National Union of Electricity Employees*.⁴⁷ The major question before the court in this case was whether an action taken by the body charged by government to privatize public corporations aimed at averting a strike by workers is 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 facts are that the Appellant is the government agency charged with privatizing government corporations while the Respondents are employees of the National Electric Power Authority (NEPA), one of the corporations to be privatized at the time (and which has now been “unbundled” into several companies and is now private). The respondents threatened a strike action should the appellant continue with plans to privatize NEPA. Appellant filed the suit to forestall the planned strike action. Respondents objected to the suit on grounds that appellant lacked *locus standi* (lacked standing before the court) to institute it because there was no relationship of employer/employee involved. After a hearing on the objection, the trial court ruled that the suit belonged to the

⁴⁴ This could derive from Article 27 of the Vienna Convention on the Law of Treaties 1969, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (“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 & 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, *supra* note 8.

⁴⁶ *Ibid* at 4.

⁴⁷ [2003] 13 NWLR (Pt 837) 382.

National Industrial Court and struck it out. Appellants contended on this appeal that no trade dispute was disclosed and therefore the High Court had jurisdiction to decide the case. Respondents also filed a cross-appeal.

The Court of Appeal in its judgment held that by virtue of section 47(1) of the Trade Disputes Act 1990, “trade dispute” is defined as any dispute between the employers and workers or between workers and workers which is connected with employment or 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 one between employees within themselves.

On the question of the correct forum for the determination of 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 on the subject matter of a trade dispute or any inter or intra union dispute in a court of law. The decree abates and renders void any action already commenced before its coming into effect. However, the court went further to hold, this is subject to the provisions of section 20(3) of the decree. As it had decided that this was not a trade dispute, the court found that the jurisdiction of the High Court to entertain it was not ousted.

Although this decision could be read as a victory for the workers’ movement involved in in the case, it could go on to have serious consequences for the rights of workers in Nigeria especially when it is placed in opposition to the government privatization program 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 judgment of the court in this case appeared too literal in its assumptions regarding the correct context for judging when a dispute could be considered pertinent to matters of labor 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 the interests of workers are often the first casualty in any privatization process where pure capitalist imperatives confront best labor 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 then seem that they are at the heart of labor disagreements or in the language of the law “trade disputes” rather than at its margins. 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 one sense, this decision stands in contrast to what is generally known to be the major fallout of privatization processes not only in Nigeria but around the world.⁴⁸ Even multi-lateral institutions like the World Bank which are in the fore front 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 which 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 has been displaced by a

⁴⁸ E Nwagbara, “The Story of Structural Adjustment Programme in Nigeria from the Perspective of the Organized Labour” (2011) 1 *Australian Journal of Business and Management Research* 30; A B 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 & Pim 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?* (Washington DC: World Bank, 1998) at 3.

TREMF paradigm which denies any significant redistributive role to the state. Instead, states are now 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 – i.e. deregulation, de-nationalization, and disinvestment (which are all components of the dominant version of the privatization paradigm).⁵⁰

To the contrary, however, it is also possible to argue that this decision allows the workers' union involved and all similar bodies to protest the Nigerian government's policy of privatization without the necessity of formally declaring a strike, and without having to be subjected to the relative rigors and alleged pro-government leanings of the industrial dispute resolution framework and apparatus in Nigeria. Perhaps, the decision is neither a total loss nor a total victory for the workers; and may in fact provide a marginal counter-factual 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.

VI. DEVELOPMENT AND COERCION: HORIZONTALITY AND THE SUBALTERN QUESTION

When judging processes of development with implications for poverty amelioration, what should be the standard of analysis? 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 have to sometimes ponder in seeking to improve their socio-economic conditions, especially in the face of the relevant government's relative failure to live up to its duties.

These questions were also central to the decision of the Supreme Court in the case of *Okoroafor Nkpa v Jacob Nkume*.⁵¹ The major issue in this case was whether a compulsory levy could be imposed on a citizen of Nigeria by other Nigerians of a particular community on the ground that such levy would be used for community development. A related question that the court grappled with was what should be the relationship between customary practices and the provisions of the Constitution protecting the human rights of citizens. An important reason for paying attention to this case is that it arose in a community in rural Nigeria (where a disproportionate majority of the poor live, and local customs tend to hold sway). Another such 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 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 through self-help efforts to deal with the most serious developmental challenges that face them. As such in this case, the respondents sought to compel appellant's wife to join the association of women in their community and also contribute to on-going developmental activities. When the appellant refused to do any of those biddings, respondent enlisted the assistance of armed

⁵⁰Okafor, *supra* note 8 at 4.

⁵¹ [2001] 6 NWLR (Pt 710) 543.

soldiers who used force to extract a levy and fine from appellant. At the High Court, the Judge ruled in favor 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, the fundamental rights of citizens must not trampled upon in this 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 or practice that permits the breach of the fundamental rights provisions guaranteed to a Nigerian citizen in the Constitution ...should not be enforced by the 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 labor, the appeal court held that under section 31(2)(d)(i) of the Constitution 1979 (under which this action was commenced), forced or compulsory labor does not include labor or service that forms part of ordinary communal or other civic obligations for the well-being of the community. According to the court, the kind of labor that is prohibited by this provision must involve some sort of compulsion to physical labor 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 labor envisaged by the constitutional provisions. However, the court concluded that employing the services of armed soldiers to intimidate the appellant into paying out money for community development was a violation of his constitutional rights.

Viewed from a strictly constitutional standpoint, it could be asserted by some 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 such an individual should be excused from it. In this view, extracting participation from that individual through coercion cannot be constitutionally justified. That is one way of looking at it. This position offers protection for the weak in the community against its majority that may sometimes be as powerful within that context as the government is in the larger scheme of things.

But this particular understanding and interpretation of that constitutional provision might seem to others as removing significantly from the social context of this 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 positive impact on poverty reduction? By what significant measure does the behavior of the relevant community differ from the imposition and exaction 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 African problem – 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 and not some value borrowed from contexts that are not commensurable.

⁵² *Ibid.*

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 our 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, howsoever well motivated it was, the issue was significantly more complex than the court let on.

VII. FIGHTING POVERTY THROUGH NON- DISCRIMINATION

One of the ways through which the superior courts in Nigeria could help with 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. This 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," that provision protects only Nigerian citizens.

This provision also 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 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 said law imposes restrictions with respect to appointment of persons to any office under the state or as a member of the armed forces of Nigeria, 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 in Nigeria which makes 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 discrimination as well in employment, as many of the federating States often deny job opportunities to so-called non-indigenes of those States and could – in

⁵³See s. 42(1)(a).

⁵⁴s 42(1)(b).

⁵⁵s 42(3).

⁵⁶C Okengbo, A Omideyi & 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; S E 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.

⁵⁷E 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; R C 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.

discriminatory fashion – sack those of them who are already employed in such States.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 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 its main victims than is otherwise the case. 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

On the basis of these widespread discriminatory practices, cases challenging them would be expected to be as rampant as those practices tend to be. This, however, does not seem to be the case in reality. Despite the prevalence of official and unofficial discrimination in the Nigerian society, and taking into account the fact that a number of different factors may be explanatory here, there are still not as many cases as one would have expected that have been filed challenging the practice. One of the relatively few cases on this subject ever litigated in Nigeria was actually commenced while the military was in power in the 1990s.⁶² However, the final appeal decision by the Supreme Court was not delivered until immediately after civil rule was restored in the country in 1999. As 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 of South Eastern Nigeria.

⁵⁸F Ludwig, “Christian-Muslim Relations in Northern Nigeria since the Introduction of Sharia in 1999” (2008) 76 *Journal of the American Academy of Religion* 602.

⁵⁹ V A, “An Issue Overlooked in Nigeria’s Reforms: The Continuation of Government Discriminatory Practices” (2006) 10 *African Sociological Review* 116 at 117.

⁶⁰ *Ibid* at 120-121.

⁶¹ See for example P Okeke, “Reconfiguring Tradition: Women’s Rights and Social Status in Contemporary Nigeria” (2000) 47 *Africa Today* 49; U U Ewelukwa, “Post-Colonialism, Gender, Customary Injustice: Widows in African Societies” (2002) 24 *Human Rights Quarterly* 424.

⁶² *Mojekwu v Mojekwu*, [1997] 7 NWLR 283; *Mojekwu & others v Ejikeme & Others*, [2000] 5 NWLR 402; *Mojekwu v Iwuchukwu*, [2004] 4 SC (Pt II) 1.

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 also does have 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 the *Nrachi* which enabled a man without male children to keep a daughter unmarried under his roof in order to produce male children to inherit property of the said man upon his death. A daughter who had 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 in question here was the *Ili Ekpe* where if a man died without a male issue and had no daughter for whom the *Nrachi* custom had been performed, even if the said man had a daughter or daughters who had not performed the custom, they could not claim their father's estate. Instead the late person's estate would devolve on the dead man's brother or the latter's male issue.

In this case, though the *Nrachi* custom 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 the *Nrachi* custom was not performed. While the women involved in this litigation 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 whom they claimed should inherit. The major question placed before the court was whether the *Nrachi* and *Ili Ekpe* customs were not repugnant to natural justice, equity and good conscience and therefore could not co-exist 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 relationship involved, it then 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 Nigerian Constitution 1999 and as well the UN Convention on the Elimination of all Forms of Discrimination against Women.⁶³

However, when the case went on further appeal to the Supreme Court, it 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." It went further to

⁶³ See N Nzegwu, *Family Matters: Feminist Concepts in African Philosophy of Culture* (Albany NY: State University of New York Press, 2006) at 115; B Ugochukwu, ed., *Update on Human Rights Litigation in Nigeria* (Lagos: Legal Defence Centre, 2003) 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; R N Nwabueze, "Securing Widow's Sepulchral Rights through the Nigerian Constitution" (2010) 23 *Harvard Human Rights Journal* 141; R A Onuoha, "Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue" (2008) 10 *International Journal of Not-for-Profit Law* 79.

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 communities.”

The Supreme Court (SCN) decision here 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 this is beside the point. While the SCN’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 our 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 part of the reasons that many women in rural societies in Nigeria are poor (and tend to be poorer than the men) is that customs like *Ili-Ekpe* which 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 state apparatus that proves unwilling or incapable of carrying out its mandate under the law and the Constitution.”⁶⁴ The kind of customary discrimination evident in the *Mojekwu* case often thrives because of government inaction. While Rajagopal views judicial intervention by way of governance in such cases mostly negatively (because they favor some rights while ignoring others or are 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 go the whole hog. This is notwithstanding the fact that it is not difficult at all to link poverty and femininity in the Nigerian context. Neither is it hard at all to connect the significant incidence of discrimination against that gender and the serious violations of socio-economic rights that they tend to endure. As such, female-headed households in Nigeria (as elsewhere) are more likely to be poor for a variety of reasons.⁶⁵ Rural women many of whom are insufficiently literate also tend to be disproportionately afflicted by extreme poverty.⁶⁶ And more women than men are more likely victims of HIV/AIDS infections.⁶⁷ But 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.

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

⁶⁴ Rajagopal, *supra* note 2. This has also been described as “political jurisprudence.” See Martin Shapiro, “Political Jurisprudence” (1963-1964) 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.”

⁶⁵ See for example C Okojie, “Gender and Education as Determinants of Household Poverty in Nigeria” (WIDER Discussion Article No 2002/37) Online: <<http://www.econstor.eu/bitstream/10419/52915/1/34630590X.pdf>>.

⁶⁶ F Ogwumike, “An Appraisal of Poverty Reduction Strategies in Nigeria” (2002) 39 *Central Bank of Nigeria Economic & Financial Review* 1 Online: <<http://www.cenbank.org/OUT/PUBLICATIONS/EFR/RD/2002/EFRVOL39-4-4.PDF>>; Maurice Akpan Okoji, “Rural Women and Poverty in Akwa Ibom State, Nigeria” (2001) 25 *Atlantis* 62.

⁶⁷ 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.

Given that under the Nigerian Constitution socio-economic rights do not appear to be amenable to judicial enforcement, the question then 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, in the context of the *African Charter on Human and Peoples' Rights*, not only did the country sign and ratify that treaty, 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 much the same way as any other domestic statute.⁶⁸ Having said this, it must be noted, however, that the related question of the hierarchy of norms in Nigeria; i.e. 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 have even been decided in favor of the Constitution.⁶⁹

Almost needless to state here, the African Charter (and its domestic incarnation) do guarantee almost all the rights provided for in Chapter 2 of the Nigerian constitution as Directive Principles. If the Supreme Court's decision in *Olafisoye* above is extrapolated, it 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 contained in chapter 4 of the constitution.

XI. CONCLUSION

Does human rights law and jurisprudence have any role to play in the amelioration of poverty? This is the broader thematic explored in this Article, albeit in the specific Nigerian context. What the line of cases analyzed in this Article indicate is 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 did 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.

And although the controversy regarding the justiciability or otherwise of the very socio-economic rights the significant enjoyment of which are crucial to the mitigation of poverty, does tend to give the impression that the question is largely unsettled (at least in Nigeria), the courts could still exert a significant influence on anti-poverty struggles by exploring and exploiting the 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 up to this challenge, they would have played their own (positive) part in the effort to mitigate poverty in Nigeria (and to even end poverty as we know it). Thus far, it is difficult to forecast the orientation of these courts going forward.

⁶⁸ See *Abacha v Fawehinmi*, [2000] 4 NWLR (Pt 660) 228. See also O C 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* (Lagos: Nigerian Institute of Advanced Legal Studies Press, 2013).

⁶⁹ See *Abacha v Fawehinmi*, *ibid.*

For the evidence at hand, the evidence that has been gleaned from the human rights jurisprudence that was interrogated in this study, is mixed at best, in its orientation.