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CHAPTER ONE

INTRODUCTION

1. RATIONALE AND BACKGROUND

I argue in this thesis that a political approach to human rights which regards political action as counterpart of socio-economic rights in poverty related struggles either in the creation of new socio-economic rights norms or the enforcement of existing ones holds the best promise for the transformation of socio-economic rights for a more effective poverty reduction in contemporary Africa.

Having regard also to the potential impact of courts' interpretive role and function underpinned by particular understandings of democracy in either constraining or enlarging the space for citizens' action in constitutional democracies like that of South Africa and Nigeria, I argue also that a judicial conception of democracy that is rooted in African political philosophy is the conception that is more likely to promote the necessary space for political empowerment of the poor and consequent redistribution of wealth in African states through effective transformation of socio-economic rights. I, therefore, in this thesis identify and analyse the existing conceptions of democracy of South African and Nigerian courts through the examination of relevant cases from both jurisdictions. I also examine the likely impact of both courts' conception of democracy on poverty-related struggles and political action in both countries through the analysis of relevant socio-economic rights related political action cases. Finally, I articulate an African conception of democracy, the WABIA model/understanding of democracy, which is based on African political theories as can be deduced from historical and anthropological evidence as well as from African philosophical literature, as the conception that is more likely to enlarge the space for political action and empowerment of the poor.

My approach in this thesis is informed and premised on the fact that there is robust literature linking poverty and vulnerability to lack of political power and voice which in turn

exacerbate the poverty and vulnerability of those concerned.¹ For instance, Diamond² while recognising the social and economic underpinnings of poverty opines that transforming the socio-economic realities of the poor requires policy and service delivery responses by the state to provide the poor with the requisite assets and enabling environment to get out of poverty. He further argues that in places where this is not happening and people are trapped in the circle of poverty and powerlessness, it is because powerful actors in such societies and political systems that benefit from the poor's disabling and disempowered conditions have prevented needed changes. Of similar view is Michelman who also opines that: 'Maldistribution of formal political power obviously removes or weakens a basic institutional safeguard against systematic maldistribution of status and the resources that support it.'³ He posits further that representation reinforcing rights in the United States of America's Constitution cannot address this disparity of power and that welfare rights (socio-economic rights) are in fact part and parcel of the United States Constitution to give the poor equality of status and address this power disparity.⁴

Furthermore, Raz also points out that one of the justifications for the entrenchment and enforcement of rights is that legal rights are sources of power.⁵ According to him: 'The allocation of rights is, among other things, a distribution of power, a way of empowering people and institutions, or of disempowering them.'⁶ In Raz's view, the politics of constitutional rights give vulnerable individuals and groups access to centres of power denied them by mainstream societal political institutions.⁷ Jackman also, writing within the context of the poor in Canada, points out that the problem with the poor's material disadvantage and

¹ L Diamond 'Moving up out of poverty: What does democracy have to do with it?' available at http://iis-db.stanford.edu/pubs/20669/Moving_Up_Out_of_Proverty.pdf (accessed on 21 November 2012); F Michelman 'Welfare rights in a constitutional democracy' (1979) *Washington University Law Quarterly* 659; LW Cole 'Empowerment as the key to environmental protection: The need for environmental poverty law' (1992) 19 *Ecology Law Quarterly* 619; M Jackman 'Constitutional contact with the disparities in the world: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law' (1994) 2 *Review of Constitutional Studies* 76; J Raz 'Rights and politics' (1995) 71 *Indiana Law Journal* 27; H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal of Human Rights* 1; N Frazer 'Social exclusion, global poverty and scales of (in) justice: Rethinking law and poverty in a globalizing world' (2011) 22 *Stellenbosch Law Review* 452; and D Brand *et al* 'Poverty as injustice' (2013) 17 *Law, Democracy and Development* 273; among others.

² L Diamond (Ibid).

³ F I Michelman 'Welfare rights in a constitutional democracy' (1979) *Washington University Law Quarterly* 659 at 675.

⁴ Id at 676 – 687.

⁵ J Raz 'Rights and politics' (1995) 71 *Indiana Law Journal* 27 at 42.

⁶ Ibid.

⁷ Id at 43.

its connection with lack of political power is a circular one.⁸ According to her, the Canadian political system, because of the desperate material conditions of the poor, excludes the poor from the political process and this exclusion in turn denies the poor the critical power and voice to make the system responsive to their needs.⁹ The main point of the above literature, among others in the same line, is aptly captured recently by Brand *et al* thus: ‘A definition of “poverty” as inadequate *access* to basic living resources, such as, food, water, housing and health care, surfaces the political dimensions of poverty. What determines access to these basic resources is economic and political power. Any response to poverty must therefore engage power.’¹⁰

In the light of the above, I argue in this thesis that failure to engage with power appears to be the Achilles’ heel of earlier efforts to effectively engage with poverty the world over. Thus, several initiatives ranging from the welfare system, to grants and aids, and even the rights based approach to poverty reduction have apparently not made meaningful or substantial difference to the worldwide deepening of poverty levels and desperate condition of the poor as experiences the world over and the literature and several reports continue to show.¹¹ The foregoing therefore informed my argument in this thesis that a political approach to human rights which regards politics/political action as counterpart of socio-economic rights in poverty related struggles holds the best promise for effective poverty reduction strategies in Africa, which appears to be worst hit by the poverty scourge.¹² I continue the argument that

⁸ M Jackman ‘Constitutional contact with the disparities in the world: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law’ (1994) 2 *Review of Constitutional Studies* 76 at 95.

⁹ Id at 95 – 105.

¹⁰ D Brand *et al* ‘Poverty as injustice’ (2013) 17 *Law, Democracy and Development* 273 – 274. [Emphasis in original].

¹¹ S Chen and M Ravallion ‘The developing world is poorer than we thought but no less successful in the fight against poverty’ available at http://siteresources.worldbank.org/JAPANINJAPANESEEXT/Resources/515497-1201490097949/080827_The_Developing_World_is_Poorer_than_we_Thought.pdf (accessed on 21 March 2012); S G Reddy and T W Pogge ‘How not to count the poor’ available at <http://www.columbia.edu/~sr793/count.pdf> (accessed on 12 March 21, 2012); Channels Television ‘World Bank Rates Nigeria among extremely poor countries’ available at <http://www.channelstv.com/home/2014/04/02/world-bank-rates-nigeria-among-extremely-poor-countries/> (accessed on 2 April 2014); F Viljoen ‘Contemporary challenges to international human rights law and the role of human rights education’ (2011) 2 *De Jure* 207 at 221. See also the UN Secretary General Report ‘Extreme poverty and human rights’ available at <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf> (accessed on 6 October 2011). The foregoing scholarly works and reports, among many others, show clearly that despite several efforts and initiatives to tackle poverty, the phenomenon has remained one of the biggest challenges of the 21st century.

¹² There appear to be little argument that poverty, although a global problem, is much more an African problem than most of the other continents of the world. This fact has been confirmed by several reports and literature. The World Bank Global Poverty Report of 2008, for instance, have gloomily predicted that at the current poverty increase rate of 0.65 % points per year in Sub Saharan Africa, one third of the world’s poor will live in

poverty related struggles may in fact hold the best promise for effective socio-economic rights transformation in Chapter Five of this thesis.

1.1 THESIS OF STUDY

The main thesis of this study is therefore that taking a historical view of the matter, a political/resistance approach to the transformation of socio-economic rights appears to be the most feasible approach to political and socio-economic empowerment of the poor and vulnerable. And that having regard to the real likelihood and impact of courts' interpretive work in either constraining or enlarging the space for struggle and action in constitutional democracies, a judicial conception of democracy rooted in African political philosophy is the mechanism that appears more likely to provide the necessary space for political empowerment of the poor through poverty related struggle, participation and action to compel more equitable redistribution of wealth through effective transformation of socio-economic rights.

1.2 STATEMENT OF THE PROBLEM

Human rights are acknowledged by quite a number of constitutional rights scholars and theorists as tools of empowerment for the poor and the vulnerable members of society; hence the popularity of the rights-based approach to poverty reduction.¹³ The essential importance

the region by 2015. S Chen and M Ravallion 'The developing world is poorer than we thought but no less successful in the fight against poverty' available at http://siteresources.worldbank.org/JAPANINJAPANESEEXT/Resources/515497-1201490097949/080827_The_Developing_World_is_Poorer_than_we_Thought.pdf (accessed on 21 March 2012).

The deepening of and increasing incidence of poverty in Africa is confirmed by another study in Columbia University: X Sala-i-Martin 'The World distribution of income: Falling poverty and... convergence, period' available at http://www.columbia.edu/~xs23/papers/pdfs/World_Income_Distribution_QJE.pdf (accessed on 25 March 2012). Xavier's Report indicates that: '... where poverty was mostly an Asian phenomenon thirty years ago (87 percent of the world's poor lived in East and South Asia), poverty is, today, an essentially African problem (68 percent of the poor live in Africa today whereas only 18 percent live in Asia)'.

¹³ W Genuten and C Perez-Bustillo 'Human rights as a source of inspiration and instrument for the eradication of extreme poverty' in W Genuten and C Perez-Bustillo (eds) *The poverty of rights: Human rights and the eradication of poverty* (2001) 184; C Jochnick 'The human rights challenge to global poverty' in W Genuten and C Perez-Bustillo (eds) *The poverty of rights: Human rights and the eradication of poverty* (2001) 159; R Haug and E Rauan 'Operationalising the right to food in Africa' available at <<http://www.nlh.no/noragric/publications/reports/NoragricRep2B.pdf>> (accessed on 17 May 2007); OHCHR 'Human rights, poverty reduction and sustainable development: Health, food and water' A background paper presented at the World Summit on Sustainable Development in Johannesburg, 26 August-4 September, 2002 available at <<http://www.ohchr.org/Documents/Publications/HRPovertyReductionen.pdf>> (accessed on 24 October 2012); OHCHR *Principles and guidelines for a human rights approach to poverty reduction strategies*

of socio-economic rights in a rights-based approach to poverty reduction has also been affirmed and the frontiers extended by many scholars from different ideological leanings and persuasions.¹⁴

However, not all scholars agree regarding the empowering and social change potentials of human rights. Quite a number of scholars view rights discourse as part of the problem;¹⁵ while some others see it as only a catalogue of individual's alienation, dependence, helplessness and powerlessness.¹⁶ Additionally, history and experience appear also to bear out scholars that doubt the empowering potential of human rights. South Africa is a case in point. Almost two decades after the entrenchment of socio-economic rights in the country's Bill of Rights not much appears to have changed for the poor whose interests are the targets of the inclusion.¹⁷

From the foregoing, there is need therefore for new approaches in the theorisation of rights as agents of empowerment, social change and transformation. This thesis is aimed at charting the course of one of the new approaches. Thus, aligning myself with eminent scholars who see resistance and struggle as counterparts of human rights,¹⁸ I argue in this thesis that taking

available at <<http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>> (accessed 24 October 2012).

¹⁴ For instance, Hart arguing from a conservative perspective made economic and material subsistence one of his criteria for the existence of a viable social organization: H L A Hart *The concept of law* (1961); Sen also arguing from an economist point of view made subsistence rights an essential component of development in any country: A Sen *Development as freedom* (2001); Cappelletti also arguing from a conservative perspective states that: '[t]o exclude social rights from a modern Bill of Rights, is to stop history at the time of laissez-faire' M Cappelletti 'The future of legal education. A comparative perspective' (1992) 8 *South African Journal of Human Rights* 1 at 10; Michelman also, a constitutional law theorist, strongly advocates welfare rights as part and parcel of constitutional rights in constitutional democracies in F Michelman, 'Welfare rights in a constitutional democracy' (1979) *Washington University Law Quarterly* 659; and Pieterse, a critical scholar, is also of the same view: M Pieterse 'Eating socio economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 (3) *Human Rights Quarterly* 796 and Fabre arguing from a constitutional rights perspective argues for the indispensability of socio-economic rights in modern legal regimes: C Fabre 'Constitutionalising social rights' (1998) 6 *The Journal of Political Philosophy* 263.

¹⁵ See for instance, D Kennedy 'The international human rights movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101.

¹⁶ See for instance, K Malan *Politocracy* trans J Scott (2012) 206 at 219. See also M Tushnet 'An essay on rights' (1983 – 1984) 62 *Texas Law Review* 1363; P Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1983-1884) 62 *Texas Law Review* 1563; R West 'Rights, capabilities and the good society' (2001) 69 *Fordham Law Review* 1901; K Van Marle 'Lives of action, thinking and revolt – A feminist call or politics and becoming in post-apartheid South Africa' (2004) 19 *Southern African Public Law* 605.

¹⁷ See for instance, S Liebenberg and G Quinot 'Editors' introduction: Law and poverty colloquium special edition' (2011) 22 *Stellenbosch Law Review* 443 for a brief review of some of the statistics.

¹⁸ P J Hountondji 'The master's voice – remarks on the problem of human rights in Africa' in *Philosophical foundations of human rights* (1985) 319; M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359; C Heyns 'A "struggle approach" to human rights' in A Soeteman (ed)

a historical view of the matter, a political struggle approach to human rights which sees poverty-related struggle and political action as counterpart of socio-economic rights either in the creation of new norms or the enforcement of existing ones is the approach that is likely to yield more effective dividends than approaches based on law or action alone. Thus, my conception of human rights here is the one aptly captured by Hountondji thus: ‘Nothing sensible or pertinent can be said about human rights if one ignores this daily, universal fact of revolt. Only those aware of rights infringed and dignity flouted can be indignant.’¹⁹

However, much literature exists that recognises the importance and potential effects of the interpretive works of courts on the space for politics, enjoyment of human rights and the life and struggle of the citizenry.²⁰ Much more so is this the case in constitutional democracies like South Africa and Nigeria. Many theorists have consequently endeavoured to theorise an appropriate conception of democracy which will facilitate a more robust enjoyment of human rights and expansion of the political space for effective action.²¹ Most of this work is, however, either based on a western construct/conception of democracy which appears to be ill-suited to the culture, norm of government and situations of Africans; or narrow, being focused on specific areas of national courts’ jurisprudence; or is now quite dated. It is as a result of the foregoing that I undertake in this thesis a comparative examination and analysis of the likely impact of judicial conceptions of democracy on poverty related struggles and action in South Africa and Nigeria through a library or desk-based research method. I also theorise a judicial conception of democracy rooted in African political philosophy which

Pluralism and law (2001) 171. I think a qualification is required here with regard to Heyns. Although, Heyns also makes a connection between struggle and human rights, I think my approach differs significantly from his. First, Heyns essentially conceive struggle as culminating in rights. He does not appear to conceive rights as in fact in part *being* struggle, a point which I am in essence making. Second, while Heyns’s approach is based on a theory of social contract, mine is underpinned by CLS scholars’ theory of law and society as derived from Marxist theory of social change.

¹⁹ P J Hountondji ‘The master’s voice – remarks on the problem of human rights in Africa’ in *Philosophical foundations of human rights* (1985) 319 at 320.

²⁰ K Klare ‘Judicial deradicalization of the Wagner Act and the origins of modern legal consciousness, 1937-1941’ (1977 – 1978) 62 *Minnesota Law Review* 265; F Michelman ‘Foreword: Traces of self-government’ (1986-1987) 100 *Harvard Law Review* 4; J Habermas ‘Law as medium and law as institution’ in G Teubner (ed) *Dilemmas of law in the welfare state* (1986); F Michelman ‘Law’s republic’ (1987-1988) 97 *Yale Law Journal* 1493; F Michelman ‘Conceptions of democracy in American constitutional argument: The case of pornography regulation’ (1988 – 1989) 56 *Tennessee Law Review* 291; F F Piven and R A Cloward ‘Collective protest: A critique of resource mobilization theory’ (1991) 4 *International Journal of Politics, Culture and Society* 435; Klare K ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146; H Botha ‘Freedom and constraint in constitutional adjudication’ (2004) 20 *South African Journal on Human Rights* 249; A J van der Walt ‘Normative pluralism and anarchy: Reflection on 2007 Term’ (2008) 1 *Constitutional Court Review* 77; D Brand *Courts, socio-economic rights and transformative politics* unpublished LLD thesis, Stellenbosch University, (2009); H Botha ‘Representing the poor: Law, poverty and democracy’ (2011) 22 *Stellenbosch Law Review* 521 at 522; among others.

²¹ A more detailed discussion of this literature is done in Chapter Four.

appears to be more culturally and contextually compatible; and more likely to open up the political space for poverty related struggles and action for a more effective socio-economic rights transformation and consequent reduction of extreme poverty and inequality in Africa.

However, a struggle/resistance approach to social change and transformation is not a new concept or area of enquiry. The seed of this kind of approach is rooted in Marxist theory of history: historical materialism. Collins has correctly, in my view, pointed out that Marxism is the theoretical backbone of revolutionary movements and politics throughout the modern world.²² This is through Marxist theory's critical analysis of modern society. Marxist theory of history conceives society as a history of class struggles occasioned by society's relation of production or economic formation.²³ According to Cohen, there are four different epochs in Marxist theory of history.²⁴ The first is the pre-class societies where no surplus is created. The second is pre-capitalist societies where some surplus is created but less than the surplus created in capitalist societies. The third epoch is the era of capitalist societies where a moderately high surplus is created which will be less than the surplus in post-class societies i.e. communism which is the last epoch of human society devoid of class relations. The surplus in communist societies will be massive.

According to Marxist theory, modern day capitalist society is in the third epoch of historical materialism. It is a society consisting of two classes of people: the owners of the means of production referred to as the bourgeois and the oppressed workers class referred to as the proletariat. In Marxist view, modern society did not arrive at where it is today naturally or by accident. Actively aided by law, modern society got to its present stage through conscious and deliberate expropriation of poor people's property by the bourgeois class.²⁵ Thus, according to Marxists, it is equally the deliberate efforts and acts of the oppressed proletariat class through a revolution that will overthrow the hegemony and domination of the capitalist class. However, Marxist theory of history is rooted in economic determinism and a base/superstructure dichotomy. Marxist conceives the economy as the base and foundation of society which influences every other relations and institutions. Law, state and ideology, among other things, classical Marxists see as superstructural and instruments of class

²² H Collins *Marxism and law* (1982) 124.

²³ M D A Freeman *Lloyd's Introduction to jurisprudence* 8th Edition (2008) 1133 – 1134.

²⁴ G A Cohen *Karl Marx's theory of history: A defence* (1978) 198.

²⁵ A very good historical account of this fact is found in K Marx *Genesis of capital* (1977) and E P Thompson *Whigs and hunters: The origin of the Black Act* (1975).

domination. Marxist theory of history thus disavowed any role or place for the law and human rights in social change and transformation.

The Marxist instrumental view of law and state has, however, been rejected by the Critical Legal Studies movement scholars (CLS scholars) as not a correct understanding of advanced capitalist states.²⁶ Although sharing Marxists' critical and historical orientations, CLS scholars reject Marxist reductionism and rather narrow view of the law and state as instruments of class domination. According to Klare,²⁷ classical Marxist theory of law and state is deficient in understanding advanced capitalist states because of its view of relative autonomy of the law and state and because it conceived both as instruments of class domination. In Klare's view, law is not superstructural; it is in fact constitutive of social practice in advanced capitalist states and therefore has an important role to play in the quest for social change. According to Klare, '[w]hat is needed is a theory in which political action can also be conceptualized as creating or articulating class power.'²⁸ I fully agree with Klare here. In fact the above quoted statement constitutes the very base of this thesis.

The above view of Klare is shared by some other CLS scholars also. In Gordon's view for instance, legal discourses are in fact discourses of power.²⁹ Such discourses can therefore not be neglected in the quest for social transformation or change. This view of CLS scholars regarding the law, action and social change is aptly summarised by Boyle thus: 'If there is one thing critical legal scholars are agreed about it is that social change is not a matter of clever legal argument deployed by elite lawyers, but rather a process of democratic organisation and mobilization in which law will play a necessary part.'³⁰ This view of the essential importance of law in the struggle for social change and transformation has also been expressed by many other scholars.³¹

²⁶ See for instance, K Klare 'Law-making as praxis' (1979) 40 *Telos* 123 who is of the view that law is constitutive of social practice in advanced capitalist state; R Gordon 'Law and ideology' (1988) 3 (1) *Tikkun* 14 who posits that legal discourses are discourses of power in modern state. See also P Gabel and P Harris 'Building power and breaking images: Critical legal theory and the practice of law' (1982-83) *Review of Law and Social Change* 369.

²⁷ K Klare 'Law-making as praxis' (1979) 40 *Telos* 123.

²⁸ *Id* at 128.

²⁹ R Gordon 'Law and ideology' (1988) 3 (1) *Tikkun* 14

³⁰ J Boyle 'Introduction' in J Boyle (ed) *Critical legal studies* (1992) xxx.

³¹ In fact, Thompson had earlier made the same point as the CLS scholars in his analysis of the oppressive and class use of the law in 18th Century England. While agreeing that the law is in fact most times fashioned to do the biddings of the class in power, he said: '...the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power

As I state earlier, I share the view of CLS scholars on the importance of law and political action in social change and transformation. CLS scholars' theory of law and social change therefore constitutes the take-off point of this thesis. This is because I think CLS scholars' theory of law and social change as derived from Marxist theory of social change better captures and explains the theoretical underpinnings of distributive justice claims that socio-economic rights transformation represents.

Having explained the relationship between human rights and political action that this work is set to interrogate, it remains to elaborate more the rationale behind the focus of this work on the courts. In addition to the fact that interpretive work of courts in fact impacts and sets the parameters for politics in constitutional democracies as I earlier pointed out, this thesis focuses on courts for eight main reasons. They are as follows: Firstly, the judiciary in liberal societies serves as the benign face of domination and power. As explained by Baxi,³² because power has to appear benign, the judiciary as an organ of state power represents the mask that covers the face of raw and oppressive power and domination in bourgeois liberal orders. The judiciary is thus organised in a way that gives an appearance of autonomy and saddled with the role of interpreting the laws and mediating disputes between citizens and the state and between the citizens *inter-se*. It is thus the critical link between citizens, the state and dominant power.

Secondly and related to the above, because the judiciary is structured to represent the mask covering the face of domination and class power in bourgeois liberal societies, it appears to be the Achilles heels of dominant power in liberal bourgeois orders. It appears to be the weak link in the chain of domination and power through which the domination and power of the state can most be challenged, constrained or countered. This is because although appointed

continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose community can never be fractured without bringing men and women into immediate danger.' E P Thompson *Whigs and hunters: The origin of the Black Act* (1975) 266 [Emphasis in original]. See also U Baxi 'Judicial discourse: Dialectics of the face and the mask' (1993) 35 *Journal of the Indian Law Institute* 1; U Baxi 'Law, struggle and change: An agendum for activists' (1985) 35 *Social Action* 118. More recent literature on this sub-theme includes, D Kairys 'Introduction' in Kairys D (ed) *The politics of law. A progressive critique* 3 ed (1998) 1; M Pieterse 'Eating socio economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 (3) *Human Rights Quarterly* 796; among others.

³² U Baxi 'Judicial discourse: Dialectics of the face and the Mask' (1993) 35 *Journal of the Indian Law Institute* 1 at 3 – 7.

by the executive ostensibly to legitimate dominant power, the judiciary sometimes deviates to make decisions and create jurisprudence that is against dominant power.³³ The reason for this is aptly explained by Thompson thus:

If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed on occasion, by actually *being* just.³⁴

Consequently, an important avenue through which to make power respond to better claims of justice appears to reside in the judiciary in liberal states. It appears the organ of state that can most be used against the state.

Thirdly, the judiciary through its interpretive function sets the parameters for future social practice. As rightly opined by Piven and Cloward, rule-making [as end product of adjudication] is a strategy of power:

...which creates new and lasting constraints on subsequent political action. Once objectified in a system of law, the rules forged by past power struggles continue to shape ongoing conflicts by constraining or enhancing the ability of actors to use whatever leverage their social circumstances yield them. That is why new power struggles often take the form of efforts to alter the parameters of the permissible by challenging or defying the legitimacy of prevailing norms themselves.³⁵

Fourthly, is the fact that the ordinary people who constitute the social base of democracy in Africa are demanding a second independence through struggles after the disappointment of formal independence. These demands and struggles are increasingly being channeled through the courts as I show in Chapters Four and Five in relation to both South Africa and Nigeria.³⁶ As rightly observed by Ake, African people are today demanding a second independence

³³ Ibid.

³⁴ E P Thompson *Whigs and hunters: The origin of the Black Act* (1975) 263.

³⁵ F Piven and R A Cloward 'Collective protest: A critique of resource mobilization theory' (1991) 4 *International Journal of Politics, Culture and Society* 435 at 436 – 437. See also J Habermas 'Law as medium and law as institution' in Teubner G (ed) *Dilemmas of law in the welfare state* (1986) 204 and U Baxi 'Judicial discourse: Dialectics of the face and the mask' (1993) 35 *Journal of the Indian Law Institute* 1.

³⁶ There is robust literature detailing the perpetual struggles of Africans against non-performing governments since after formal independences. See for instance, in relation to South Africa, T Madlingozi 'Post-apartheid social movements and the quest for the elusive "new" South Africa' in Motha S (ed) *Democracy's empire: sovereignty, law and violence* (2007) 77; T Madlingozi 'Hayi bo! Refusing the plan: acting, thinking and revolting by post-apartheid social movements and community organisations' in K Van Marle (ed) *Refusal, transition and post-apartheid law* (2009) 79; and in relation to Nigeria, A Momoh 'Popular struggles in Nigeria 1960 – 1982' (1996) 1 *African Journal of Political Science* 154; O C Okafor *Legitimizing human rights NGOs: Lessons from Nigeria* (2006) 777 – 111.

from ‘...indigenous leadership whose economic mismanagement, together with brutal repression, has made mere survival all but impossible’.³⁷

Fifthly, as has been pointed out by Uprimmy and Garcia – Villegas, though the power of review conferred upon the courts in constitutional democracies places them between the border zone of institutional weakness and emancipatory social practices, the courts if they are so minded and I believe properly guided through consciousness raising, as I seek to do here, can choose to act vigorously and pro-actively without fear or favour to open up the political space, release and foster the emancipatory potential of rights and democracy.³⁸

Sixthly and related to the previous point, there is in fact a crisis of representation in most growing democracies, especially in Africa, occasioned by the hegemony of liberal democracy (more will be said on this in Chapter Three). In such a situation, the courts can step in to fill the vacuum left by law and exclusionary social practices to resolve problems that in principle should have been resolved in the political sphere. And the courts will not be taking up other powers in this regard. They will be stepping in to fill the vacuum left by relevant political forces.³⁹

Seventhly, where the text and tenor of the constitution is progressive but the implementing authorities are acting retrogressively through their neo-liberal agenda and policies as subsequent analysis shows in relation to both Nigeria and South Africa, the judiciary becomes a legitimate forum to compel obedience to the progressive command of the constitution.⁴⁰

Finally, where courts’ jurisprudence is progressive and inclusive it is capable of being further appropriated by groups and social movements as the discussion of the Colombian

³⁷ C Ake ‘The unique case of African Democracy’ (1993) 69 (2) *International Affairs* 239 at 240.

³⁸ R Uprimmy and M Garcia – Villegas ‘The Constitutional Court and social emancipation in Colombia’ in B De Sousa Santos (ed) *Democratising democracy: Beyond the liberal democratic cannon* (2005) 66 at 70.

³⁹ *Id* at 71 – 72.

⁴⁰ *Id* at 72 – 73. For a comparative analysis of examples of retrogressive action by South African and Nigerian governments through neo-liberal policies and the progressive response of a Nigerian court in that regard, see A E Akintayo ‘A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights: Lessons from the *Nigerian case of Bamidele Aturu v Minister of Petroleum Resources and Others*’ (2014) 15 (2) *Economic and Social Rights Review* 5.

Constitutional Court's emancipatory jurisprudence by Uprimmy and Garcia – Villegas has shown. According to Uprimmy and Garcia – Villegas:

... the emancipatory power of certain of the court's decisions lies in the fact that they contain political message: they make concrete the expectations encoded in the Constitution and, to this extent, actors find in this message a pretext for political action. In other words, the court has an important role in shaping political practices because, on the one hand, it raises an emancipatory political consciousness among some excluded social groups and, on the other hand, provides possible strategies for political and legal action to remedy their situation.⁴¹

In short, a progressive court can promote further political action. The court can inculcate a spirit of non-conformity in the minds of social movements and the people in general based on the court's authoritative assertion that injustice exists and should be remedied. This tends to favourably affect the social and political reality of social movements and activists.⁴²

However, as can be gathered from some of the points made above, recourse to courts as vehicles for social transformation and change is a two-edged sword. It can cut both ways. It is capable of either constraining or enlarging the space for participation and action.⁴³ As argued elsewhere,⁴⁴ because of the nature of legal decision-making processes and the pliable nature of legal texts, recourse to courts is a weapon that is capable of being regressive as well as being transformative. This is why a number of theorists have been pre-occupied with and tried to fashion an appropriate model/ judicial conception of democracy which will widen the political space and make for a more robust rights enjoyment. A more detailed discussion of the literature in this area of the law is done in Chapters Three and Four of this thesis. However, in order not to make this thesis unduly repetitive and this introduction unwieldy suffices to say here that most of the earlier theories and literature on judicial conceptions of democracy are, among other defects, based on a western construct and rooted in western political theories which appear to be culturally and contextually inappropriate to Africa. This thesis differs from these in that it offers a conception of democracy that is rooted in African political philosophy which is culturally and contextually appropriate and appears to be more political action friendly as well.

⁴¹ R Uprimmy and M Garcia – Villegas 'The Constitutional Court and social emancipation in Colombia' in B De Sousa Santos (ed) *Democratising democracy: Beyond the liberal democratic cannon* (2005) 66 at 81.

⁴² Id at 81 – 82.

⁴³ One of the very good studies of the deradicalising effects of courts interpretive works in this regard is K Klare 'Judicial deradicalization of the Wagner Act and the origins of modern legal consciousness, 1937-1941' (1977 – 1978) 62 *Minnesota Law Review* 265.

⁴⁴ A E Akintayo 'Pliability of legal texts under a transformative constitution: *Mansingh v President of the Republic of South Africa* 2012 6 BCLR 650 (GNP) in perspective' (2012) 27 (2) *Southern African Public Law* 639.

1.3 OBJECTIVES OF STUDY AND RESEARCH QUESTIONS

A political approach to human rights implicates and brings very sharply into focus the relationship between human rights and democracy.⁴⁵ This is so because ‘...both political participation and the protection of human rights are part of the definition of democracy.’⁴⁶ Thus, a number of scholars have established strong linkages between democracy and human rights on the one hand, and political stability and socio-economic progress on the other.⁴⁷ This, however, may be a rather idealistic or too benevolent view of modern democracy. A more critical examination of the practice of modern democracy reveals rather a catalogue of exclusionary practices and systems of government that serve the interest of the materially advantaged. This appears to be more so the case in Africa.⁴⁸ According to Ake, the pure form of democracy as practiced in ancient Athens was appropriated by the European bourgeois class, trivialised into its present representative form and redefined to suit bourgeois class interest.⁴⁹ And it is within this trivialised and diluted form of democracy that Africa is democratising.⁵⁰ Ake therefore rejected the imposition of this form of democracy on Africa because it is opposed to and incapable of meeting the political needs and basic economic expectation of the masses in Africa. He therefore called for the ‘...deepening of the democratic experience in every sphere.’⁵¹

As a matter of fact, many prominent political scientists and theorists in Africa are in agreement that there is a crisis of representation in the form and practice of democracy in Africa.⁵² A good number of them therefore counsel a return to African roots because it

⁴⁵ C Heyns ‘A “struggle approach” to human rights’ in A Soeteman (ed) *Pluralism and law* (2001) 171 at 185.

⁴⁶ Id at 186.

⁴⁷ B K Twinomugisha ‘The role of judiciary in the protection of democracy in Uganda’ (2009) 9 *African Human Rights Law Journal*; Lake D & Baum M ‘The invisible hand of democracy: Political control and the provision of public services’ (2001) 34 *Comparative Political Studies* 587; among others.

⁴⁸ See for instance, C Ake *Democracy and development in Africa* (1996) where the author traces the failure of development in Africa to existing political conditions.

⁴⁹ C Ake *The feasibility of democracy in Africa* (2000) 25.

⁵⁰ Id at 29.

⁵¹ Id at 87.

⁵² See for instance, J Nyerere *Ujamaa: Essays on socialism* (1964); K Nkrumah *Consciencism: Philosophy and ideology for de-colonization and development with particular reference to the African revolution* (1964); L S Senghor *On African socialism* (Trans M Cook) (1964); K Kaunda *A humanist in Africa* (1966); K A Busia *African in search of democracy* (1967); A Claude ‘The unique case of African democracy’ (1993) 69 (2) *International Affairs* 239; A E Ifidon ‘Transition from democracy in Nigeria: Towards a pre-emptive analysis’ (2002) 7 *African Journal of Political Science* 109; K Wiredu ‘Democracy and consensus in African traditional politics: A Plea for a non-party polity’ available at <http://them.polylog.org/2/fwk-en.htm> (accessed on 14 July 2013); among others.

appears to be a more substantive form of democracy. Granted, the prescriptions of some of these African political theorists may have been self-serving and may not themselves stand up to substantive democratic scrutiny as I show in Chapter Three. However, I think that this self-serving nature of their prescription does not affect the substance, validity or legitimacy of their observations. Disenchantment with the dominant model of democracy is also not restricted to African scholars. It cuts across scholars from various parts of the world, especially scholars from the so called 'new democracies' in Third World countries some of whom have also advocated more culturally compatible models of democracy. More is said on this in Chapter Three of the thesis.

This thesis, therefore, by developing a theory or model of democracy that is more culturally compatible to Africa, addresses, it is hoped, Africa's crisis of representation and democratic deficit for more plural political arrangements and consequent socio-economic progress. The central importance and role of the judiciary in the laying of this democratic foundation for political pluralism and socio-economic progress cannot be overstated.⁵³ This is because judicial conceptions of democracy in constitutional democracies (such as South Africa and Nigeria) and the decisions of courts consequent upon this understanding have both space creating and space closing effects for political action, democracy and the ability of citizens to use the law to wrought transformative changes as I already pointed out. There is, therefore, a reinforcing relationship between democracy, political action, rights and transformative change(s).

It has, in the light of the above, become necessary therefore to interrogate and theorise a judicial understanding of democracy appropriate for political action in contemporary Africa for expanded space for action, socio-economic rights transformation and political stability. This I undertake in this thesis through a comparative analysis of the impact on political action

⁵³ See also B K Twinomugisha 'The role of judiciary in the protection of democracy in Uganda' (2009) 9 *African Human Rights Law Journal* 1; J Dugard 'Judging the judges: Towards an appropriate role of the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965. See also the Supreme Court of Nigeria pronouncement in *AG Abia v AG Federation* (2006) 16 NWLR (Pt 1005) 265 at 454 where Mustapher JSC (as he then was) says as follows: 'It is also important to bear in mind that that the judiciary especially the Supreme Court in particular is an essential integral arm in the governance of the nation. It is the guardian of the Constitution charged with the sacred responsibility of dispensing justice for the purposes of safeguarding and protecting the Constitution and its goals. The judiciary when properly invoked has a fundamental role to play in the structure of governance by checking the activities of the other organs of the government and thereby promoting good governance, respect for individual rights and fundamental liberties and also ensuring the achievement of the goals of the Constitution and not allow the defeat of such good goals and intendments. It is the duty of the court to keep the government faithful to the goals of democracy, good governance for the benefit of the citizens as demanded by the Constitution'.

and participation of citizens of the judicial conception of democracy in South Africa and Nigeria.

The rationales for the comparison are as follows: One, both countries are constitutional democracies. Thus, although both have legal systems rooted in different systems of laws and different constitutional histories, the judiciaries of both countries have similar constitutional competences that courts have in a democracy to interpret the constitution and review laws and policies for compliance with the constitution.

Two, both have similar but not identical constitutionally entrenched socio-economic rights frameworks. Thus, although South Africa's framework is contained in its Bill of Rights and that of Nigeria is contained in its directive principles of state policy with consequential differences in their effects as I point out in Chapter Two of this thesis, both frameworks are just one of the different ways socio-economic rights can be made justiciable i.e. through inclusion in the constitution.⁵⁴ It is therefore interesting to compare the judicial conception of democracy of the courts of both jurisdictions to see whether the differences in the frameworks make any difference in the courts' conception of their constitutional roles and impacts on political action.

Third, both countries are also very rich countries with a disproportionate number of poor people. And there is also ample evidence from both jurisdictions of the use of law and politics in poverty-related struggles as I show in Chapter Five of the thesis. Both jurisdictions are therefore compared in this regard in order to examine the dynamics of poverty-related struggle within the different frameworks and the role and impact of judicial conceptions of democracy in the enterprise.

Four, there is, relative to Nigeria, rich jurisprudence and some literature on judicial understandings of democracy in South Africa. This I examine and use as basis for analysing judicial understandings of democracy in Nigeria. The reason for this is that despite textual differences in the provisions of the Constitutions of both countries, the effects of the relevant constitutional provisions are in certain respects similar so as to justify a fruitful comparison. Thus, apart from approaching judicial conceptions of democracy from African political

⁵⁴ F Viljoen 'National legislation as a source of justiciable socio-economic rights' (2005) 6 *Economic and Social Rights Review* 6.

theory, the study and analysis of judicial conceptions of democracy in Nigeria where it appears there is no significant literature as yet is another contribution of this thesis to the discourse in this area of study.

Five, although African states have many different types of socio-economic rights regimes, the socio-economic rights regimes of both South Africa and Nigeria are similar to that of many other countries in Africa. Thus, the conclusion drawn from this comparative study and the model of democracy derived therefrom may fruitfully be used as a basis for understanding and deepening democracy and socio-economic rights transformation in many other African countries that share similar cultures, constitutional frameworks, problems of poverty and deficient democratic models with South Africa and Nigeria.

Finally, this study, apart from contributing to the corpus of knowledge, is also intended to serve as reference material to policy-makers, the judiciary, academia, activists, and other stakeholders who are interested in the study and examination of the continued relevance in contemporary time of African ideas and philosophy on such issues and themes as the courts, democracy, rights and socio-economic rights and well-being.

The research questions are thus as follows:

- i. To what extent do constitutionally justiciable socio economic rights or the lack thereof enhance or limit political action?
- ii. What is the most appropriate understanding of democracy for political action in Africa from an African perspective?
- iii. What particular understandings of democracy are deducible from the decisions of South African and Nigerian courts?
- iv. What is the likely impact of this understanding of democracy on effective political action and socio-economic rights transformation in South Africa and Nigeria and what likely difference would an African understanding of democracy make in this regard?

1.4 CLARIFICATION OF CONCEPTS

Law

The difficulties and challenges inherent in defining the term ‘law’ is well illustrated by Dworkin who in one of his treatises was hard put to proffer a precise definition or description of law but instead undertook a rather long enquiry into different perspectives and arguments about the concept of law and concludes that law lies in interpretation.⁵⁵ There is actually no widely accepted definition or description of the concept of the term ‘law’ as ‘...the controversy on the word “law” itself is not just about semantics but, very often, disguises attitudinal and ideological differences among the different proponents’.⁵⁶ The term law has therefore been variously defined by legal theorists⁵⁷ and jurists alike⁵⁸ according to their various persuasions.⁵⁹ Thus, the positivists defined law in terms of the trinity of sovereign, command and sanction. Accordingly, Austin defined law as a command of a sovereign (which could be a person or a group of persons) directed at subjects exhibiting habitual obedience to the sovereign’s commands as a result of threat or certainty of sanction in cases of non-compliance.⁶⁰ On their part, the natural law theorists defined law in terms of moral or ethical imperatives, emphasising the role of human reason in the enterprise of law. Thus, according to Aquinas law is nothing else ‘...than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.’⁶¹

Jurists have also not been left out of attempts to define law. According to Holmes, ‘[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law’.⁶² On the US Supreme Court bench, Holmes, (then as Mr Justice Holmes) defines law as:⁶³

Law is a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to

⁵⁵ R Dworkin *Law’s empire* (1986) 62 – 68.

⁵⁶ A Oyebo *Of norms, values and attitudes: The cogency of international law* (An inaugural lecture delivered at the University of Lagos, Nigeria 7th December, 2011) 4 (fn omitted).

⁵⁷ See for instance, O W Holmes ‘The path of the law’ (1896 – 1897) 10 *Harvard Law Review* 457

⁵⁸ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1990).

⁵⁹ The arguments and counter-arguments regarding the meaning of law as proffered by different theories and theorists of law are outside the immediate scope of this section. I will therefore not go into any detailed examination of the controversies surrounding the definitions or descriptions of law presented here

⁶⁰ J Austin *Province of jurisprudence determined* Vol. 1 (1861) lix – lxxix and 1 – 27.

⁶¹ T Aquinas *Summa theologiae: The essence of law* (Prima Secundae Partis, Q. 90) article 4 available at <http://www.newadvent.org/summa/2090.htm> (accessed on 10 May 2012).

⁶² O W Holmes ‘The path of the law’ (1896 – 1897) 10 *Harvard Law Review* 457 at 461.

⁶³ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 at 356 (1990).

persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense.

Thus, jurists have tended to define law in terms of the circumstances in which the public force will be brought to bear upon men through the courts.

In the light of the different and, often-times, opposing meaning assigned to law by theorists, it has become pertinent that one defines the context within which the term ‘law’ is used in this work. While theorists appear to agree on the role of a definitive law-giver in the making of a valid law but diverging on other issues like the content and end of enacted law, Holmes has pointed out that regardless of the source of law, a distinction is to be drawn between the black letter law or statute and its meaning. Just like a distinction is drawn between the letters of a poem and its meaning.⁶⁴ He further argues that as far as practical matter of life is concerned, it is the meaning assigned to law that is of relevance. And since it is within the province of courts to interpret or give meaning to the law, it is to the courts or judges to which resort must be had as to what the law really is and not the black letter of statutes.⁶⁵ I am in total agreement with Holmes on this score.

Furthermore, the pretext that judges do not make law but only discover the mystical intention of the legislature or the ‘immanent something called law’⁶⁶ is a myth that has since been debunked by modern theorists.⁶⁷ Therefore, what ‘law’ means here is the law emanating from or deducible from the decisions of courts in the exercise of their interpretive jurisdiction. This is otherwise referred to as decisional law to borrow the phrase of Alexander Bickel.⁶⁸ While I acknowledge the fact that the sphere of law-making processes is much wider than this;⁶⁹ and while I also acknowledge that political action may also be relevant and necessary in other law-making processes;⁷⁰ a restricted focus on adjudication and the courts is mainly justified

⁶⁴ O W Holmes ‘The path of the law’ (1896 – 1897) 10 *Harvard Law Review* 457.

⁶⁵ *Ibid.*

⁶⁶ Mr Justice P N Bhagwati ‘The role of the judiciary in the democratic process: Balancing activism and judicial restraint (1992) 2 (3) *Journal of Human Rights Law and Practice* 8.

⁶⁷ See for instance, D Kennedy ‘Freedom and constraint in adjudication: a critical phenomenology’ (1986) 36 *Journal of Legal Education* 518.

⁶⁸ A M Bickel ‘The Supreme Court 1960 Term Foreword: The passive virtues’ (1960) 75 *Harvard Law Review* 40.

⁶⁹ Other law-making processes and institutions include the legislature, subsidiary legislation by the executive, extra-legal mechanisms, among others.

⁷⁰ For instance, political action in form of nation-wide strike of the Nigerian Labour Congress resulted in the enactment of a new minimum wage statute in Nigeria recently.

in this research project as a result of the narrow focus of this inquiry on the courts and adjudication.⁷¹

Politics/political action

There is also no universally accepted definition of politics. As stated by Ayeni-Akeke, '[n]o definition of politics, the subject-matter of political science, which is accepted by everybody as correct, comprehensive and adequate exists.'⁷² Ayeni-Akeke, however, identified five major conceptions of politics by theorists.⁷³ First, is the conception of politics as activities related to the organisation of an organised human community to facilitate conditions for the satisfaction of human needs and realisation of full human potentials. The second conception of politics views it as the mechanisms for exercise of power and influence. Third, politics is also conceived by theorists as activities by which valuable scarce societal resources and values are distributed or allocated among members of a society. The fourth conception of politics owes its origin to the Marxist theorists. This school of thought conceives politics as the 'struggles between social classes to capture and exercise the powers of state'.⁷⁴ The fifth conception of politics conceive it as *locus* of continuing disagreements, contestations and disputes among members of a political community regarding societal goals and methods or routes to achieving those goals.

Although each of the conceptions of politics above is subject to one objection or the other, the fifth one is the view closest to my conception of politics in this thesis. A conception of politics as a process of antagonism and conflicts sits particularly well with my study of wealth redistribution and allocation of scarce resources as dimensions of socio-economic rights transformation.

The conception of politics as a terrain of contestations and disagreements has been elaborated upon by several theorists. In Mouffe's view, conflict is at the heart of politics and democracy.⁷⁵ According to her: 'Modern democracy's specificity lies in the recognition and

⁷¹ This is in addition to other reasons advanced by Klare for the study of judge-made laws. See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 147 – 149.

⁷² A Ayeni-Akeke *Foundations of political science* (2008) 1.

⁷³ *Id* at 1 – 5.

⁷⁴ *Id* at 3.

⁷⁵ C Mouffe *On the political: Thinking in action* (2005).

legitimation of conflict and the refusal to suppress it by imposing an authoritarian order.⁷⁶ In Mouffe's view therefore, the non-acknowledgement of conflict and antagonism as constitutive of politics and absence of political channels to ventilate grievances may ensure the failure of modern democratic experiments.⁷⁷

In the same vein, Frazer also conceives politics as arena of contestation and conflicts.⁷⁸ In her elaboration of the politics of need interpretation, she maintains that politics is conceived in two senses within the context of need interpretation.⁷⁹ First is the conception of politics in an institutional sense whereby a matter is political if it is handled directly by official governmental apparatus like the parliaments, administrative apparatuses of governments, among others. Second, a matter is also deemed to be political if 'it is contested across a range of different discursive arenas and among a range of different publics.'⁸⁰ In Frazer's view, the correct conceptualisation of politics or the political in the context of need interpretation is the breaking out of some matters out of private zones or specialised or enclaved public zones '... to become foci of generalized contestation.'⁸¹ Botha is another scholar who conceives democratic politics as arena of plurality and conflicts.⁸² Botha sees democratic politics as absence of organic unity, single authoritative standpoint or a constellation of interests but is marked by a measure of uncertainty and social dissent.⁸³ Finally, Rosa also remarks that the model of democracy required by the South African transformative Constitution is, in fact, the participatory democratic model where 'vigorous discussion, debate and activism in the process of transformation' is possible.⁸⁴ Thus, the modern tendency among scholars is to conceive of politics and democracy as constitutive of plurality and conflicts where social dissent, activism and contestation are conceived as vital ingredients necessary for continued viability and sustenance. The foregoing view of politics is the one adopted here.

Following from the above, political action in this thesis refers to the different forms citizens participate in politics. These include lobbying, civil disobedience, protests and

⁷⁶ Id at 30.

⁷⁷ Id pp 64 – 88.

⁷⁸ N Fraser 'Talking about needs: interpretive contests as political conflicts in welfare-state societies' (1989) 99 *Ethics* 291.

⁷⁹ Id at 297.

⁸⁰ Ibid.

⁸¹ Id at 298.

⁸² H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 1.

⁸³ Id at 11.

⁸⁴ S Rosa 'Transformative constitutionalism in a democratic developmental state' (2011) 22 *Stellenbosch Law Review* 542 at 543.

demonstrations, strikes and litigation. Furthermore, the term political action and politics is used interchangeably in this thesis.

Poverty

According to Brand *et al.*,⁸⁵ there are three explanations of or ways that poverty is generally defined. The first is an empirical explanation or definition of poverty which defines poverty in terms of the moral deficiency or moral turpitude of the poor. This explanation sees poverty of the poor as their fault, a consequence of their deficient morality and ethics. The second explanation/definition of poverty is the functionalist definition of poverty which sees poverty as economic or social regression. Under this explanation will fall the income approach to the definition of poverty. This approach defines poverty in terms of sufficiency or insufficiency of income to buy a minimum of goods and services. The income approach to the definition of poverty is the preferred approach of world economic and development institutions like the World Bank and the United Nations Development Programme, among others.⁸⁶ The last way/explanation of poverty is the dialectical explanation of poverty which sees poverty in terms of the unequal distribution of power and resources in the society and the impact of this on the capability of the poor to lift themselves out poverty. This approach views poverty as a matter of social justice. Under this approach will fall the capability approach to the definition of poverty made popular by Sen.⁸⁷

However, since the main argument of this thesis is that participation or involvement of the poor in politics as peers is the key to their political and economic empowerment, I conceive poverty here as any denial to the poor's parity of participation in politics. The term 'parity of participation' is a coinage of Frazer, as explained in several of her articles.⁸⁸ According to

⁸⁵ D Brand *et al* 'Poverty as injustice' (2013) 17 *Law, Democracy and Development* 273 at 274 – 276.

⁸⁶ See for instance, World Bank *Can Africa Claim the 21st Century?* (2000) available at <<http://www.worldbank.org/html/extdr/canafricaclaim.pdf>> (accessed on 15 August 2007); S Chen and M Ravallion 'The developing world is poorer than we thought but no less successful in the fight against poverty' available at http://siteresources.worldbank.org/JAPANINJAPANESEEXT/Resources/515497-1201490097949/080827_The_Developing_World_is_Poorer_than_we_Thought.pdf (accessed on 21 March 2012) See the criticisms of the income approach to the definition of poverty in S G. Reddy and T W. Pogge 'How not to count the poor' available at <http://www.columbia.edu/~sr793/count.pdf> (accessed on 21 March 2012).

⁸⁷ See for instance, A Sen *Development as Freedom* (2001) 87.

⁸⁸ N Frazer 'Rethinking the public sphere: A Contribution to the critique of actually existing democracy' (1990) 25/26 *Social Text* 56; N Frazer 'Social justice in the age of identity politics: Redistribution, recognition and participation' in N Frazer and A Honneth *Redistribution or recognition? A political-philosophical exchange*

Frazer, there are two dimensional aspects to social justice viz; redistribution and recognition. Both of these dimensions interact together and reinforce each other to either give or deny social justice.⁸⁹ According to Frazer, even in apparently one-dimensional social justice issues like class based differentiation which mainly requires politics of redistribution (the re-organisation of the economic underpinnings of society), maldistribution may have given rise to class misrecognition, so that the exploited class may need a politics of recognition to get their politics of redistribution off the ground. Same goes for apparently one-dimensional social justice issue like sexual orientation which mainly requires a politics of recognition to remedy. According to Frazer, the misrecognition of the sexually different class will most likely have given rise to maldistribution of resources. Thus, even here then the misrecognised class will also have to engage in the politics of redistribution before their politics of recognition will be complete.⁹⁰ Frazer thus concludes that: ‘For practical purposes, then, virtually all real-world axes of subordination can be treated as two-dimensional. Virtually all implicate both maldistribution and misrecognition in forms where each of those injustices has some independent weight, whatever its ultimate roots.’⁹¹

At the core of Frazer’s two-dimensional concept of social justice is the notion of parity of participation. Frazer explained the notion as follows: ‘...the normative core of my conception is the notion of *parity of participation*. According to this norm, justice requires social arrangements that permit all (adult) members of society to interact with one another as peers.’⁹² This norm of social justice rests upon and revolves around three distinct yet intertwined conditions. Frazer describes the requisite conditions thus:

First, the distribution of material resources must be such as to ensure participants’ equal capacity for social interaction. This condition precludes economic structures that institutionalise deprivation, exploitation, and gross disparities in wealth, income, labour and leisure time, which prevent some people from participating as on a par with others in social life. Second, the status order must express equal respect for all participants and ensure equal opportunity for achieving social esteem. This condition precludes institutionalised patterns of cultural value that systematically depreciate some categories of people and the qualities associated with them, thus denying them the status of full partners in social interaction. Finally, the political constitution of society must be such as to accord

trans J Golb *et al* (2003) 7; N Frazer ‘Social exclusion, global poverty and scales of (in) justice: Rethinking law and poverty in a globalizing world’ (2011) 22 *Stellenbosch Law Review* 452.

⁸⁹ N Frazer ‘Social justice in the age of identity politics: Redistribution, recognition and participation’ in N Frazer and A Honneth *Redistribution or recognition? A political-philosophical exchange* trans J Golb *et al* (2003) 7 at 22 – 26.

⁹⁰ *Id* at 9 – 26.

⁹¹ *Id* at 25.

⁹² *Id* at 36 [emphasis in original].

roughly equal political voice to all social actors. This condition rules out electoral decision rules and media structures that systematically deprive some people of their fair chance to influence decisions that affect them.⁹³

To Frazer therefore parity of participation is the notion around which social justice revolves.

I adopt Frazer's analysis of the concept of social justice and the centrality of the notion of parity of participation in the endeavour. Her theory sits well with my conception of politics as central to the amelioration of the desperate condition of the poor. I accordingly define poverty not merely as the absence of material or economic wherewithal but as the absence, denial or lack of parity of participation or involvement of the poor in politics.

1.5 OUTLINE OF CHAPTERS

Apart from this introduction, this thesis is divided into five further chapters. In Chapter Two titled 'Political action and constitutional frameworks for socio-economic rights protection: Nigeria and South Africa,' I engage in a comparative analysis of the constitutional frameworks for socio-economic rights protection in South Africa and Nigeria. I identify and analyse the pertinent features of each regime in order to determine which regime best enables politics/political action consistent with the focus of the thesis on political action.

In Chapter Three titled 'A judicial conception of democracy appropriate for political action in contemporary Africa,' I undertake a conceptual examination of the meaning and the discussion of some of the more dominant models of democracy. Their suitability or otherwise for political action is examined and a conception of democracy rooted in African political philosophy is theorised for a more participation/political action and socio-economic rights transformation friendly democracy in contemporary Africa.

Chapter Four titled 'Judicial understanding of democracy in South Africa and Nigeria: Implications for political action,' is a comparative examination of the judicial conceptions of democracy in South Africa and Nigeria through a dissection and discussion of selected cases considered relevant to the interrogation. The likely implication of the identified conception of

⁹³ N Frazer 'Social exclusion, global poverty and scales of (in) justice: Rethinking law and poverty in a globalizing world' (2011) 22 *Stellenbosch Law Review* 452 at 455.

democracy of South African and Nigerian courts for political action is also identified and discussed in the chapter.

Chapter Five titled ‘The implication of South African and Nigerian courts’ conception of democracy for socio-economic rights transformation’ is an illustration of the likely implication and impact of South African and Nigerian courts’ extant conception of democracy on socio-economic rights related political action through the examination and analysis of selected records of the courts from both jurisdictions. The difference(s) that the theorised conception of democracy based on African political philosophy in Chapter Three of the thesis is likely to make to some of the cases are also examined in this chapter.

In Chapter six titled ‘Conclusions’, I undertake a summary of the conclusions of the different chapters and conclude the thesis with some remarks and tentative proposals on the way forward.

1.6 LIMITATIONS OF STUDY

This study is limited to and by certain factors and considerations as follows. The first is that my focus is on socio-economic rights transformation. Thus while the conclusion drawn from the thesis may also be applied to other categories of rights, that is not an issue upon which I focus except to the extent that discussion of other categories of rights is relevant to my discussion.

The second limitation of this study is that because objections to judicial review of socio-economic rights and involvement of the judiciary in politics are largely based on liberal/representative conceptions of democracy, I did not deal at any length with the controversy surrounding the counter-majoritarian dilemma except to the extent that the issue becomes relevant and pertinent in my discussion. This is also because I think that the issue has been over-flogged by others and is not likely to add any value to the discussion at hand.

The third limitation is that my interrogation is limited to normative political action, that occurring within the courts, and the impact of its jurisgenerative politics on general political action. My examination is thereby confined. Thus, my examination of extra-curial political

action is limited to circumstances where they are directly connected to the cases examined or aided their understanding.

CHAPTER TWO

POLITICAL ACTION AND CONSTITUTIONAL FRAMEWORKS FOR SOCIO-ECONOMIC RIGHTS PROTECTION: SOUTH AFRICA AND NIGERIA

2. INTRODUCTION

In the last Chapter, I deal and dispense with preliminary, definitional and other general matters and issues pertaining to this thesis. In this Chapter, I examine the constitutional frameworks for the protection of socio-economic rights in South Africa and Nigeria with a view to determining which of the two frameworks, *ex-facie* the texts, is more likely to promote or enable political action and the struggle of the mass of the people against poverty. This is in accordance with the general tenor of this thesis which sees political action/resistance as counterpart of human rights; and also in agreement with those CLS theorists, among other scholars, who argue that we have to step out of rights to give effect to rights.¹ I have chosen to focus on and emphasise politics/political action in this thesis because of its more likely effectiveness in poverty-related struggles as studies appear to suggest.²

¹ This point is lucidly put by Klare thus: ‘...by itself, rights discourse does not and probably cannot provide us with the criteria for deciding between conflicting claims of right. In order to resolve rights conflicts, it is necessary to step outside the discourse. One must appeal to more concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions of and intuitions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts. If the processes of concretizing rights concepts and of resolving rights conflicts extend beyond the traditional discourse of rights onto the terrain of social theory and political philosophy, it follows that rights rhetoric must be politicized in order to serve as a foundation for legal reconstruction.’ K Klare ‘Legal theory and democratic reconstruction: Reflections on 1989’ (1991) 25 *University of British Columbia Law Review* 69 at 101. See also S Liebenberg ‘Needs, rights and transformation: Adjudicating social rights’ (2006) 1 *Stellenbosch Law Review* 5 at 7

² There is in fact very robust literature suggesting that political action/struggle is more effective in bringing about social change and transformation than reliance on legal mechanisms alone. For instance, Piven and Cloward in their study of civil rights protests in America notes that the success of struggle by social movements may in part depends on the fragmenting of political elites at the top and the political opportunities provided thereby, they however tellingly note that: ‘Still, the impact of protest during these periods is not simply that it contributes to subsequent coalition building and realignment. What needs to be understood is that disruptive protest itself makes an important contribution to elite fragmentation and electoral dealignment. Indeed, we think the role of disruptive protest in helping to create political crises (or what we have called “dissensus politics”) is the main source of political influence by lower stratum groups’ F F Piven and R A Cloward ‘Collective protest: A critique of resource mobilization theory’ (1991) 4 *International Journal of Politics, Culture and Society* 435 at 453. Similar arguments about the importance of political action for the successes of poor people’s movement are also made in their empirical study of poor people’s movements in America in F F Piven and R A Cloward

Having regard to the impact of courts' interpretive work on the enlargement or constriction of political space for citizens' action, especially in constitutional democracies where the courts are prominent as I point out in Chapter One, a comparative study of the impact of judicial conception of democracy on political action in both South Africa and Nigeria and the theorisation of new and more participation/political action friendly judicial conception of democracy constitutes the core of this thesis.

Consequently, I interrogate in this chapter the constitutional frameworks for the protection of socio-economic rights in South Africa and Nigeria in order to determine which of the two frameworks is from the texts more likely to promote or enable political action and the struggle of the mass of the people against poverty. This chapter is intended to serve as a building block for the subsequent examination of the impact of dominant ideology in the form of judicial conception of democracy on the interpretation of the frameworks and on the enlargement or constriction of political space for citizens' action in both jurisdictions under examination in Chapters Four and Five of the thesis. Chapter Three, on the other hand, deals with the theorisation of an appropriate and political action friendly judicial conception of democracy from an African perspective.

The comparison of the constitutions of South Africa and Nigeria in this part of the thesis is, however, not meant to suggest that both jurisdictions have identical histories or that both are underpinned by identical legal systems as I explain generally in Chapter One. Specifically here, it is noteworthy to point out that both constitutions are in fact informed by very different history and considerations which may have accounted for their different structure and character. Thus, while the South African legal system is underpinned by the Roman-Dutch common law system, that of Nigeria is rooted in the English common law. And while the South African Constitution is a product of negotiation between the ruling apartheid regime and the South African liberation movement, that of Nigeria is a byproduct of military

Poor people's movements: Why they succeed, how they fail (1977). See also J Young 'Riots are a class act' *The Guardian* 14 November 2005 available at <http://www.theguardian.com/politics/2005/nov/14/france.eu> (accessed on 15 August 2014); J Dugard 'Civic action and legal mobilisation: the Phiri water meters case' in J Handmaker and R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 71; among others.

rule.³ The foregoing facts continue to pervade and influence the operation and character of these constitutions in their respective jurisdictions and may largely account for the different socio-economic rights regimes of both countries.⁴

Notwithstanding the above-mentioned differences, however, both countries are similarly afflicted with high levels of poverty and a very wide gap between the rich and the poor as I already point out in Chapter One. Both countries are also constitutional democracies where the judicial arm of government is a prominent part of the structure of government and the respective constitutions are generally conceived as tools of social change as can be gathered from their respective provisions.⁵ Much more important for the purposes of this thesis, however, is the fact that there is now a growing struggle against poverty by individuals and civil society groups through both curial and extra-curial action in both jurisdictions as I show in Chapters Four and Five. I therefore think that the comparative examination of the potential of the constitutions for enabling or disabling the noticed struggles on their own terms is worthy of examination. The foregoing considerations I think justify the comparison here.

In order to achieve the afore-mentioned objectives of this chapter, this chapter is divided into four sections. In section one, after this introduction; I examine the constitutional framework for the protection of socio-economic rights in South Africa and the legal implications of the framework for South Africa's socio-economic rights regime. This is in order to be able to

³ For a detailed discussion of the pervasive influence of the military on Nigeria's constitutional history and development see A O Olukoshi 'Economy and politics in the Nigerian transition' (2000) 5 *African Journal of Political Science* 5. For more recent literature on the subject-matter, see for instance, D A Chima 'The dawn of constitutionalism in Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 135; D Olowu 'Constitutional governance, democratisation and military legacies in post-independence Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 315; A O Jegede 'From military rule to constitutional government: The case of Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 337.

⁴ Jegede has in fact opined that the continued non-justiciability of socio-economic rights in Nigeria is traceable to the military origin of the Nigerian constitutions. A O Jegede 'From military rule to constitutional government: The case of Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 337 at 352. On the other hand, it appears clear from record that the constitutionalisation of socio-economic rights in South Africa is a product of negotiation. See for instance, A Sachs 'South Africa's unconstitutional Constitution: The transition from power to lawful power' (1996 – 1997) 41 *Saint Louis University Law Journal* 1249 for a detailed history of South Africa's negotiated transition and Constitution.

⁵ Admittedly, this is more the South African Constitution than its Nigerian counterpart.

more properly identify the pertinent features of the regime that may further or restrict politics/political action in section 2.3.1 of the chapter. Section two is an examination and analysis of the constitutional framework for the protection of socio-economic rights in Nigeria and the legal implications of the framework for Nigeria's legal climate. This is also in order to be able to more properly identify the pertinent features of the regime that may operate to enable or disable politics/political action in section 2.3.2 of the chapter. In section three, I identify and discuss the pertinent features of each framework vis-a-vis each framework's potential to further or hinder politics and the ability of the citizens to participate or resist. Section four concludes the chapter.

2.1 CONSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

Post-apartheid South Africa is credited with being a product of the age and norm of human rights discourse.⁶ This is because of the important role played by the rights discourse in the transition of the country from apartheid to democratic rule in 1994. As rightly noted by Mutua, '...the most important feature of the post-apartheid state is its virtually exclusive reliance on rights discourse as the engine of change'.⁷ During the negotiation of South Africa's transition from apartheid to democracy, the issue of whether to include or exclude a bill of rights in the transition constitution occupied the centre stage of discussions. While the older generation of the liberation struggle championed the inclusion of a bill of rights as an instrument of social transformation,⁸ and the white minority viewed the inclusion of a bill of rights as an irreducible minimum of a democratic state, the younger elements in the liberation struggle opposed the inclusion of a bill of rights regarding it as a tool of the white minority for the perpetuation of the *status quo*.⁹

⁶ M Wa Mutua 'Hope and despair for a new South Africa: The limits of rights discourse' (1997) 10 *Harvard Human Rights Journal* 63.

⁷ Id at 68.

⁸ A Sachs 'Towards a bill of rights in a democratic South Africa' (1990) 6 *South African Journal on Human Rights* 1.

⁹ See for instance, D M Jenkins 'From apartheid to majority rule: A glimpse into South Africa's journey towards democracy' (1996) 13 *Arizona Journal of International and Comparative Law* 463 which recaps the history of South Africa's journey into democracy and the inclusion of the bill of rights in the South Africa's democratic Constitutions. See also, A Sachs 'South Africa's unconstitutional Constitution: The transition from power to lawful power' (1996 – 1997) 41 *Saint Louis University Law Journal* 1249.

Contemporaneous with the controversy regarding whether to include a bill of rights in the transition constitution was also the issue about the specific contents of the bill. While some regarded the inclusion of socio-economic rights along-side civil and political rights in the bill as beyond question because of the importance of such a holistic regime to the poor majority of black South Africans who were living under extreme material deprivation and economic inequality,¹⁰ others opposed such inclusion on grounds ranging from the economic to the democratic.¹¹ Despite the oppositions and objections, however, those in favour of a socio-economic rights bill of rights eventually carried the day. Consequently, a limited number of socio-economic rights were included in the 1993 Interim Constitution of the Republic of South Africa (Interim Constitution) adopted by the old order South African parliament on April 27, 1994.¹²

The limited list of socio-economic rights included in the Interim Constitution along-side civil and political rights in Chapter 3 of that Constitution titled ‘Fundamental Rights’ are the right of detained and sentenced prisoners to ‘be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense’;¹³ the right of every person ‘freely to engage in economic activity and to pursue a livelihood anywhere in the national territory’;¹⁴ the right of every person to fair labour practices;¹⁵ the right of every person to an environment which is not detrimental to his well-being;¹⁶ the right of every child ‘to security, basic nutrition and basic health and social services’;¹⁷ and the right of every person to basic education, and equal

¹⁰ ANC ‘Constitutional guidelines for a democratic South Africa’ (1989) 5 *South Journal on Human Rights* 129; A Sachs ‘Towards a bill of rights in a democratic South Africa’ (1990) 6 *South African Journal on Human Rights* 1; E Mureinik ‘Beyond a charter of luxuries: Economic rights in the constitution’ (1992) 8 *South African Journal on Human Rights* 462; N Haysom ‘Constitutionalism, majoritarian democracy and socio-economic rights’ (1992) 8 *South African Journal on Human Rights* 451; among others.

¹¹ D H M Brooks ‘Albie Sachs on human rights in South Africa’ (1990) 6 *South African Journal on Human Rights* 25; D M Davis ‘The case against the inclusion of socio-economic demands in a bill of rights except as directive principles’ (1992) 8 *South African Journal on Human Rights* 475; among others.

¹² For a more detailed discussion of the nature of the controversy and the dynamics of the negotiation and arrangements leading to the adoption of the 1993 Interim and the 1996 Final South African Constitutions see S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2010) 7 – 22.

¹³ Section 25 (1) (b) of the Interim Constitution.

¹⁴ Section 26 (1) of the Interim Constitution.

¹⁵ Section 27 (1) of the Interim Constitution.

¹⁶ Section 29 of the Interim Constitution.

¹⁷ Section 30 (1) (c) of the Interim Constitution.

access to educational institutions,¹⁸ and to instruction in the language of his or her choice where practicable.¹⁹ The socio-economic rights in the Chapter are subject to the same limitation as civil and political rights.²⁰ They are also subject to the same interpretive methodology as civil and political rights.²¹

The Interim Constitution was however, like the name connotes, a temporary arrangement upon which democratic elections were to be conducted and a democratic government ushered in. According to agreement reached at the negotiated transition, the Interim Constitution was intended to be superseded by a more permanent constitution made by a duly elected parliament which was to usher in a more permanent constitution. Thus, after the conclusion of democratic elections in 1994, the 1996 Final Constitution of the Republic of South Africa (the South African Constitution) was drafted and passed by the elected Constitutional Assembly (that is the two Chambers of the South African Parliament sitting together) in 1996.

The South African Constitution provides for a far more extensive array of socio-economic rights along-side civil and political rights in the bill of rights than the Interim Constitution did. The socio-economic rights guaranteed by the South African Constitution are as follows: the right of every citizen to freely choose their trade, occupation and profession subject to regulation by law;²² the right of everyone to fair labour practices;²³ the right of everyone to an environment that is not harmful to their health or wellbeing;²⁴ the right of everyone to have access to adequate housing,²⁵ with respect to which the state is obliged to take reasonable measures which include legislative and other measures within the state's available resources

¹⁸ Section 32 (a) of the Interim Constitution.

¹⁹ Section 32 (b) of the Interim Constitution.

²⁰ At least the negative dimension of it. See section 33 of the Interim Constitution.

²¹ Section 35 (1) and (3) of the Interim Constitution provides that in the interpretation of bill of rights a court shall promote the values underlying an open and democratic society based on freedom and equality; the court is also to have regard to international law and comparative foreign case law. The court is also to have due regard to the spirit and object of the bill of rights when construing any statute; and in the development of customary and common law.

²² Section 22 of the South African Constitution.

²³ Section 23 (1) of the South African Constitution.

²⁴ Section 24 of the South African Constitution.

²⁵ Section 26 (1) of the South African Constitution.

in furtherance of its progressive realisation;²⁶ the right not to be arbitrarily evicted from or have one's homes demolished without a court order, no legislation is also to permit arbitrary evictions.²⁷

Everyone is also guaranteed a right to have access to health care services which includes reproductive health;²⁸ a right to have access to sufficient food and water;²⁹ a right to have access to social security and social assistance,³⁰ with respect to all of which the state is obliged to take legislative and other measures to achieve their progressive realisation.³¹ No one in South African territory is to be refused emergency medical treatment.³² Every child within South African territory is also to have appropriate alternative care when removed from the family environment;³³ and the rights to basic nutrition, shelter, basic health care and social services.³⁴ The Constitution also provides for a right to be protected from exploitative labour practices.³⁵

There is also the right of everyone to basic education which includes adult basic education³⁶ and a right to further education which is to be made progressively available by the state through reasonable measures.³⁷ Like with the interim Constitution, the negative protection dimension of socio-economic rights is subject to the same standard of limitation as civil and political rights in the Bill of Rights.³⁸ The rights are also made subject to the same enforcement mechanisms³⁹ and same interpretive methodology as civil and political rights in the Bill of Rights.⁴⁰

²⁶ Section 26 (2) of the South African Constitution.

²⁷ Section 26 (3) of the South African Constitution.

²⁸ Section 27 (1) (a) of the South African Constitution.

²⁹ Section 27 (1) (b) of the South African Constitution.

³⁰ Section 27 (1) (c) of the South African Constitution.

³¹ Section 27 (2) of the South African Constitution.

³² Section 27 (3) of the South African Constitution.

³³ Section 28 (1) (b) of the South African Constitution.

³⁴ Section 28 (1) (c) of the South African Constitution.

³⁵ Section 28 (1) (e) of the South African Constitution.

³⁶ Section 29 (1) (a) of the South African Constitution.

³⁷ Section 29 (1) (b) of the South African Constitution.

³⁸ Section 36 of the South African Constitution. The positive duty dimension of socio-economic rights in the bill of rights is additionally made subject to availability of resources and to progressive realisation.

³⁹ Section 38 of the South African Constitution.

⁴⁰ Section 39 of the South African Constitution is *in pari-materia* with section 35 of the Interim Constitution considered above.

Furthermore, in furtherance of the agreement reached during South Africa's negotiated transition, the provisions of the new South African Constitution were to be certified by the newly created Constitutional Court⁴¹ for compliance with some 34 constitutional principles earlier agreed upon by the parties and entrenched in the Interim Constitution before the provisions of the new Constitution could become binding.⁴² Consequently, following the inclusion of socio-economic rights in the South African Constitution, three objections that the inclusion violated some constitutional principles earlier referred to were raised by the opponents of the inclusion in the Constitutional Court at the certification stage of the new Constitution.⁴³ First, it was alleged that the inclusion is unconstitutional because socio-economic rights are not universally accepted fundamental rights as required by Constitutional Principle II.⁴⁴ In answer to that objection, the Constitutional Court held that Constitutional Principle II allows the Constitutional Assembly to supplement universally accepted fundamental rights with other rights that are not universally accepted.⁴⁵

The second objection to the inclusion of socio-economic rights was that the inclusion is inconsistent with separation of powers of the various organs of government as required by Constitutional Principle VI.⁴⁶ This is because, in the opinion of the opponents of the inclusion, socio-economic rights would involve the judiciary in budgetary matters. The Constitutional Court, in answer to this objection, conceded the fact that the enforcement of

⁴¹ The Constitutional Court was created for the first time under the Interim Constitution and given jurisdiction as a court of final instance over all matters pertaining to the interpretation, protection and enforcement of the provisions of the Constitution including alleged violation or threatened violation of any fundamental right entrenched in Chapter 3 of the Interim Constitution. See section 98 of the Interim Constitution.

⁴² The 34 constitutional principles are in the Fourth Schedule to the Interim Constitution. Section 71 (2) of the Interim Constitution provides that the provisions of the new constitution (the 1996 Constitution) shall have no force or effect until it has been certified by the Constitutional Court that such provisions complies with the Constitutional Principles in the Fourth Schedule to the Interim Constitution. Section 74 of the Interim Constitution entrenched the Constitutional Principles by forbidding the alteration or amendment of the Constitutional Principles or the alteration or amendment of any section or provision pertaining to the Principles in the Interim Constitution.

⁴³ See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) (*First Certification Judgment*) paras 76 -78.

⁴⁴ Constitutional Principle II provides that: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution [the Interim Constitution]'.

⁴⁵ *First Certification Judgment* 1996 (10) BCLR 1253 (CC) para 76.

⁴⁶ Constitutional Principle VI provides as follows: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

socio-economic rights in the constitution may have budgetary implications. However, the Court held that this fact is not peculiar to socio-economic rights. The enforcement of some civil and political rights, for example, equality, freedom of speech or the right to a fair trial, among others may also have budgetary implications. The Constitutional Court, therefore, concluded that the inclusion of socio-economic rights in the Bill of Rights conferred no task on the court different from that conferred by civil and political rights so as to result in the breach of separation of powers under Constitutional Principle VI.⁴⁷

The third objection by the opponents of the inclusion of socio-economic rights in the Bill of Rights is that these rights are not justiciable. This argument was, again, based on the Constitutional Principle II that fundamental rights are to be ‘...protected by entrenched and justiciable provisions in the Constitution....’ The Constitutional Court response to that was that since the socio-economic rights in the text of the new constitution are not universally accepted fundamental rights their justiciability is not required by Constitutional Principle II. The Court further pronounced:

Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.⁴⁸

Socio-economic rights thereby scaled the hurdle of certification in the Constitutional Court and became part and parcel of the South African Constitution’s Bill of Rights. The entrenchment of socio-economic rights alongside the more traditional civil and political rights in the South African Constitution and the inherent potential of this regime of rights for social transformation have prompted a number of scholars to characterise the constitution as a transformative one.⁴⁹

⁴⁷ *First Certification Judgment* 1996 (10) BCLR 1253 (CC) para 77.

⁴⁸ *Id* para 78.

⁴⁹ One of the better known readings of the South African Constitution in this regard is by Karl Klare in his seminal article on the Constitution of the Republic of South Africa, 1996. See K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146.

The status of socio-economic rights as part and parcel of the Bill of Rights and occupying equal status to civil and political rights in South Africa has since been affirmed by the Constitutional Court in many other cases decided after the *First Certification Judgment*. In *Government of the Republic of South Africa & Others v Grootboom & Others*⁵⁰ for instance, the Constitutional Court put the justiciability of socio-economic rights in South Africa beyond all doubt. The Court pronounced in this regard as follows: 'While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment'.⁵¹ With this pronouncement the contestation regarding the formal justiciability or lack thereof of socio-economic rights in South Africa was finally laid to rest.⁵²

2.1.1 The legal implications of South Africa's entrenched socio-economic rights framework

There are at least two clear implications of a constitutionally entrenched regime of rights. The first is that the state becomes constitutionally saddled with the immediate as opposed to progressive realisation and fulfillment (except where the text of the constitution provides otherwise) of the rights entrenched. The second legal implication is that such entrenched rights become justiciable.

As regards the first legal implication, constitutional entrenchment of rights imposes four different levels of obligations on a state.⁵³ These are the obligations to respect, protect, promote and fulfill the rights constitutionally entrenched. The obligation to respect obliges

⁵⁰ 2000 (11) BCLR 1169.

⁵¹ Id at para 20 (fn omitted).

⁵² Some of the other cases that confirmed the justiciability of socio-economic rights in South Africa are: *Soobramoney v Department of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* (No. 2) 2002 (10) BCLR 1033 (CC); among many others. However, it appears that the formal justiciability of socio-economic rights in South Africa is what is acknowledged. There continue to be debate about how properly to make the rights justiciable in substance. The whole controversy about the minimum core and reasonableness review concepts appear to be centred on this debate.

⁵³ S Leckie 'The right to housing' in Eide, Krause & Rosas (eds) *Economic, social and cultural rights: A Textbook* 2 ed (2001) 167; *SERAC v Nigeria* (2001) AHRLR 60.

the state to refrain from interfering with or impairing the enjoyment of the rights and freedoms entrenched. The duty of the state to protect obliges it to protect entrenched rights from injurious and violating acts of others. The obligation to promote obliges the state to create an enabling environment for the effective enjoyment of rights and freedoms i.e. by promoting tolerance, raising awareness on the import of entrenched rights, among others. The duty of the state to fulfill entrenched rights requires it to take affirmative measures to ensure the effective realisation of entrenched rights. These four levels of obligation translate into two types or species of duties for states: the negative and positive duties of states.⁵⁴

The negative duty of states requires states to refrain from interfering or impairing the rights and freedom of entrenched rights. With regard to socio economic rights, the African Commission on Human and Peoples' Rights (the African Commission) has rightly pronounced in the context of the right to adequate housing under the provisions of the African Charter on Human and Peoples' Rights (the African Charter) that states are obliged to:

At the very minimum, ...abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family or household or community housing needs.⁵⁵

The above pronouncement of the African Commission applies equally to other socio-economic rights. Thus, even in situations noted above where the texts of any constitution subjects entrenched rights to the requirement of progressive realisation and availability of resources, entrenched rights are, at the very least, to be protected from improper invasion and injurious affectation.⁵⁶

⁵⁴ Some scholars have however pointed out that the distinction drawn between the negative and positive duties of state can sometimes be problematic. This is because the distinction may sometimes amount to a distinction without a difference. The same conduct may violate both the negative and positive obligations of the state. Both types of obligations may also equally have resource/budgetary implications contrary to the general understanding of the distinction. As rightly pointed out by Brand, however; despite its fluidity, the distinction remains important for strategic reasons: D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) 1 at 10 – 12.

⁵⁵ The African Commission on Human and Peoples' Rights in *SERAC and Another v Nigeria* (2001) AHRLR 60 para 61.

⁵⁶ The Constitutional Court of South Africa emphatically put the point thus: 'At the very minimum, socio-economic rights can be negatively protected from improper invasion' *First Certification Judgment* 1996 (10) BCLR 1253 para 78. See also *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2006 (1) BCLR

The positive duty of states requires that states ensure the effective realisation of entrenched rights and freedoms. With regard to socio economic rights, a state is required to take affirmative steps to make the rights immediately available to those who cannot provide for themselves through direct provisions or grants, except where the constitutional texts subjects the rights to the dictates of progressive realisation. In the latter case, however, the negative component of the right becomes immediately implementable by the state as pointed out above. Here then lies the difference between a socio-economic rights regime that relies on the international framework and norms for effect and a domestic regime that relies on a constitutional framework and norms for effect. In the case of the former, socio-economic rights are automatically subjected to the requirement of availability of resources and progressive realisation in accordance with requisite norms of international law,⁵⁷ while in the case of the latter, except where the constitution expressly subjects the rights to the availability of resources and progressive realisation, the rights are immediately implementable and enforceable.⁵⁸

The second legal implication of entrenched socio-economic rights is that such rights become justiciable. As rightly noted by Juma: ‘Justiciability refers to the ability of courts to adjudicate and enforce rights. The idea is that a court should be able to provide a remedy if it finds that there has been a violation.’⁵⁹ Thus, where a state is found to be reneging on any of the duties and obligations constitutionally imposed as analysed above, a right-bearer can approach the courts to have the rights vindicated. In this case, the courts are constitutionally mandated and duty bound to adjudicate on the matter and offer appropriate remedies to vindicate entrenched rights. This point is aptly and forcefully put by the South African

78 (CC) where litigants successfully relied upon the negative duty dimension of the right to have access to adequate housing.

⁵⁷ Article 2 (1) of the International Covenant on Economic Social and Cultural Rights.

⁵⁸ Brand has in this regard made a distinction between basic socio-economic rights (children rights, rights of detainees and the right to basic education) and qualified socio-economic rights (other socio-economic rights) in the South African Constitution. According to him, the availability of resources and progressive realisation requirements that applies to the latter will not apply to the former. Rather, the general limitation clause in section 36 of the Constitution will apply to the former. One fact in support of this argument is the textual differences between the two categories of rights in the South African Constitution. While qualified socio-economic rights provisions contained internal limitation clauses, these are absent in respect of the basic socio-economic rights categories. See D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) 1 at 43.

⁵⁹ L Juma ‘Nothing but a mass of debris: Urban evictions and the right of access to adequate housing in Kenya’ 2012) 12 *African Human Rights Law Journal* 470 at 483.

Constitutional Court in relation to the constitutionally entrenched socio-economic rights regime of South Africa thus:

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.⁶⁰

Having thus reviewed the constitutional framework for the protection of socio-economic rights in South Africa and the legal implications thereof for the South African legal order, I review the constitutional framework for the protection of socio-economic rights in Nigeria and the legal implications thereof for the Nigerian legal order below.

2.2 CONSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF SOCIO-ECONOMIC RIGHTS IN NIGERIA

Nigeria also has a checkered constitutional history and development with the military playing an overarching role in the formulations and shaping of many of Nigeria's post-independence constitutions. No useful purpose will however be served by recounting that history here as I think this has been more than ably done by other scholars.⁶¹ It suffices to say that unlike South Africa, Nigeria does not have a constitutionally entrenched/justiciable socio-economic rights regime. The socio-economic rights of Nigeria are contained in the Fundamental Objectives and Directives Principles of State Policy in Chapter II of the Constitutions of Nigeria (Chapter II). The inclusion of Chapter II in the Constitutions of Nigeria is a novelty

⁶⁰ *Minister of Health and Others v Treatment Action Campaign and Others* (No.2) 2002 (10) BCLR 1033 at para 99 (CC). See also M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 at 404 where the author opines with regard to the constitutionally entrenched socio-economic rights in the South African bill of rights thus: 'Post-1996 South African courts are not only allowed, but constitutionally *obliged* to pronounce on the validity of legislation and policy in the socio-economic sphere.' (fn omitted) [Emphasis in original].

⁶¹ See for instance, D A Chima 'The dawn of constitutionalism in Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 135; D Olowu 'Constitutional governance, democratisation and military legacies in post-independence Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 315 A O Jegede 'From military rule to constitutional government: The case of Nigeria' in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 337 for a detailed account of Nigeria's constitutional history.

of the military midwifed Constitution of the Federal Republic of Nigeria, 1979 (the 1979 Constitution). Earlier constitutions did not have such a provision. A scholar has therefore has the cause to refer to the inclusion of Chapter II in the 1979 Constitution as a ‘radical innovation’.⁶²

Like in South Africa, the inclusion of Chapter II which contained Nigeria’s socio-economic rights regime in the 1979 Constitution was not without controversy. Unlike South Africa, however, the controversy that trailed the inclusion of Chapter II in the 1979 Constitution was more explicitly ideological with a smattering of arguments based on the liberal-legal theory of democracy.

Two distinct lines/strands of arguments for and against the inclusion of Chapter II in the 1979 Constitution are identifiable. The first are those that supported the inclusion/entrenchment based on a socialist/marxist ideology of state and society⁶³ as against those who opposed the inclusion/entrenchment on grounds of capitalist ideas of state and society.⁶⁴ The second are those who opposed or supported the inclusion on liberal-legal theory of democracy and government.⁶⁵ As far as most of the proponents of inclusion/entrenchment of Chapter II in the 1979 Constitution were concerned, the Nigerian state is a bourgeois state and earlier constitutions of Nigeria were bourgeois instruments. According to Oyebode, expressing a

⁶² O N Ogbu ‘The fundamental objectives and directive principles of state policy as a barometer for appraisal of Nigeria’s nascent democracy’ (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 75.

⁶³ Among this group are A Oyebode ‘Where Shehu Malami erred’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 13; I Nzimiro ‘Democratic socialism and mixed economy’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 16; L A Jinadu ‘Elitist or popular instrument’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 24; E Toyo ‘Property ownership and egalitarian society’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 32 and O Awolowo ‘My thoughts’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 42; among others.

⁶⁴ Among this group are: S Malami ‘Ideology and the new Constitution’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 9; G O Onagoruwa ‘Constitutional review and economic ideology for Nigeria’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 28; J D Ojo ‘Directive principles in the draft constitution’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 55; among others.

⁶⁵ Notable among this group is the exchanges between Dr Abiola Ojo and Professor B O Nwabueze. See A Ojo ‘The objectives and directives must be expunged’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 46 - 49; and B O Nwabueze ‘Its nature and function’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 49 and B O Nwabueze ‘Where Dr. Ojo misfired’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 52.

view shared by many of the proponents in that regard: ‘Whatever mask apologists of capitalism don, whether it is mixed economy (sic) peoples’ ‘capitalism’, ‘humanist socialism’ or ‘convergence’ one fact stands out (sic) their uncompromising stand on the sanctity of private property.’⁶⁶ What is needed therefore, in these proponents’ views, is a new constitution that embodies ‘...a radical transformation of what had hitherto been the backbone of our inherited legal theory of property and contracts’⁶⁷ for a more just and egalitarian Nigerian society. This is what the entrenchment of Chapter II in the 1979 Constitution would for them achieve. Thus goes the argument of the proponents of inclusion/entrenchment of Chapter II.

For the opponents of the inclusion/entrenchment of Chapter II in the 1979 Constitution, however, Nigeria lacked the requisite trained bureaucracy that is capable of implementing 100 per cent state ownership of means of production even if the state is willing to toe the line of socialism. In addition, opponents of the inclusion/entrenchment regard such entrenchment as a disincentive to hard work, creativity and productivity, which are regarded as irreducible minimum of creation of wealth and development in a state.⁶⁸

On the other hand, the arguments for and against the inclusion of Chapter II based on liberal-legal theory of democracy and government was more or less a precursor of the legitimacy of judicial review of socio-economic rights arguments that later occupied the centre-stage during South Africa’s transition period already referred to above. To the opponents of the inclusion in this school of thought, a constitution is first and foremost a legal document. Nothing should therefore be found in it that does not lend itself to legal/judicial enforcement. In addition to this, the judiciary, an unelected body, is said to lack the expertise or the institutional competence to be reviewing policy-decisions of elected arms of government.⁶⁹

⁶⁶ A Oyeboode ‘Where Shehu Malami erred’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 13 at 16.

⁶⁷ *Ibid.*

⁶⁸ See for instance, S Malami ‘Ideology and the new Constitution’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 9; G O Onagoruwa ‘Constitutional review and economic ideology for Nigeria’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 28; J D Ojo ‘Directive principles in the draft constitution’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 55; among others.

⁶⁹ See for instance A Ojo ‘The objectives and directives must be expunged’ in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 46 – 49.

Some of these points were however ably countered, in my opinion, by Nwabueze who is of the view that a constitution is not only a legal document but also a charter of government that can legitimately contain the aims and aspiration of society.⁷⁰ According to the renowned jurist:

A constitution operating as law and imposing judicially enforceable restraints upon government should not abandon its other function as a source of legitimacy for those political concepts and governmental powers and relations that are, by their very nature non-justiciable. Nor should it renounce its role in the affirmation of fundamental objectives and ideals or directive principles of government which serve to inform and inspire governmental actions along desirable lines. It is in this combination of judicially enforceable restraints and the legitimization of needed non-justiciable governmental powers and relation that the singular achievement of the US Constitution lies.⁷¹

In Nwabueze view, therefore, constitutional duties in the form of fundamental objectives and directive principles of state policies has inherent sanctions by the mere fact that they are constitutional commands and for that reason possess moral, educative and psychological force for the ruled and the rulers; force/sanctions that may be more important than the sanctions of judicial enforcement.⁷²

Despite the controversies and arguments that trailed the inclusion, however, fundamental objectives and directive principles of state policy came to be included in the 1979 Constitution as a non-justiciable Chapter of that Constitution and contained a number of socio-economic rights. The current Constitution of Nigeria that became operative on May 29, 1999 on the eve of Nigeria's fourth democratic governance, the Constitution of the Federal Republic of Nigeria, 1999 retained identical provisions of Chapter II of the 1979 Constitution with its socio-economic rights regime. It is to the Constitution of the Federal Republic of Nigeria, 1999 (the Nigerian Constitution) that I now turn for the examination of Nigeria's socio-economic rights regime.

⁷⁰ B O Nwabueze 'Its nature and function' in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 49 and B O Nwabueze 'Where Dr. Ojo misfired' in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 52.

⁷¹ B O Nwabueze 'Its nature and function' in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 49 at 50.

⁷² B O Nwabueze 'Where Dr. Ojo misfired' in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 52 at 54.

The present Nigerian Constitution, like most of its earlier counterparts, is a military fashioned and imposed Constitution. The Constitution for that reason retained most of the features of earlier military fashioned constitutions in Nigeria despite changes in the circumstances in the country and in the lived conditions of the citizens. This has resulted in huge gaps between the lived realities of Nigerians and the Constitution. This fact and the dissatisfaction occasioned by it have already led to various amendments to the Constitution.⁷³ One of the features of the 1979 Constitution retained by the Nigerian Constitution under examination is the non-justiciable socio-economic rights regime in Chapter II of the 1979 Constitution.

Chapter II of the Nigerian Constitution contained identical provisions of the 1979 Constitution and some of its provisions provides for socio-economic rights as follows: The state is to direct its policy to ensure ‘that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens’.⁷⁴ The state is also obliged to direct its policy to ensure that - ‘all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment’;⁷⁵ ‘conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life’;⁷⁶ ‘the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused’;⁷⁷ ‘there are adequate medical and health facilities for all persons’;⁷⁸ ‘there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever’;⁷⁹ ‘children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect’;⁸⁰ ‘provision is made for public assistance in deserving cases or other conditions of need’.⁸¹

⁷³ See for instance, D A Chima ‘The dawn of constitutionalism in Nigeria’ in M k Mbondenyi and T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 135 for details of the specific amendments that have been made to the 1999 Constitution at the date of writing.

⁷⁴ Section 16 (2) (d) of the Nigerian Constitution.

⁷⁵ Section 17 (3) (a) of the Nigerian Constitution.

⁷⁶ Section 17 (3) (b) of the Nigerian Constitution.

⁷⁷ Section 17 (3) (c) of the Nigerian Constitution.

⁷⁸ Section 17 (3) (d) of the Nigerian Constitution.

⁷⁹ Section 17 (3) (e) of the Nigerian Constitution.

⁸⁰ Section 17 (3) (f) of the Nigerian Constitution.

⁸¹ Section 17 (3) (g) of the Nigerian Constitution.

In addition to the foregoing, the government of Nigeria is also obliged to ensure that there are equal and adequate educational opportunities for all at all levels.⁸² The government is consequently to strive to eradicate illiteracy and shall when practicable provide – ‘free, compulsory and universal primary education’;⁸³ ‘free secondary education’;⁸⁴ ‘free university education’;⁸⁵ ‘and free adult literacy programme’.⁸⁶

Although the above provisions are not couched in the traditional language of rights, as pointed out by a scholar, and rightly too in my view, a critical analysis/review of the relevant provisions of the directive principles as enumerated above indicates that they are substantially socio-economic rights (or at least a good number of them).⁸⁷ Thus, the intention behind these provisions of the directive principles is the entrenchment/justiciability of socio-economic entitlements contingent upon the happening of another event. The event may be the availability of resources, executive action in terms of policies or legislative action in terms of the enactment of requisite enabling laws.

Following from the above, the following socio-economic rights can be distilled from the foregoing provisions of the Nigerian Constitution as follows: the right to suitable and adequate shelter; the right to suitable and adequate food; the right to a living national minimum wage; the right to old age care and pension; the right to unemployment and sick benefits; the right of welfare for disabled persons; the right to adequate means of livelihood; the right to adequate opportunity to secure suitable employment; the right to just and humane conditions of work; the right to adequate facilities for leisure, social, religious and cultural life; the right to the health, safety and welfare of all persons in employment; the right to adequate medical and health facilities for all persons; the right to equal pay for equal work without discrimination on ground of sex, or on any other ground whatsoever; the right of children, young persons and the aged to be protected from exploitation, moral and material

⁸² Section 18 (1) of the Nigerian Constitution.

⁸³ Section 18 (3) (a) of the Nigerian Constitution.

⁸⁴ Section 18 (3) (b) of the Nigerian Constitution.

⁸⁵ Section 18 (3) (c) of the Nigerian Constitution.

⁸⁶ Section 18 (3) (d) of the Nigerian Constitution.

⁸⁷ O Fagbohun ‘Legal arguments for the non-justiciability of Chapter 2 of the 1999 Constitution’ in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 150 at 169.

neglect; the right to public assistance in deserving cases or other conditions of need; and the right to free education at all levels.

As can be gathered from the above, the foregoing socio-economic rights are far more extensive than that contained in the South African Bill of Rights. The Achilles heel of the Nigerian framework, as I already pointed out above, is that the Constitution forbids the justiciability of the provisions of Chapter II of the Nigerian Constitution, the socio-economic rights therein inclusive. This is by virtue of section 6 (6) (c) of the Nigerian Constitution. Section 6 (6) (c) of the Nigerian Constitution provides as follows:

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

Nigerian courts have, since after the 1979 Constitution came into operation, confirmed the non-justiciability of Chapter II in several cases pursuant to section 6 (6) (c) of the 1979 Constitution. *Archbishop Okogie v The Attorney-General of Lagos State*⁸⁸ presented the first opportunity for Nigerian appellate courts to pronounce upon the provisions of section 6 (6) (c) of the of the 1979 Constitution.⁸⁹ In *Okogie's* case, the applicants had challenged the abolition of private primary schools in Lagos State in the state's bid to provide free and compulsory universal primary education to residents of the state pursuant to its obligation under section 18 (1) of the 1979 Constitution (the same with section 18 (1) of the 1999 Constitution). The applicants alleged that the abolition was a violation of sundry fundamental rights in Chapter IV of the 1979 Constitution. The Nigerian Court of Appeal in finding for the applicants held that the provisions of Chapter II are, pursuant to section 6 (6) (c) of the Constitution, not justiciable and that where a government is intending to fulfill its obligation under Chapter II through laws or policies, such laws or policies must not be in violation of constitutionally guaranteed rights under Chapter IV of the Constitution.

⁸⁸ [1981] 2 NCLR 337.

⁸⁹ Before the *Okogie's* case there was the earlier case of *A J A Adewole and Others v Alhaji L. Jakande and Others* (1981) 1 NCLR 262 with similar facts and decision in the High Court of Lagos State.

Later cases emanating from Nigerian courts on the justiciability of Chapter II of the Constitution have generally followed the position of the Court of Appeal in *Okogie's case*. Thus, in *Adebisi Olafisoye v Federal Republic of Nigeria*⁹⁰ the Supreme Court of Nigeria held that the Chapter II of the Constitution as it presently stands without more is not justiciable by virtue of the provisions of section 6 (6) (c) of the Constitution. However, if a matter is justiciable by virtue of other provisions of the Constitution or the government has evinced an intention that a matter be justiciable by virtue of a policy or law, then the particular provision of Chapter II dealing with the subject-matter of executive or legislative action will cease to be non-justiciable.⁹¹ Thus, in *Attorney-General of Ondo State v. Attorney-General of the Federation*,⁹² the applicant challenged the constitutionality of the enactment of the Corrupt Practices and Other Related Offences Act, 2000 (the Anti-Corruption Act) by the Nigerian Federal Parliament enacted pursuant to its obligation to eradicate corrupt practices and abuse of power under section 15 (5) of the 1999 Constitution. The constitutional challenge was based on the argument that the enactment was *ultra-vires* the Federal Parliament. The Supreme Court of Nigeria conceded that the provisions of Chapter II of the Constitution on their own are not justiciable but can be made justiciable by legislation. The Court held that the combined reading of section 15 (5) of the Constitution, which obliges the state to eradicate corrupt practices and Item 60 (a) of Part 1 of the Second Schedule to the 1999 Constitution, which authorises the Federal Government to establish and regulate authorities for the Federation or any part thereof for the promotion, enforcement, or observance of the provisions of Chapter II of the Constitution saved the Anti-Corruption Act enacted to give effect to the above-mentioned provisions from constitutional invalidity.⁹³ In other words, the enactment of a law to effect the state's obligation to eradicate corruption under Chapter II made the issue of eradication of corruption a justiciable one. Some other cases that have arisen on the justiciability of Chapter II of the Constitution have followed this trend.⁹⁴

⁹⁰ (2004) 4 NWLR (Pt. 864) 581.

⁹¹ *Id* at 659 – 660.

⁹² (2000) 9 NWLR (Pt. 772) 222.

⁹³ *Id* at 382 – 385.

⁹⁴ See for instance, *Federal Republic of Nigeria v Anache & Others* (2004) 14 WRN 1 a case which has similar facts and issues as *Attorney General of Ondo State v Attorney General of the Federation* (2000) 9 NWLR (Pt. 772) 222 and which was similarly disposed-off by the Supreme Court.

Judicial sanction of section 6 (6) (c) of the 1999 Constitution and the consequent non-justiciability of Nigeria's socio-economic rights regime has, however, happened in spite of the domestication in Nigeria of the African Charter, a human rights treaty that does not make the traditional distinction between civil and political rights and socio-economic and cultural rights.⁹⁵ There is, therefore, ongoing controversy regarding whether the African Charter has not rendered sterile the argument for the non-justiciability of socio-economic rights in Nigeria.⁹⁶ As a result of the importance to this Chapter of the African Charter and the arguments surrounding its impact on the justiciability of socio-economic rights in Nigeria, I will spend some time to elaborate on the Charter and the argument surrounding its precise impact and effect on Nigeria's socio-economic rights regime.

Unlike other international and regional human rights treaties, the African Charter does not make the traditional differentiation between the different categories of rights. The Charter provides for socio-economic rights alongside civil and political rights. Socio-economic rights provided for in the African Charter alongside the more traditional first generation rights are the right to work;⁹⁷ the right to health;⁹⁸ the right to education;⁹⁹ and the right to economic, social and cultural development.¹⁰⁰ The African Commission, the quasi-judicial organ saddled with the interpretation and enforcement of the African Charter, has also implied the right to housing into the Charter in *SERAC and Another v. Nigeria*¹⁰¹ through a community reading of the right to property,¹⁰² the right to enjoy the best attainable state of physical and

⁹⁵ Nigeria ratified and domesticated the African Charter in 1983 via the African Charter (Ratification and Enforcement) Act Cap A9 LFN 2004.

⁹⁶ Apart from the provisions of the African Charter, some other innovative approaches suggested by scholars to get around section 6 6 (c) of the 1999 Constitution includes: (1) The interpretation of common law doctrines to give effect to socio-economic rights as well as the invocation of relevant international treaties: O Fagbohun 'Legal arguments for the non-justiciability of Chapter 2 of the 1999 Constitution' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 150 at 184 – 185; (2) by way of citizens' action to compel state response: D Adekunle 'Justiciability of socio economic rights in the Constitution and the political question' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 60 at 73; (3) through the ballot box: U O Umozurike 'The African Charter on Human and Peoples' Rights and economic, social and cultural rights' (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 101 at 108 and (4) the community reading of section 15 (5) and Item 60 (a) of the 1999 Constitution: B Owasanoye 'Non-justiciability: Judicial avoidance or judicial timidity' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 34 at 58 – 59; among others.

⁹⁷ Article 15 of the African Charter.

⁹⁸ Article 16 of the African Charter.

⁹⁹ Article 17 of the African Charter.

¹⁰⁰ Article 22 of the African Charter.

¹⁰¹ (2001) AHRLR 60.

¹⁰² Article 14 of the African Charter.

mental health¹⁰³ and the obligation of states to protect the family as the natural unit and basis of society.¹⁰⁴

As I point out above, Nigeria domesticated the African Charter in 1983 via the African Charter (Ratification and Enforcement) Act.¹⁰⁵ The Charter therefore became part and parcel of Nigeria's domestic regime from the time of its domestication onwards. This state of the law has been confirmed by the Supreme Court of Nigeria in several cases. The *locus classicus* in this area of the law is *Abacha and Others v Fawehinmi*.¹⁰⁶ In *Abacha v Fawehinmi*, the military junta of the then Head of State of Nigeria, General Sanni Abacha had through a Decree suspended the application of the fundamental rights provision of Chapter IV of the Constitution and ousted the jurisdiction of the courts to inquire into anything done or omitted to be done by the military junta. The junta had, however, omitted to include the provisions of the African Charter in the Decree. Consequently, when soldiers invaded and ransacked the premises of the applicant, a lawyer, human rights activist and a well-known critic of the military junta and illegally detained him, he brought an application before the court seeking relief for the violations of his rights under the African Charter. When the matter got to the Supreme Court of Nigeria on appeal, the Court held that the African Charter is a statute with international flavour in Nigeria; it is superior to other domestic statutes but inferior and subject to the provisions of the Nigerian Constitution.¹⁰⁷

*Agbakoba v Director of State Security Service & Another*¹⁰⁸ is another case where the Supreme Court of Nigeria earlier vindicated the rights in the African Charter as part and parcel of the corpus of fundamental rights law in Nigeria. In this case, the appellant, another lawyer and human rights activist and critic of the military junta was arrested while on his way outside the country to attend a conference. His passport was also seized by the officials of the State Security Service, the intelligence arm of the junta. He sued claiming violations of his fundamental rights under the Constitution and the African Charter. The Supreme Court

¹⁰³ Article 16 (1) of the African Charter.

¹⁰⁴ Article 18 (1) of the African Charter.

¹⁰⁵ Cap A9 LFN 2004.

¹⁰⁶ (2001) AHRLR 172.

¹⁰⁷ *Id* at para 15.

¹⁰⁸ (1999) 1 NWLR (Pt. 625) 129.

vindicated his rights holding that the provisions of the African Charter are part and parcel of the laws in Nigeria upon which a citizen can rely in the vindication of his/her rights.¹⁰⁹

While it may legitimately be argued that the Supreme Court in the above and similar cases was dealing with civil and political rights provisions of the African Charter that have a counter-part in Chapter IV of the Constitution, the Court did not, however, make any such distinction between the categories of rights in the African Charter when it was making its various pronouncements and decisions in the above cases. Be that as it may, it is to be noted that there appears to be a hesitant but emerging socio-economic rights jurisprudence based on the socio-economic rights provisions of the African Charter from some lower courts in Nigeria.

The first of the two cases representing this trend is *Odafe & Others v Attorney-General of the Federation and Others*.¹¹⁰ In this case, applicants who were HIV positive detainees alleged that their non-treatment by Nigerian prison authorities after their diagnosis as being HIV positive is a breach of their rights to health under the African Charter, among other claims. The Federal High Court of Nigeria, Port Harcourt Division held that the non-treatment of applicants is in fact a violation of article 16 of the African Charter. The Court pronounced thus:

The second and third respondents are under a duty to provide medical help for applicants. Article 16 of African Charter Cap 10 which is part of our law recognises that fact and has so enshrined that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health'. Article 16(2) places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. All the respondents are federal agents of this country and are under a duty to provide medical treatment for the applicants.¹¹¹

The Court thereby vindicated applicants' rights. The second case is *Gbemre v Shell Petroleum Development Company Nigeria Ltd & Others*.¹¹² Here, the Federal High Court of

¹⁰⁹ Other cases in this regard are *Ogugu v State* (1994) 9 NWLR (Pt. 366) 1; *Registered Trustees of Constitutional Rights Projects v The President of the Federal Republic of Nigeria* (1991) 4 *Journal of Human Rights Law and Practice* 218; *Garuba and Others v AG Lagos State* (1991) 4 *Journal of Human Rights Law and Practice* 185; among others.

¹¹⁰ (2004) AHRLR 205.

¹¹¹ *Ibid* paras 33 – 34.

¹¹² (2005) AHRLR 151.

Nigeria, Benin Judicial Division, also held that gas flaring in the Niger Delta region of Nigeria is a violation of articles 4,¹¹³ 16¹¹⁴ and 24¹¹⁵ of the African Charter.

Sadly, however, despite the progressive bent of the High Court cases mentioned above and the continued subscription and domestication by Nigeria of human rights treaties that did not make the traditional distinctions between civil and political rights and socio-economic rights in their provisions,¹¹⁶ (the implication of which appears to me to be that Nigeria may have become estopped from denying the justiciability of socio-economic rights in her jurisdiction notwithstanding the provisions of her constitution to the contrary)¹¹⁷ some lower courts in Nigeria continue to cast doubt on the applicability and justiciability of the provisions of the African Charter where such provisions implicate socio-economic rights and Chapter II of the 1999 Constitution.

In *the Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another*¹¹⁸ for instance, the applicants commenced a suit to compel the disclosure of how \$ 12.4 billion dollars of Nigeria oil windfall during the Gulf War was spent by the then incumbent military regime in the Federal High Court, Abuja. The action was commenced under the new Fundamental Rights Enforcement Procedure Rules, 2009 (the new FREP Rules) which included the African Charter as one of the human rights instruments that can be enforced by the special procedure

¹¹³ Right to life.

¹¹⁴ Right to health.

¹¹⁵ Right to a healthy environment.

¹¹⁶ Notable among these are UN Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990 which Nigeria signed and ratified in 1991 and 2000 respectively. The principles behind these two instruments were enacted into domestic law via the Child Rights Act in September 2003. See for instance, UNICEF 'Information sheet: The Child Rights Act' available at http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf (accessed on 12 April 2013).

¹¹⁷ A conclusion that may have found support in the recent decision of the ECOWAS Court of Justice against Nigeria in the *Registered Trustees of the SERAP v Nigeria* (2009) AHRLR 331 at para 19 where the ECOWAS Court of Justice rejected the contention of the government of Nigeria that the right to quality education in the African Charter is not justiciable because it violated directive principles of state policy under Chapter II of the 1999 Constitution. The Court held in the case that since the plaintiff's application is based on the provisions of the African Charter which has been domesticated in Nigeria the contention that the right to education is not justiciable because it falls within the directive principles of state policy does not hold any water.

¹¹⁸ Suit No: FHC/ABJ/CS/640/2010. A decision of the Federal High Court Abuja, delivered on the 29th of November, 2012).

in the new FREP Rules.¹¹⁹ In dismissing the applicant's suits and declaring unconstitutional the provisions of the new FREP Rules, the Court held that the provisions of the African Charter cannot be enforced via the new FREP Rules because this will be an unconstitutional enlargement via a delegated legislation of the fundamental rights in Chapter IV of the 1999 Constitution. This is because the African Charter contained other categories of rights not included in the fundamental rights provisions of Chapter IV of the 1999 Constitution. The Court explained its decision thus:

The question is whether the Fundamental Rights (Enforcement Procedure) Rules, 2009 have expanded the scope of the provisions in Chapter IV beyond what the drafters have clearly stipulated therein. I have no doubt, as was argued by the 2nd Respondent that when the provision of Section 46 (1) of the Constitution is read and construed in its ordinary or literal meaning of the words used, the intention of the drafters of the Constitution is that the Rules which the Chief Justice of Nigeria is constitutionally empowered to make for "the practice and procedure for the High Court" is intended to be for the enforcement of those fundamental rights specifically and exclusively provided for in the said Chapter IV of the Constitution. When the Preamble in clause 3 (b) (i) & (ii) go further to include "The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system" and "The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations Human Rights System", the Hon. The (sic) Chief Justice of Nigeria by this expansion of the enforceable rights beyond the provisions in Chapter IV of the CFRN, 1999 As amended as a delegated legislative authority. I am of the view, with the greatest respect to the person and office of the Chief Justice of Nigeria that in so doing, it had acted *ultra vires* the limited mandate conferred by section 46 (3) which Section 46 (1) has clearly and affirmatively limited to the "provisions of this Chapter", i.e. Chapter IV of the Constitution.¹²⁰

Thus, the Court declared unconstitutional the requisite provisions of the new FREP Rules which includes the African Charter as part of the instruments enforceable via the Rules on grounds mentioned above. The precise implication of the African Charter for socio-economic rights enforcement could therefore be said to be still in a flux in Nigeria with lower courts on both sides of the justiciability divide.

¹¹⁹ The new FREP Rules was promulgated by the then Chief Justice of Nigeria in 2009 under powers conferred on him in section 46 (3) of the 1999 Constitution of Nigeria to regulate the procedure and practice of courts in fundamental rights litigation across the country. The new FREP Rules superseded the obsolete 1979 FREP Rules. Para 3 (b) (i) and (ii) of the Rules provides that courts respect regional and international bills of rights which includes the African Charter and the UDHR in the enforcement of fundamental rights under the new Rules. Section 2 of the New FREP Rules also defines 'Fundamental Right' to mean 'any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.

¹²⁰ *The Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* Suit No: FHC/ABJ/CS/640/2010. A decision of the Federal High Court Abuja, delivered on the 29th of November, 2012) 28 – 29.

The controversial status of the African Charter in the decision of the courts when it comes to the enforcement of socio-economic rights is also replicated in the literature on the subject. While some scholars are of the view that the argument for the non-justiciability of socio-economic rights in Nigeria can no longer be sustained having regard to the domestication of the African Charter, some others continue to contend otherwise.¹²¹

On the side of the pro-justiciability group, there is Ogbu who is of the view that: 'It is fortunate that the African Charter on Human and Peoples' Rights which has not only been ratified by Nigeria but has formed part of her municipal law contains enforceable provisions on social and economic rights. Recourse can therefore be made (sic) to the Charter for the enforcement of these rights'.¹²² In Owasonoye's view, '...the route to the better protection of ICESCR rights in Nigeria is to seek to enforce socio-economic rights through the African Charter'.¹²³ Quite a number of other scholars are of this view.¹²⁴

Amechi¹²⁵ has in fact argued in this regard that the promulgation of Nigeria's new FREP Rules have laid to rest any lingering doubt regarding the justiciability of socio-economic rights in Nigeria. This is by virtue of the fact that the new FREP Rules expressly define fundamental rights to include any of the rights in the African Charter on Human and Peoples'

¹²¹ There are scholars who are even questioning the wisdom behind the domestication of the African Charter in Nigeria. There is for instance, Professor Oji Umzurike, a Nigerian and one time Commissioner of the African Commission who questioned the wholesale incorporation of the African Charter into the corpus of Nigerian law and thinks the action is not a well thought-out one on the part of the government. See U O Umzurike 'The African Charter on Human and Peoples' Rights and economic, social and cultural rights' (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 101 at 108.

¹²² O N Ogbu 'The fundamental objectives and directive principles of state policy as a barometer for appraisal of Nigeria's nascent democracy' (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 75 at 84

¹²³ B Owasonoye 'Non-justiciability: Judicial avoidance or judicial timidity' in E Azinge and B Owasonoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (2010) 34 at 56.

¹²⁴ See for instance, O Fagbohun 'Legal arguments for the non-justiciability of Chapter 2 of the 1999 Constitution' in E Azinge and B Owasonoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (2010) 150 at 184 – 185; D C J Dakas 'A panoramic survey of the jurisprudence of Indian and Nigeria courts on the justiciability of fundamental objectives and directive principles of state policy' in E Azinge and B Owasonoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (2010) 262 at 315 – 320; among others.

¹²⁵ 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 (3) *Law, Environment and Development Journal* 320

Rights (Ratification and Enforcement) Act.¹²⁶ This position, however, appears to have been implicitly countered by Sanni who opines that the new FREP Rules is a subsidiary legislation which cannot purport to repeal or amend the Constitution.¹²⁷ Sanni's position was recently confirmed by the decision of the Federal High Court, Abuja referred to above which declared unconstitutional the Preamble of the new FREP Rules which includes the African Charter and other international human rights instruments as part of Nigeria's human rights *corpus*.¹²⁸

In the anti-justiciability group on the other hand, there is Umozurike, a one-time Commissioner of the African Commission, who not only thinks that the wholesale incorporation of the African Charter into the corpus of Nigerian law was not a well thought-out move but also that socio-economic rights are not justiciable and that the African Charter cannot purport to universalise socio-economic rights in the territories of state parties to the Charter. This is because, according to him, universality of human rights is not tantamount to uniformity in the jurisdictions of state parties.¹²⁹ There is also Ikhariale¹³⁰ who opines that it is not the intention of the drafters of the Constitution that directive principles should be subject of judicial review. According to him: 'The expectation was that government will be honour-bound to comply with them'.¹³¹ Finally, there is Peters who is of the view that litigation of socio-economic rights via the African Charter is untenable having regard to the provisions of section 1 (1) and (3) of the Constitution of Nigeria which proclaims the supremacy of the Constitution over all other laws in the country.¹³²

¹²⁶ According to section 2 of the New FREP Rules "Fundamental Right" means any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.

¹²⁷ A Sanni "Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform" (2011) 11 *African Human Rights Law Journal* 511.

¹²⁸ *The Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* Suit No: FHC/ABJ/CS/640/2010, Decision of the Federal High Court Abuja, delivered on the 29th of November, 2012).

¹²⁹ U O Umozurike 'The African Charter on Human and Peoples' Rights and economic, social and cultural rights' (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 101.

¹³⁰ M Ikhariale 'Political and economic stability and the justiciability question' in E Azinge and B Owasanoye (eds) *Justiciability and Constitutionalism: An economic analysis of law* (2010) 126.

¹³¹ *Ibid* at 149.

¹³² D Peters 'On human rights in economic, social and cultural context and the Nigerian judiciary' (2002) 1 (5) *Journal of Economic, Social and Cultural Rights* 1 at 36 fn 93.

What the foregoing analysis reveals is that the controversy regarding the precise impact of the African Charter on Nigeria's socio-economic rights regime is still on-going with courts and scholars on both sides of the divide. Nigerian appellate courts have not had the opportunity to pronounce on this issue yet. Until such a time that Nigerian appellate courts make authoritative pronouncements on the status and impact of the African Charter on Nigeria's socio-economic rights regime, the precise status and impact of the domestication of the Charter on Nigeria's socio-economic rights regime will continue to be a matter of argument.

Notwithstanding the above conclusion, however, three things appear to be clear from the foregoing discussion. The first is that Chapter II of the Nigerian Constitution, barring legislative or executive action, is not justiciable. The second is that at least with regard to civil and political rights provisions of the African Charter which have counterpart in Chapter IV of the Nigerian Constitution; the African Charter is part and parcel of Nigeria's domestic law.

The third point is that Ebobrah has correctly argued, in my view, that a clear reading of the relevant provisions of the Nigerian Constitution will reveal that section 6 (6) (c) of the Constitution does not remove the competence of the legislature to translate socio-economic rights in Chapter II into enforceable rights, neither does the provision prohibit Nigerian courts from entertaining socio-economic rights cases where such rights have been translated into subjective rights by law or policy.¹³³ Notwithstanding the correctness of the foregoing arguments of Ebobrah, however, the African Charter will appear to me not to be in contemplation as one of the statutes transforming the socio-economic rights in Chapter II of the Nigerian Constitution into subjective rights. This is because, as can be gathered from the pronouncement of the Supreme Court of Nigeria in *Abacha and Others v Fawehinmi* above, the African Charter, although superior to other local statutes is inferior to and subject to the Nigerian Constitution. Thus, scholars and courts that have argued that the enforcement of the socio-economic rights provisions in Chapter II of the Nigerian Constitution through the African Charter will violate section 6 (6) (c) and section 1 (1) and (3) of the Nigerian Constitution may indeed be correct from a legal point of view. I therefore disagree with

¹³³ S T Ebobrah 'The future of economic, social and cultural rights in Nigeria' (2007) 1 (2) *CALS: Review of Nigerian Law and Practice* 108 at 117 – 119.

Ebobrah and others who argue that the African Charter can ground claims for socio-economic rights enforcement in Nigeria.¹³⁴ I agree with Otubu who is of the opinion that the justiciability of socio-economic rights in Nigeria may in fact remain with future legislations.¹³⁵ This is more so since a critical reading of *Odafe* and *Gbemre* referred to above appears to reveal that the courts in those cases did not reach their decisions on the basis of the socio-economic rights provisions in the African Charter alone. Both courts appear to merely refer to the relevant socio-economic rights provisions of the African Charter to strengthen their respective arguments. The main basis of the courts' decision appears to be for *Odafe*, mainly the civil and political rights of equality and non-discrimination; and the right to life with respect to *Gbemre*. The conclusion flowing from the above is that socio-economic rights are not yet justiciable in Nigeria by virtue of section 6 (6) (c) of the Nigerian Constitution.

As can be gathered from the above analysis, the main difference between the constitutional framework for socio-economic rights protection in South Africa and Nigeria is that while the South African socio-economic rights are entrenched alongside civil and political rights in the South African Bill of Rights and can be directly invoked by citizens in court, Nigeria socio-economic rights are included in the Constitution as fundamental objectives and directive principles of state policy only. The directives are also expressly made non-justiciable by the Constitution. Although there are various other instruments and laws in Nigeria, especially the African Charter, which suggest that the scope of the fundamental human rights may have been broadened to include socio-economic rights, the precise scope and impact of such instruments and laws are still subject to much controversy.

Having examined the constitutional framework for the protection of socio-economic rights in Nigeria above, I examine in the sub-section below the implications of a non-justiciable socio-economic rights framework.

¹³⁴ Id at 120 – 122.

¹³⁵ A Otubu 'Fundamental right to property and right to housing in Nigeria: A discourse' (2011) 7 (3) *Acta Universitatis Danubius Juridica* 25 at 38.

2.2.1 The legal implications of Nigeria's non-justiciable socio-economic rights framework

Viljoen has identified three main ways to make socio-economic rights justiciable within domestic jurisdictions.¹³⁶ The first is through constitutional reference in monist states. An example of this is Benin Republic and Côte d'Ivoire.¹³⁷ The second is through inclusion in a country's bill of rights as justiciable rights or inclusion in directive principles of state policy of a constitution as non-justiciable rights. This is what is obtainable in South Africa and Nigeria respectively. The third way is through domestic statutes. This is also in theory found in Nigeria through the country's domestication of the African Charter, for instance. Nigeria therefore does appear to have a hybrid system, combining inclusion in directive principles of state policy with enactment of domestic statutes.

The grouping together by Viljoen of socio-economic rights included as justiciable rights in a country's bill of rights on one hand and inclusion as non-justiciable rights in directive principles of state policy on the other hand as one of the three ways of making socio-economic rights justiciable in domestic jurisdiction notwithstanding, there is a gulf of difference between the two different types of constitutional frameworks. For one thing, while inclusion in a bill of rights makes entrenched socio-economic rights directly justiciable, socio-economic rights included in directive principles of state policy are not directly justiciable. The latter method requires further steps or action by state organs and/or functionaries to become justiciable. The further step could be by way of enabling legislation, governmental policy or judicial activism as is the case in India.

For another thing, most constitutional frameworks that follow the path of directive principles of state policy for the justiciability of socio-economic rights, often-times forbid the courts from enquiring into if or what action has been taken by the state in furtherance of the

¹³⁶ F Viljoen 'National legislation as a source of justiciable socio-economic rights' (2005) 6 *Economic and Social Rights Review* 6 at 7.

¹³⁷ See A Tanoh and H Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 1 at 109 for a discussion of the constitutional frameworks for the protection of human rights in both Benin and Côte d'Ivoire.

constitutional objectives as the examples of India and Nigeria show. The constitutional ousting of courts' jurisdiction to inquire into if or what action has been taken by state authorities in furtherance of constitutional objectives in directive principles of state policy framework is, in my view, the very negation of the concept of justiciability. The effect of this on politics/political action and socio-economic rights transformation will be dealt with later on in this chapter. The purpose of this sub-section is to articulate the implications of a directive principles framework as obtained in Nigeria. This I turn to examine below.

Constitutional ousting of jurisdiction of courts with respect to directives principles framework notwithstanding, the framework is not without implications or effects. Five of such implications are discussed here. First, directive principles of state policy are expected to inform all laws, policies and governmental actions or omissions. This is because as the name connotes, fundamental objectives and directive principles of state policy contain principles and objectives that the state has come to regard as fundamental to the continued existence of the society and the means towards achieving those objectives. The objectives and principles are, therefore, to serve as ideals or goals that the state concerned strives towards.¹³⁸ All governmental policies and laws must therefore conform to and be informed by the ideals set out in directive principles of state.¹³⁹ Scholars have, therefore, variously referred to the purpose or intendment of directive principles as a guide or some kind of code of conduct for governmental exercise of power.¹⁴⁰

The implication/impact of directive principles as basis of laws and policies is well illustrated by the recent case of *Bamidele Aturu v Minister of Petroleum Resources*.¹⁴¹ Detailed discussion and analysis of this case is done in Chapter Five. Suffice it to say here, that a Federal High Court of the Federal Capital Territory, Abuja had in the case declared

¹³⁸ J N Aduba 'The constitutionality of the justiciability question' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 114 at 117.

¹³⁹ B De Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29 at 34.

¹⁴⁰ K Omidire 'History, objectives and implications of entrenchment of fundamental objectives and directive principles of state policy in the Nigerian constitution' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 17 at 25-27; J N Aduba 'The constitutionality of the justiciability question' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 114 at 120.

¹⁴¹ Suit No: FHC/ABJ/CS/591/09. Delivered on the 19th day of March, 2013

unconstitutional the neo-liberal policy of the Nigerian government of incessant increases in the prices of petroleum products based on the combined reading of section 16 (1) (b) of Chapter II of the Nigerian Constitution and sections 6 and 4 of the Petroleum Act and the Price Control Act respectively. The Court held that section 16 (1) (b) of the Nigerian Constitution obliges the government of Nigeria to regulate the economy of Nigeria, including the downstream sector of Nigeria's petroleum industry, in a manner consistent with the economic objective of section 16 (1) (b) of the Constitution, which obliges the government to regulate the economy to secure the maximum welfare, freedom and happiness of Nigerian citizens. The incessant increases in prices of petroleum products were held by the Court to violate this constitutional objective and obligation and are for that reason illegal and unconstitutional.

Second, directive principles of state policy constitute the very foundation of the legitimacy of the state. According to some scholars, the whole essence of any state is to carry into effect the social objectives encapsulated in the directive principles of a constitution. If this is lacking, the argument goes, the whole essence of a constitution and the existence of the state as it were is itself called into question. According to Awolowo: '... social objectives constitute the *raison d'être* the bedrock, and, indeed, the original legitimacy of the state...' ¹⁴² The importance attached to social and economic objectives in modern constitutions is premised on the realisation by theorists that modern constitutions must not only promise freedom but bread as well. This is for the constitution to be relevant to the majority of citizens in modern states. The rationale for this viewpoint is aptly explained by Cappelletti thus:

Far from representing a luxury of a few 'rich' nations, social rights are a *sine qua non* for modern societies. Indeed, even more so for developing societies.... To exclude social rights from a modern Bill of Rights, is to stop history at the time of *laissez-faire*; it is to forget that the modern state has greatly enlarged its reach and responsibilities into the economy and the welfare of the people. ¹⁴³

Many other scholars continue to confirm Cappelletti's standpoint in this regard. ¹⁴⁴

¹⁴² O Awolowo 'My thoughts' in W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution (1976/1977)* 42 at 43.

¹⁴³ M Cappelletti 'The future of legal education: A comparative perspective' (1992) 8 *South African Journal on Human Rights* 1 at 10.

¹⁴⁴ See for instance, C Fabre 'Constitutionalising social rights' (1998) 6 *The Journal of Political Philosophy* 263; N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African*

Third, directive principles are expected to serve as interpretive guide for the courts. This point is aptly explained by De Villiers as follows:

The non-justiciability of the directives does not mean that they can be ignored by the courts. The way in which fundamental rights are understood and interpreted depends on the vision formulated in the directives. ...No court can nullify legislation on the grounds that it is contrary to the directives, but as an instrument of interpretation... the directives can cause the validity of legislation to be upheld while otherwise it may have been nullified.¹⁴⁵

Directive principles are therefore expected to serve as interpretive guides for fundamental rights and other laws in a state with such a framework.¹⁴⁶ It is in fact on this basis that the validity of Nigeria's Anti-Corruption Act was validated by the Supreme Court of Nigeria in *Attorney-General of Ondo State v. Attorney-General of the Federation*¹⁴⁷ discussed earlier on in this Chapter.

Fourth, directive principles are also expected to serve as barometer to measure the competence and effectiveness of the government/state and societal progress. Ogbu, is therefore, of the view that despite the absence of direct judicial enforcement, directive principles of state policy can serve as a barometer against which the people can measure the performance of their government.¹⁴⁸ This is by measuring the achievement of the government against set objectives of directive principles. A high compliance level will signify that the society is progressing vis-à-vis its fundamental objectives and that the government is doing well, while a low compliance level will signify the reverse.

Finally, in the event of a conflict between directive principles and entrenched rights, directive principles are expected to triumph. This, however, has not always been the position nor is this

Journal on Human Rights 451 and J Donnelly 'Human rights, democracy and development' (1999) 29 *Human Rights Quarterly* 608.

¹⁴⁵ B De Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29 at 32 – 33.

¹⁴⁶ See also D Adekunle 'Justiciability of socio economic rights in the Constitution and the political question' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 60 at 73 – 75.

¹⁴⁷ (2000) 9 NWLR (Pt. 772) 222.

¹⁴⁸ O N Ogbu 'The fundamental objectives and directive principles of state policy as a barometer for appraisal of Nigeria's nascent democracy' (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 75 at 85.

position the same in every jurisdiction with that kind of framework. For instance, De Villiers in his discussion of the Indian framework identified three different attitudes of Indian courts to conflicts between directive principles and fundamental rights.¹⁴⁹ According to him, the initial response and attitude of Indian courts was to give primacy to fundamental rights over directive principles of state policy in case of conflicts. This was followed by a phase in which the courts treated both fundamental rights and directive principles as complementary and tried to harmonise them in case of conflicts. The last attitude of Indian courts which coincided with the activist phase of the Indian Supreme Court is to give primacy to directive principles over fundamental rights because of the recognised importance of the directives in peculiar Indian socio-political life.¹⁵⁰ However, consequent upon the controversy that trailed the conflicts between fundamental rights and directive principles in India and the ever-changing posture and attitudes of the courts in that regard, the Indian parliament by subsequent amendments to the Indian Constitution gave primacy to directive principles over fundamental rights in the Indian Constitution.¹⁵¹ The latter position, therefore, represents the current position of the law in India.

As I point out earlier, the position in India is not the same in every jurisdiction with a directive principles framework. In Nigeria for instance, primacy is given by the courts to fundamental rights over directive principles in cases of conflicts. The stage for this position was set by the Nigerian Court of Appeal very early in the history of Nigeria's directive principles in *Archbishop Okogie v The Attorney-General of Lagos State*.¹⁵² The Court held in that case that fundamental rights in Chapter IV of the 1979 Constitution are superior to directive principles in Chapter II of the same Constitution and that in cases of conflict

¹⁴⁹ B De Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29 at 39 – 49.

¹⁵⁰ See B De Villiers 'The socio-economic consequences of directive principles of state policy; limitations on fundamental rights' (1992) 8 *South African Journal on Human Rights* 188 for a detailed discussion of the various stages the Indian Supreme Court went through in addressing the conflict btw directive principles and fundamental rights.

¹⁵¹ See for instance, S Muralidhar 'The expectations and challenges of judicial enforcement of social rights' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 102 – 104.

¹⁵² [1981] 2 NCLR 337.

between the two fundamental rights will be given primacy over directive principles. This position of the law has since been confirmed by Nigerian appellate courts in several cases.¹⁵³

Differences in attitudes of courts from different jurisdictions notwithstanding, many scholars in this area of the law are of the view that directive principles of state policy should in fact inform the understanding and interpretation of fundamental human rights and other laws.¹⁵⁴ It does, therefore, appear that the logical implication of this view is that fundamental rights should give way to directive principles whenever the two conflict.

Having compared the constitutional frameworks of both Nigeria and South Africa and the implications of each framework in the foregoing sections, I examine in the next section the pertinent features of each framework as can be deduced from the foregoing discussion and the likely effects or potential of each framework to enable or disable politics/political action.

2.3 PERTINENT FEATURES OF EXAMINED FRAMEWORKS AND POTENTIAL TO FURTHER OR HINDER POLITICS

2.3.1 Pertinent features of South Africa's entrenched socio-economic rights regime and potentials for politics

There are, at least, three features of South Africa's entrenched socio-economic rights regime that can be deduced from discussions in section 2.1 of this chapter. The first feature is that the framework is justiciable and enforceable in court. The second feature is that the framework imposes positive obligations to provide bare necessities of life to those in need of them on the state. The third feature is that the framework not only informs laws and policies but also

¹⁵³ See for instance, *Ukaegbu v The Attorney General of Imo State* [1983] 1 SCNLR 212 (SC). See also *Adamu v Attorney General of Borno State* (1996) 8 NWLR (Pt 465) 203 (CA).

¹⁵⁴ See for instance, B De Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29; D Adekunle 'Justiciability of socio economic rights in the Constitution and the political question' in E Azinge and B Owasanoye (eds) *Justiciability and Constitutionalism: An Economic analysis of law* (2010) 60 at 74 – 75; among others.

constitutes a limitation on laws, policies and governmental exercise of power and a limitation on the politics of the majority (majoritarian democracy). These features are now discussed in turn.

Enforceability in court

As discussed in section 2.1 of this chapter, South African socio-economic rights are part and parcel of South African Bill of Rights. That is to say that they are justiciable and enforceable in the courts just like their civil and political rights counterparts. As also pointed out in the section, South African courts have confirmed this reading of the regime in many cases. This feature of the regime implicates or impacts politics in at least three ways. First, it provides a forum and discourses for materially disadvantaged groups and individuals; two, it serves as an accountability mechanism through which the government is obliged to justify its laws and policies to citizens and; three, it provides a platform for political action.

First, constitutional rights theorists appear to agree, in spite of weighty objections to the contrary,¹⁵⁵ that constitutional rights politics give disadvantaged groups and individuals' access to *loci* of power not otherwise afforded them by mainstream institutions.¹⁵⁶ As explained by Raz: 'The politics of constitutional rights allows small groups easier access to the centres of power, including groups which are not part of the mainstream in society'.¹⁵⁷ The particular importance and usefulness of socio-economic rights in granting access to *loci* of power not otherwise available to materially disadvantaged individuals and groups has in

¹⁵⁵ While democratic theorists object to constitutional rights politics generally on the ground that it is a negation of politics, two major objections are levelled against judicial review of socio-economic rights in this regard: the first is from libertarians who object to judicial review of social rights on grounds of the unacceptable role imposed on the state and the courts in relation to resource allocation. The second is again from democratic theorists who object to judicial review of social rights on the ground that it is a negation of democracy. See for instance, S Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2006) 1 *Stellenbosch Law Review* 5 at 13 – 14 for more detail. Objections to rights discourse as instrument of social change is much broader than the ones mentioned here. Other objections, particularly from Critical Legal Scholars, are examined in other parts of this thesis as they become relevant.

¹⁵⁶ J Raz 'Rights and politics' (1995) 71 *Indiana Law Journal* 27 at 42 – 43.

¹⁵⁷ *Id* at 43.

this regard been noted by a number of scholars.¹⁵⁸ In fact, Michelman, rightly in my view, regards some social rights (life, health, vigour, presentable attire, education, shelter, among others) as interests that are the ‘...universal rock-bottom prerequisites of effective participation in democratic representation...’¹⁵⁹

Despite this, however, there is immense literature opposing this usefulness and importance of constitutional rights in general¹⁶⁰ and socio-economic rights in particular on the ground that it is a negation of democracy.¹⁶¹ In Monaghan’s view, constitutionalising affirmative claims (socio-economic rights) runs against the fundamental tenet of representative democracy.¹⁶² In Winter’s part, reduction of economic inequality through the courts is ‘more a seizure of power than a legitimate exercise of judicial review’.¹⁶³ And according to Davis, constitutionalising socio-economic rights will remove politics to the court room in violation of democratic norms.¹⁶⁴

Now let us assume for one moment, for purposes of argument, that those who suppose that the entrenchment of socio-economic rights and the policing function of the courts in respect thereof as negation of democracy are correct.¹⁶⁵ What then is the way out, having regard to the fact that the dominant form of democracy of contemporary time viz: bourgeois liberal

¹⁵⁸ See for instance, F Michelman ‘Welfare rights in a constitutional democracy’ (1979) *Washington University Law Quarterly* 659; E Mureinik ‘Beyond a charter of luxuries: Economic rights in the constitution’ (1992) 8 *South African Journal on Human Rights* 462; C Fabre ‘Constitutionalising social rights’ (1998) 6 *The Journal of Political Philosophy* 263.

¹⁵⁹ F Michelman ‘Welfare rights in a constitutional democracy’ (1979) *Washington University Law Quarterly* 659 at 677.

¹⁶⁰ Waldron for instance views constitutional rights as undemocratic as it places restraint on the power of the majority which should be the locus of power and decision-making in a democracy. J Waldron ‘A rights based critiques of constitutional rights’ (1993) 13 *Oxford Journal of Legal Studies* 18.

¹⁶¹ R K Winter ‘Poverty; economic equality, and the Equal Protection Clause’ (1972) *Supreme Court Review* 41; H P Monaghan ‘The Constitution goes to Harvard’ (1978) 13 *Harvard Civil Rights-Civil Liberties Law Review* 117; G E Frug ‘The judicial power of the purse’ (1977 - 1978) 126 *University of Pennsylvania Law Review* 715; D M Davis ‘The case against the inclusion of socio-economic demands in a bill of rights except as directive principles’ (1992) 8 *South African Journal on Human Rights* 475, among others.

¹⁶² H P Monaghan ‘The Constitution goes to Harvard’ (1978) 13 *Harvard Civil Rights-Civil Liberties Law Review* 117 at 130.

¹⁶³ R K Winter ‘Poverty; economic equality, and the Equal Protection Clause’ (1972) *Supreme Court Review* 41 at 102.

¹⁶⁴ D M Davis ‘The case against the inclusion of socio-economic demands in a bill of rights except as directive principles’ (1992) 8 *South African Journal on Human Rights* 475 at 489 - 490

¹⁶⁵ This argument is, however, only tenable if one’s conception of democracy is bourgeois liberal democracy. The argument that at constitutional rights are undemocratic is incompatible with more modern conception or forms of democracy.

democracy is actually found to be exclusionary and not adequately protective of the interests of the poor and disadvantaged as I show in Chapter Three? A point ably supported by Michelman thus:

To be hungry, afflicted, ill-educated, enervated, and demoralized by one's material circumstances of life is not only to be personally disadvantaged in competitive politics, but also, quite possibly, to be identified as a member of a group--call it "the poor"--that has both some characteristic political aims and values and some vulnerability to having its natural force of numbers systematically subordinated in the processes of political influence and majoritarian coalition-building. Even if there is no group of "the poor" for which that description holds, it is a blatant fact of national-including constitutional-history that there are groups for which it has held and does hold.¹⁶⁶

In addition to the above, many of those opposed to the tempering effects of constitutional rights on democracy/politics have either not adverted their minds to the exclusionary impact of majoritarian democracy on the less privileged, or when they have, their solution to the problem has been found to be either unworkable or ineffective. For instance, Davis's solution to the tempering effect of constitutionalisation of socio-economic rights on democracy is to suggest that socio-economic rights be included in constitutions only as directive principles of state policy.¹⁶⁷ A suggestion shown by Mureinik to be both inadequate and ineffective as it will make nonsense of the very objectives of the inclusion of socio-economic rights in constitutions.¹⁶⁸ On this view therefore, democratic theorists' arguments can only hold water if we take the natural selection standpoint of Darwinism and say that the interests of the poor and disadvantaged are not important in a democracy and that they can die off if they cannot compete. And I am almost sure that the most vociferous democratic theorists will not go that far (or would they?).¹⁶⁹ I think Donnelly was quite right when he says:

¹⁶⁶ F Michelman 'Welfare rights in a constitutional democracy' (1979) *Washington University Law Quarterly* 659 at 678.

¹⁶⁷ D M Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

¹⁶⁸ E Mureinik 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* 462 at 468 – 469.

¹⁶⁹ It may not be far – fetched to suppose that some in society may hold the opinion that the poor are an inferior specie the society is better-off without. This is having regard to the prejudicial view the society have for a long time now hold of the poor and the disadvantaged. After all, the United States Supreme Court in recent memory sanctioned the sterilization of mental defectives and epileptics in *Buck v Bell* 274 US 200 (1927) based on the science of eugenics that was subsequently discredited by scientists. The Court per Mr Justice Oliver Wendell Holmes made a now very famous statement at page 208 of the Report thus: 'We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of

Human rights are required to civilize both democracy and markets by restricting their operation to a limited, rights-defined domain. Free markets, like pure democracy, sacrifice individuals and their rights to a "higher" collective good. Only when the pursuit of prosperity is tamed by economic and social rights, such as when markets are embedded in a welfare state, does a political economy merit our respect.¹⁷⁰

I adopt Donnelly's reasoning in this regard.

Thus, while there are controversies about the nature and extent of democratic participation that could be engendered by constitutional rights politics, there appears to be a balance of opinion from constitutional rights scholars that constitutional rights politics does enable some level of political participation for disadvantaged persons and groups through the courts.

Furthermore, the view one takes about the democratic nature of constitutional rights in general or constitutional socio-economic rights in particular, depends on the perspective or the side from which one is viewing the issue. As regards those with the material wherewithal, voice and political power, constitutional rights politics is evidently a negation of democracy because it restricts the exercise of political power and decisional ability of the majority and/or the wealthy and politically powerful vis-à-vis the minority or the disadvantaged groups. However, if the perspective from which one is viewing the issue is that of people from the fringes of society, constitutional rights politics is a potent tool for political empowerment of the disadvantaged and the poor.

Additionally, rights-mediated participation of vulnerable groups may in fact be a concept mandated by a constitutionally entrenched socio-economic rights regime. A point that I think is being gradually developed by the South African Constitutional Court in cases dealing with eviction of unlawful occupiers. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*,¹⁷¹ *Residents of Joe Slovo Community*,

waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. ... Three generations of imbeciles are enough'.

¹⁷⁰ J Donnelly 'Human rights, democracy and development' (1999) 29 *Human Rights Quarterly* 608 at 630

¹⁷¹ 2008 3 SA 208 (CC).

*Western Cape v Thubelisha Homes*¹⁷² and *Abahlali baseMjondolo Movement SA v Premier of KwaZulu-Natal*,¹⁷³ among others, the South African Constitutional Court is gradually making consultation and deliberation with affected groups a condition for the granting of eviction orders against unlawful occupiers through the concept of meaningful engagement. In other words, the Constitutional Court is mandating the political participation of disadvantaged groups through the concept of meaningful engagement.¹⁷⁴ More is said on the concept of meaningful engagement and its nexus with political action in Chapter Five of this thesis.

The second impact of an entrenched regime on politics is that the government is required to justify its policies, actions and expenditure of public funds to right holders and the general public. According to Mureinik, the scrutiny of governmental actions and policies and the justification thereof is the essence of constitutional rights.¹⁷⁵ The importance of this feature of the regime stems from the importance of allocation and expenditure of public funds in poverty alleviation efforts. As has also been pointed out by a scholar, ‘...the major criterion for effectiveness and impact of budgets is the contribution to poverty reduction. This is especially so in the context of developing societies....’¹⁷⁶ Budgeting is therefore a sensitive and important matter that cannot be left to government or bureaucrats alone when wealth redistribution or equitable allocation of resources becomes an issue.¹⁷⁷ Thus, justiciable socio-economic rights, when interpreted in a manner consistent with the ideals of constitutional democracy and in the context of an appropriate understanding of democracy, have the potential to enable individuals and groups not only to engage with and demand reasoned justification from government. Citizens will be able to hold government to account with respect to allocation and expenditure of public funds and demand reasoned justification and account in respect of other governmental actions and policies for a more responsive and accountable government. As pointed out by Mureinik, in an entrenched socio-economic

¹⁷² 2010 3 SA 454 (CC).

¹⁷³ 2010 2 BCLR 99 (CC)

¹⁷⁴ See S Liebenberg ‘Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’ (2012) 12 (1) *African Human Rights Law Journal* 1 for a robust discussion of the potentials and limits of the meaningful engagement strategy of the Constitutional Court.

¹⁷⁵ E Mureinik ‘Beyond a charter of luxuries: Economic rights in the constitution’ (1992) 8 *South African Journal on Human Rights* 462 at 469 – 474. See also E Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31.

¹⁷⁶ M Kankwenda ‘A donor’s perspective on pro-poor budgeting’ (2001) 1 (2) *Journal of Economic, Social and Cultural Rights* 29 at 30.

¹⁷⁷ M Kankwenda ‘A donor’s perspective on pro-poor budgeting’ (2001) 1 (2) *Journal of Economic, Social and Cultural Rights* 29 at 30; see also E Onyekpere ‘Civil society intervention strategies on the management and allocation of public expenditure’ (2002) 1 (5) *Journal of Economic, Social and Cultural Rights* 59.

rights regime the courts will be entitled to scrutinise and ask the government to justify its policy choices against the background of the state's commitment to provide the basic necessities of life to citizens. The prospect of this inquiry and review may compel some public servants to carefully consider the effectiveness of their programmes.¹⁷⁸ This situation can be contrasted with the case of the inclusion of socio-economic rights as directive principles of state policy. Under such a regime, the courts clearly will have no constitutional basis, or at best a weaker constitutional basis for any enquiry or review. Such a review or enquiry is even constitutionally forbidden in Nigeria by virtue of the provisions of section 6 (6) (c) of the Nigerian Constitution. Through the directive principles approach, the bottom has clearly been taken off one of the means available to citizens to call governments to account and the ability of citizens to be part of governmental decision-making process has been thereby compromised.

The third potential of an entrenched socio-economic rights regime for politics is that the regime is not only more likely to enable curial political action as discussed above, but it is also more likely to provide platforms around which extra-curial political action can be furthered. In other words, the framework is more likely to legitimise actions that would otherwise be illegitimate but for constitutionally entrenched socio-economic rights. A comparative illustration of the point being made here will make my argument clearer. Service delivery protests in South Africa will not generally be regarded as illegal or illegitimate if they have not crossed the threshold of legality and degenerated into riots that threaten public peace. What is more, should the protests fail the protesters can have recourse to the law courts to enforce their threatened or breached socio-economic rights. In Nigeria on the other hand, socio-economic rights related protests will *ab initio* be illegal and illegitimate unless some smart lawyers can bring the action within the ambit of any of the civil and political rights entrenched in the Nigerian Constitution. This may, however, be a little difficult if the protest is not related to employer/employee trade disputes, the umbrella under which very many of the socio-economic rights related protests have taken place in Nigeria as will be shown in Chapters Four and Five of this thesis. Furthermore, should the protests fail

¹⁷⁸ E Mureinik 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* 462 at 469 – 474. See also E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 469 – 474.

in Nigeria; there cannot be any recourse to the courts. That option is foreclosed under Nigeria's socio-economic rights framework.

Fuller illustration of how entrenched socio-economic rights regime may further political action through provision of a platform for action is done in Chapter Five of this thesis. Suffice it to say here that it is on record that while litigation was pending in the High Court in the case of *Mazibuko and Others v City of Johannesburg and Others*,¹⁷⁹ the respondents (state) increased the amount of free water per household (the bone of contention between the parties in that case) to ten kilolitres of water per month under a newly created policy probably engendered by the litigation. It is also on record that existence of a right to water under South Africa's bill of rights and the accompanying favourable decisions of the lower courts in the case boosted the morale of the struggle and enlarged the scope for political action through a re-invigoration of water-related struggles by activists in other municipalities around South Africa.¹⁸⁰

Positive obligation of the state to provide

The second feature of South Africa's entrenched socio-economic rights framework that can be deduced from discussion in section 2.1 of this Chapter is that the framework imposes positive obligations on the state to provide basic necessities of life to those in need of them. Thus, of the four levels of obligations that all types of human rights frameworks impose on states, the positive obligation to fulfill is the most important for socio-economic rights. It is this feature of the regime that has provoked the most opposition from libertarians and democratic theorists alike. My conceptual starting point for discussing the potential of this

¹⁷⁹ 2010 (3) BCLR 239 paras 81 and 96 (CC).

¹⁸⁰ See J Dugard 'Civic action and legal mobilisation: the Phiri water meters case' in J Handmaker and R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 73 at 91 – 95

feature of the regime to further politics is again Fraser's 'parity of participation' as a notion of social justice.¹⁸¹

According to Frazer, this norm of social justice '...requires social arrangements that permit all members of society to interact with one another as peers.'¹⁸² This norm of social justice rests upon and revolves around three distinct yet intertwined conditions. Frazer describes the requisite conditions thus:

First, the distribution of material resources must be such as to ensure participants' equal capacity for social interaction. This condition precludes economic structures that institutionalise deprivation, exploitation, and gross disparities in wealth, income, labour and leisure time, which prevent some people from participating as on a par with others in social life. Second, the status order must express equal respect for all participants and ensure equal opportunity for achieving social esteem. This condition precludes institutionalised patterns of cultural value that systematically depreciate some categories of people and the qualities associated with them, thus denying them the status of full partners in social interaction. Finally, the political constitution of society must be such as to accord roughly equal political voice to all social actors. This condition rules out electoral decision rules and media structures that systematically deprive some people of their fair chance to influence decisions that affect them.¹⁸³

Frazer's parity of participation thus requires the satisfaction of the economic, cultural and political conditions of citizens. And while these conditions are conceptually distinct, they are nonetheless intertwined. This is because the lack of material or economic wherewithal for equal participation is most likely to lead to the deprivation or lack of the other two conditions and *vice versa*.¹⁸⁴

Frazer's theory of social justice outlined above brings into sharp relief the essential connection between the positive obligation of state to provide economic/material sustenance and political participation/action. More specifically, the positive obligation of states to provide implicates and has the potential to enable politics in at least two ways. The first is

¹⁸¹ N Fraser 'Social Justice in the Age of Identity Politics' in N Fraser & A Honneth (trans J Golb, J Ingram & C Wilke) *Redistribution or Recognition? A Political- Philosophical Exchange* (2003) 7. This concept has been more adequately discussed in Chapter One.

¹⁸² N Frazer 'Social exclusion, global poverty and scales of (in) justice: Rethinking law and poverty in a globalizing world' (2011) 22 *Stellenbosch Law Review* 452 at 455.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

through enabling civic equality and the second is through the enhancement of the autonomy and dignity of individuals.

First, there is a very large body of literature establishing the nexus between socio economic rights and substantive equality as opposed to formal equality of citizens.¹⁸⁵ This literature establishes that the presence or provision of material sustenance where same is lacking enables the enjoyment of other rights. Thus, as has rightly pointed out by Agbakwa, the enjoyment of socio- economic rights is the key to the enjoyment of civil and political and other rights in Africa. According to him ‘...want and deprivation create an atmosphere that is not conducive to the enjoyment of civil and political rights’.¹⁸⁶ He consequently counseled a holistic approach to the issue of human rights in Africa. The South African Constitutional Court is also of the same with Agbakwa on this point. Thus, in *Government of the Republic of South Africa and Others v Grootboom and Others*,¹⁸⁷ the Constitutional Court views all rights as inter-related and mutually supporting. According to the Court ‘There can be no doubt that human dignity, equality and freedom, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2’.¹⁸⁸ Quite a number of other commentators affirm this point of view.¹⁸⁹

¹⁸⁵ G Brodsky & S Day ‘Denial of the means of subsistence as an equality violation’ (2005) *Acta Juridica* 149; S Fredman ‘Providing equality: Substantive equality and the positive duty to provide’ (2005) 21 *South African Journal on Human Rights* 163; G Brodsky & S Day ‘Beyond the social and economic rights debate: Substantive equality speaks to poverty’ (2002) 14 *Canadian Journal of Women and the Law* 184; D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 1; M Jackman ‘Constitutional contact with the disparities in the world: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law’ (1994) 2 *Review of Constitutional Studies* 76; S Liebenberg and B Goldblatt ‘The interrelationship between equality and socio economic rights under South Africa’s transformative constitution’ (2007) 23 *South African Journal on Human Rights* 335; R Kunnemann ‘A coherent approach to human rights, (1995) 17 *Human Rights Quarterly* 323.

¹⁸⁶ S C Agbakwa ‘Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights (2002) 5 *Yale Human Rights and Development Law Journal* 177 at 206. See also J Donnelly ‘Human rights, democracy and development’ (1999) 21 *Human Rights Quarterly* 608 at 610 who also opines that those living on the economic brink with no prospect of a better life are much less likely to be willing to respect the rights of others.

¹⁸⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169.

¹⁸⁸ *Id* at para 23.

¹⁸⁹ See M Cappelletti ‘The future of legal education. A comparative perspective’ (1992) 8 *South African Journal on Human Rights* 1 at 10 who is of the view that: ‘Far from representing a luxury of a few ‘rich’ nations, social rights are a sine qua non for modern societies. Indeed, even more so for developing societies...’ See also R Kunnemann ‘A coherent approach to human rights’ (1995) 17 *Human Rights Quarterly* 323; M Jackman ‘Constitutional contact with the disparities in the world: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law’ (1994) 2 *Review of Constitutional Studies* 76; S Liebenberg and B

The second potential of the positive obligation of states to provide socio economic rights for equality and enablement of citizens' participation in politics is through the enhancement of the autonomy and dignity of the individual. The fact that lack of subsistence rights nullifies the autonomy of the individuals and makes them a little less worthy than other human beings has long been recognised in the literature for centuries. Thus, the Lord Chancellor Henley of the English Chancery long ago in *Vernon v Bethell*¹⁹⁰ made the point that: '...necessitous men are not, truly speaking, free men; but, to answer a present exigency, will submit to any terms that the crafty may impose upon them'. The same point has more recently been made by Fabre who opines '[i]f we are hungry, thirsty, cold, ill and illiterate, if we constantly live under the threat of poverty, we cannot decide on a meaningful conception of the good life, we cannot make long-term plans, in short we have very little control over our existence'.¹⁹¹ The absence of social rights impairs the ability of the poor to participate in politics by rendering them incapable of developing the necessary mental and physical capacity for autonomy. This also imperils their dignity in particularly significant ways by subjecting them to economic, social and political conditions that make them little less worthy than other human beings.¹⁹² Dignity and autonomy of the individual is the *raison detre* for the existence and entrenchment of human rights in liberal democratic theory. The absence of social rights therefore makes nonsense of these liberal ideals and renders infantile the political philosophy of bourgeois liberal democracy which is aimed, in theory at least, at the participation of all citizens in government.

What the above points try to establish is that the positive obligation of the state to provide socio-economic rights equalise the playing field of politics and enhances the ability of citizens to participate as peers in society and politics through the provision of economic wherewithal and the enhancement of the autonomy and dignity of individuals.

Goldblatt 'The interrelationship between equality and socio economic rights under South Africa's transformative constitution' (2007) 23 *South African Journal on Human Rights* 335; among others.

¹⁹⁰ 28 E R 838 at 839.

¹⁹¹ C Fabre 'Constitutionalising social rights' (1998) 6 *The Journal of Political Philosophy* 263 at 267.

¹⁹² See also R Kunnemann 'A Coherent approach to human rights' (1995) 17 *Human Rights Quarterly* 323; N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451 at 452.

Limitation of governmental exercise of power and majoritarian politics

The third feature of an entrenched framework as identified above is that it constitutes a limitation on laws, policies and governmental exercise of power and a limitation on the politics of the majority (majoritarian democracy). Socio economic rights *qua* rights like all other entrenched rights limit the exercise of governmental power.¹⁹³ It also limits the scope of majoritarian politics and put subsistence rights beyond the whims and caprices of transient electoral majorities.¹⁹⁴ This results from the fact that inclusion in a bill of rights transforms such rights into norms that serve as a check on the overarching powers of state. Once they become part of a bill of rights, the supervision and review of these constitutional promises of bread become vested in an independent and impartial arbiter: the courts, which may invalidate laws and policies inconsistent with them. The norms therefore become boundaries beyond which majoritarian politics cannot go. While there are democratic objections from some democratic scholars on this feature of the regime as pointed out above,¹⁹⁵ constitutional rights scholars have argued that these objections as well as the distinctions made between civil and political rights and socio economic rights are illegitimate and cannot stand critical scrutiny.¹⁹⁶ The likely effect of the limitations placed on the powers of the state and on majoritarian politics by an entrenched socio-economic rights regime in favour of the disadvantaged individuals and groups as deducible from the foregoing discussion is to preserve political space for the participation and involvement of materially disadvantaged persons and groups as material minorities. This, even though they may constitute numerical majorities in fact.

¹⁹³ See also B O Nwabueze *The Presidential Constitution of Nigeria* (1982) at 247 – 254.

¹⁹⁴ E Mureinik ‘Beyond a charter of luxuries: Economic rights in the constitution’ (1992) 8 *South African Journal on Human Rights* 462 at 468

¹⁹⁵ See for instance, M Cranston ‘Are there any human rights?’ (1983) 112 *Daedalus* 1; D M Davis ‘The case against the inclusion of socio-economic demands in a bill of rights except as directive principles’ (1992) 8 *South African Journal on Human Rights* 475

¹⁹⁶ See F Michelman ‘Welfare rights in a constitutional democracy’ (1979) *Washington University Law Quarterly* 659; E Mureinik ‘Beyond a charter of luxuries: Economic rights in the constitution’ (1992) 8 *South African Journal on Human Rights* 462; N Haysom ‘Constitutionalism, majoritarian democracy and socio-economic rights’ (1992) 8 *South African Journal on Human Rights* 451; J Donnelly ‘Human rights, democracy and development’ (1999) 29 *Human Rights Quarterly* 608.

Having examined the pertinent features of South Africa's entrenched regime and how they implicate politics above, I turn to the examination of the pertinent features of Nigeria's directive principles regime and how they implicate political action below.

2.3.2 Pertinent features of Nigeria's directive principles and potential for politics

De Villiers has helpfully identified two important characteristics of directive principles.¹⁹⁷ One, that the regime is not enforceable in court; and two, that it informs laws and policies. However, as can be gathered from my discussion on the legal implications of Nigeria's directive principles regime in section 2.2.1, De Villiers' identified characteristics will need to be adapted. Consequently, the pertinent features of Nigeria's directive principles framework as can be gathered from earlier discussion and adaptation of De Villiers' identified characteristics are as follows: One, the framework is not enforceable in court; and two that the implementation of the provisions of the framework is left by law to the discretion and mercy of a benevolent government/majority. These features are now discussed in turn.

Unenforceability in court

Ikhariale has correctly argued that the intention of the drafters of the 1979 Constitution was that Nigeria's directive principles should not be subject of judicial review.¹⁹⁸ 'The expectation was that government will be honour-bound to comply with them'¹⁹⁹ he says. This conclusion was correctly derived from the position and subsequent report of the Constitution Drafting Committee (CDC) during the preparation of the 1979 Constitution.²⁰⁰ It was as a result of this conclusion of the CDC accepted by the then military government that the provision of section 6 (6) (c) of the 1979 Constitution which ousts the jurisdiction of the

¹⁹⁷ B De Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29 at 34.

¹⁹⁸ M Ikhariale 'Political and economic stability and the justiciability question' in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 126.

¹⁹⁹ Id at 149.

²⁰⁰ See generally, W I Ofonagoro *et al* (eds) *The great debate – Nigerian viewpoints on the draft Constitution* (1976/1977) 1 – 83.

courts with regard to the provisions of Chapter II was inserted in the 1979 Constitution and duplicated in the current Nigerian Constitution. And as I earlier pointed out, this position of the law has been confirmed ever since. For instance, the Nigerian Court of Appeal has said in this regard that breaches of Nigeria's directive principles can only be remedied by the legislature or the electorates.²⁰¹ The Court has thus pronounced: 'It seems clear to me that the arbiter for any breach of and the guardian of the Fundamental Objectives and Directive Principles of State Policy, subject to what I will say hereafter, is the legislature itself or the electorate.'²⁰²

The effects of the foregoing have already been discussed in section 2.2.1 above. Suffice it to say here however that what that means is that no individual(s) or group can approach the court to complain about the threatened breach or breaches of the provisions of Nigeria's directive principles. The implication of this for political action can be summarised as follows: First, unlike in South Africa, there is no forum provided for materially disadvantaged individuals or groups to participate or air their grievances. Two, except through the doubtful and periodic electoral mechanism, there is no mechanism through which the Nigerian citizens can hold the government to account for policy choices their government makes, unlike in South Africa. Three, there is no constitutional platform around which poverty-related struggle can be furthered.

Implementation at the mercy of a benevolent government or majority

In spite of the fact that directive principles are supposed to constitute the bedrock of governance and thereby inform laws and policies, the fact that the compliance or otherwise of the government cannot be questioned by anybody leaves the implementation of the regime at the sole mercy and discretion of a benevolent government. There is however literature which rightly confirms that governments in Africa are neither benevolent nor pro-poor. As rightly pointed out by Omidire: 'Experience in many developing countries, and perforce Nigeria, continues to confirm the fact that the exercise of State power is influenced by considerations

²⁰¹ *Archbishop Okogie v The Attorney-General of Lagos State* [1981] 2 NCLR 337.

²⁰² *Id* at 350.

other than the sole benefit of the people.’²⁰³ This view of governments in Africa is shared by other scholars.²⁰⁴ Additionally, as rightly observed by Ogbu, experience in Nigeria showed that governments have generally ignored the directive principles in the absence of judicial enforcement.²⁰⁵

One of the implications of the above state of affairs is that the poor are liable to continue to get poorer without any enforceable obligation on the government to do anything, which has led to successive governments in Nigeria doing ‘nothing’, as some literature has correctly pointed out. Furthermore, in addition to the fact that the more affluent, who often-times are numerically inferior to the poor, may continue in practice to be in control of the latter’s political, economic and cultural destiny, the constitution will also be privileging the interests and rights of the rich over those of the poor. This is because in a directive principles regime, the tendency of courts is to privilege civil and political rights over the provisions of directive principles as I already pointed out in earlier discussion.²⁰⁶ While India is an exception to this rule, Nigeria appears a validation of that supposition as Nigerian courts have tended to privilege fundamental rights in Chapter IV of the 1979 Constitution over the provisions of Chapter II of that Constitution (same as in the current Nigerian Constitution).²⁰⁷

I have already established the connection between material wherewithal and political participation or action in section 2.3.1 above. The consequence of the points made above and the absence of positive obligations of the state to provide under the directive principles of state policy is therefore to impair the equality and dignity of the materially disadvantaged and compromise their ability to participate as peers with the more materially endowed or privileged in the society. This is likely to further their exclusion from mainstream politics and deepen their poverty.

²⁰³ K Omidire ‘History, objectives and implications of entrenchment of fundamental objectives and directive principles of state policy in the Nigerian Constitution’ in in E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 17 at 25

²⁰⁴ See for instance, E Pieterse and Van Donk M ‘Incomplete ruptures: the political economy of realising socio-economic rights in South Africa’ (2002) 6 *Law, Democracy and Development* 193.

²⁰⁵ O N Ogbu ‘The fundamental objectives and directive principles of state policy as a barometer for appraisal of Nigeria’s nascent democracy’ (2002) 1 (3) *Journal of Economic, Social and Cultural Rights* 75 at 85.

²⁰⁶ See also S Fredman ‘Providing equality: Substantive equality and the positive duty to provide’ (2005) 21 *South African Journal on Human Rights* 165 at 168 – 169.

²⁰⁷ See for instance in this regard, *A J A Adewole and Others v Alhaji L. Jakande and Others* (1981) 1 NCLR 262 and *Archbishop Okogie v The Attorney-General of Lagos State* [1981] 2 NCLR 337.

By way of a summary, South Africa's constitutionally entrenched socio-economic rights framework has the potential to enable politics/political action for vulnerable and materially disadvantaged individuals and groups in at least five main ways: (1) by providing a forum for political action for the materially disadvantaged which mainstream institutions may not have provided for them; (2) by providing mechanisms through which the materially disadvantaged may call government to account; (3) by providing a platform around which curial and extra-curial poverty-related struggle may be furthered; (4) by its likelihood to empower the poor to participate as peers in society; and (5) by taking socio-economic entitlements outside the depredations of electoral majorities. Nigeria's directive principles framework on the other hand disables politics by doing the exact opposites. From the foregoing analysis therefore, entrenched frameworks appear to be better-suited to and to further political action better than directive principles frameworks, weighty objections of democratic and some progressive scholars to rights discourse vis-a-vis politics notwithstanding.

2.4 CONCLUSION

I in this chapter interrogate which of the two socio-economic rights frameworks of the countries under examination, South Africa's entrenched socio-economic rights regime or Nigeria's directive principles of state policy regime, is more likely to further political action. This I have done by identifying and discussing the pertinent features of each framework and the implications of the identified features for political action. My analysis revealed that South Africa's entrenched socio-economic rights framework has the potential to enable politics in at least five ways: First, by providing a forum for political action for materially disadvantaged persons and groups. Two, by providing rights-mediated mechanisms to hold governments to account. Three, through the provision of platform around which curial and extra-curial poverty-related struggle may be furthered. Four, through the framework's likelihood to materially empower the poor to participate as peers in society. And finally, by taking socio-economic entitlements outside the depredations of electoral majorities. My analysis in the

Chapter also revealed that Nigeria's directive principles framework on the other hand is likely to disable politics by doing the exact opposites.

Having determined in this Chapter that from the texts of the frameworks, South Africa's entrenched socio-economic rights framework appears to be more amenable to political action than its Nigerian counterpart, I in the next Chapter identify and discuss the more dominant models of democracy in contemporary democratic discourses. The scope of the identified models for politics and deepening of democracy are also discussed, after which I theorise a conception of democracy that is rooted in African political philosophy which I think is likely to be more participation/political action friendly in contemporary Africa.

CHAPTER THREE

A JUDICIAL UNDERSTANDING OF DEMOCRACY APPROPRIATE FOR POLITICAL ACTION IN CONTEMPORARY AFRICA

3. INTRODUCTION

In the preceding chapter, I examine the constitutional frameworks for socio-economic rights protection in both South Africa and Nigeria. This is in order to determine which of the two frameworks, from their texts alone, is more likely to further political action. My analysis in the chapter revealed that South Africa's entrenched socio-economic rights framework appears to be more likely to further political action than its directive principles counterpart in Nigeria. However, the importance and potential impact of courts' interpretive work in either enlarging or constraining the space for politics and necessary action for transformation and in realising objectives contained in constitutional texts in constitutional democracies like South Africa and Nigeria underscores the importance of an appropriate conception of democracy by the courts. Consequently, my main objective in this chapter is to theorise an appropriate judicial conception of democracy suitable for the enlargement of the public sphere and space for political action of citizens. Thus is something that I argue is essential to a political/resistance approach to effective socio-economic rights transformation in South Africa and Nigeria in the first instance, and the rest of the countries in Africa sharing cultural and contextual similarities with these two.

Consequently, I argue first that democracy within the meaning of popular government is not the exclusive preserve of the West. There is historical and anthropological evidence (as I will later show in this chapter through my examination of pre-colonial African political systems) that

democracy in terms of popular government is not a western invention. It appears to have been independently evolved upon the availability of suitable conditions in different parts of the world at different times.¹ Second, I argue that bourgeois liberal democracy is not in fact democracy within the meaning of popular and participatory forms of government. This point I will enlarge upon later in this chapter. Third, I contend that a notion of democracy that is able to enlarge the space for political action of citizens for a more effective socio-economic rights transformation is found in pre-colonial Africa. As claimed by Ake, ‘...liberal democracy offers a form of participation which is markedly different from *and arguably inferior to the African concept of participation*.’² Fourth, I contend that a culturally compatible notion of democracy has become a *sine qua non* if democracy is to be sustained in Africa. This is because, for one thing, I think An-Naim has rightly argued that for concepts like constitutionalism, democracy and human rights to work there must be civic engagement by critical mass of the people;³ or as Mokgoro and Woolman will put it, the concepts must accord with the lived experiences of the people.⁴ For another thing, bourgeois liberal democracy that is received by Africa from the West is an alien form of government which is at variance with African ‘cultural and contextual particularities’⁵ and makes little sense in contemporary Africa. A point buttressed by Ake thus:

...the familiar political assumptions and political arrangements of liberal democracy make little sense in Africa. Liberal democracy assumes individualism, but there is little individualism in Africa: it assumes the abstract universalism of legal subjects, but in Africa that would apply only in the urban environment; the political parties of liberal democracy do not make sense in societies where associational life is rudimentary and interest groups remain essentially primary groups.⁶

There is therefore need to fashion an alternative model of democracy to fit the cultural context and contextual political arrangements of Africans in Africa. It is as a result of this that several African scholars/political theorists have already put forward their views of what the appropriate

¹ This position is also supported by Dahl. See R A Dahl *On democracy* (1998) 9 – 10.

² C Ake ‘The unique case of African Democracy’ (1993) 69 (2) *International Affairs* 239 at 243 (Emphasis supplied).

³ A An-Naim ‘Religion, the state and constitutionalism in Islamic and comparative perspectives’ (2008-2009) 57 *Drake Law Review* 829.

⁴ Y Mokgoro and S Woolman ‘Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell’s thoughts’ in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 241 at 242 – 243.

⁵ To borrow An-Naim phrase. See A An-Naim ‘The legal protection of human rights in Africa: How to do more with less’ in A Sarat and T R Kearns (eds) *Human rights: Concepts, contests and contingencies* (2001) 89 at 102 – 103.

⁶ C Ake ‘The unique case of African Democracy’ (1993) 69 (2) *International Affairs* 239 at 243.

political theory/philosophy of democracy for Africa should be. Some of these political theorists and their views will be examined shortly. The extent to which their theories further or constrain politics/political action will also be discussed later in this chapter.

In addition to the works of African political philosophers referred to above, there is also growing recognition and tendency at the African regional level to invoke African values as basis for action. This is noticeable in many of the diverse instruments emanating from both the Organisation of African Unity (OAU) and the African Union (AU), the regional body that superseded OAU in the region. For example, the African Charter on Human and Peoples' Rights (the African Charter) provides that the virtues of their historical tradition and the values of African civilisation should inspire and characterise member states' concepts of human and peoples' rights.⁷ The African Charter further provides that every individual has the fundamental right under the Charter freely to take part in the cultural life of his/her community⁸ and that member states are under obligation to protect and promote the moral and traditional values recognised by the community.⁹ In addition to this, there is the African Youth Charter which mandates member states to take steps to promote and protect the moral and traditional values recognised by the community without prejudice to the physical integrity and dignity of women.¹⁰

Furthermore, there is also the Charter for African Cultural Renaissance of 2006 which states that African culture is meaningless unless it is allowed to play a full part in the political, economic and social liberation struggles and rehabilitation and unification efforts in Africa, among other things.¹¹ The Charter has 12 different objectives which include: '[t]o assert the dignity of African men and women as well as the popular foundations of their culture;'¹² '[t]o promote freedom of expression and cultural democracy, which is inseparable from social and political democracy;'¹³ '[t]o promote an enabling environment for African peoples to maintain and reinforce the sense

⁷ The Preamble to the African Charter.

⁸ Article 17 (2) of the African Charter.

⁹ Article 17 (3) of the African Charter.

¹⁰ Article 20 (1) (a) of the African Youth Charter.

¹¹ See the Preamble to the Charter for African Cultural Renaissance.

¹² Article 3 (a) of the Charter for African Cultural Renaissance.

¹³ Article 3 (b) of the Charter for African Cultural Renaissance.

and will for progress and development;¹⁴ '[t]o preserve and promote the African cultural heritage through preservation, restoration and rehabilitation;¹⁵ and '[t]o combat and eliminate all forms of alienation, exclusion and cultural oppression everywhere in Africa;¹⁶ among others. The Charter therefore obliges state parties to, among other things; create an enabling environment for cultural innovation and development through the guarantee of freedom of expression for citizens and other cultural stakeholders.¹⁷

Lastly, the African Charter on Democracy, Elections and Governance (the African Charter on Democracy) also underpins the importance and vital role of traditional authorities and culture in modern democracy. The Charter therefore provides that State Parties shall strive to increase the effectiveness and integration of traditional authorities within the larger democratic system.¹⁸

What the foregoing brief examination shows is that there is a growing recognition at the African regional level of the importance and potency of African culture and values as vehicles for social change and development in contemporary Africa. This development is in accord with the growing counter-hegemonic movement currently noticeable across the world, especially in Latin America and Africa, to re-inject emancipatory content into the discourse and practice of democracy through a thorough-going critique and contestation of current notions of democracy and the presentation of workable alternatives forms suitable to the cultural and political context and need of these countries as a means to social justice and emancipation.¹⁹ This chapter is my own humble contribution to this emerging counter-hegemonic movement. I therefore intend to articulate, or if you may, theorise, an alternative and appropriate judicial conception of democracy for South African and Nigerian courts which will aid political action for socio-economic rights transformation through an enquiry into worldview and theory of government that can be garnered from historical and anthropological evidence of systems I take to be

¹⁴ Article 3 (c) of the Charter for African Cultural Renaissance.

¹⁵ Article 3 (d) of the Charter for African Cultural Renaissance.

¹⁶ Article 3 (e) of the Charter for African Cultural Renaissance.

¹⁷ Article 9 of the Charter for African Cultural Renaissance.

¹⁸ Article 35 of African Charter on Democracy, Elections and Governance.

¹⁹ S Bhulungu 'Reinventing participatory democracy in South Africa' in B De Sousa Santos (ed) *Democratizing democracy: Beyond the liberal democratic cannon* (2005) 38 at 61 – 63.

representative examples of pre-colonial African systems of government as well as from relevant African philosophical literature.

In furtherance of the afore-mentioned objectives, this chapter is divided into eight sections. In section one, after this introduction; I examine the main or the more popular conceptions of democracy noticeable or deducible from the discourse on democracy. In section two, I examine the perspectives and prescriptions of some African political scientists/scholars as regards appropriate theories of politics in Africa. I also identify in this section the defects in their prescriptions vis-à-vis scope for effective political action. The views of some more contemporary theorists who are also arguing for the infusion of African values, ideals and philosophies into law and politics in Africa are also examined in the section. In section three, I examine the nature and state of bourgeois liberal democracy in Africa. In section four, I examine some of the factors that appear to be responsible for the untoward state of bourgeois liberal democracy in Africa. In section five, I examine African worldviews and theories of government as can be gathered from historical and anthropological evidence of what appears to be representative examples of pre-colonial African political systems as well as from relevant African philosophical literature. This is in order to find out whether there is a workable alternative to bourgeois liberal democracy in African epistemology with regard to enabling effective politics in African democracy. In section six, I examine the impact of colonialism on pre-colonial African political systems. In section seven, I articulate an African based conception of democracy from the features, ideals and principles derived from the examination and analysis of African political theories and systems done in section five. Section eight concludes the chapter.

3.1 CONCEPTIONS/MODELS OF DEMOCRACY NOTICEABLE FROM DEMOCRATIC DISCOURSE

There is a noticeable proliferation of theories on democracy. While some scholars think these are spurious and fraudulent usages of the word ‘democracy’,²⁰ others think the proliferation is meant to either offer ‘strictly descriptive accounts of actually existing democracy’ or are seeking to ‘extend our understanding of the ideal form of democracy in the modern state’.²¹ On my part, however, I think the proliferation of democratic theories can best be explained away on the basis of theorists’ dissatisfaction and disenchantment with liberal/representative democracy²² and the consequent search for viable alternatives which will address the theorists’ particular problem area. Thus, we have theorists who are unhappy with the winner takes all *modus operandi* of liberal/representative democracy proposing the concept of consociational democracy;²³ while theorists concerned with the exclusionary nature of bourgeois liberal democracy propound the concept of participatory democracy;²⁴ those dissatisfied with the neo-liberal and market oriented agenda of liberal/representative democracy propound the theory of social democracy;²⁵ and those dissatisfied with bourgeois liberal democracy’s entrenchment of the *status quo* and slow change came up with the idea of radical democracy;²⁶ among many others.

Among the ever-growing lists of democratic theories, however, there appear to be some that, in my opinion, have become more popular and a recurring decimal in contemporary discourses on democratic theory. These are direct democracy, representative democracy, participatory democracy, deliberative democracy, constitutional democracy and radical democracy. The foregoing forms/conceptions of democracy will now be discussed in turn.

3.1.1 Direct democracy

²⁰ See for instance, L Kolakowski ‘Uncertainties of a democratic age’ (1990) 1 *Journal of Democracy* 47.

²¹ See for instance, T Roux ‘Democracy’ in Woolman S *et al* (eds) *Constitutional law of South Africa* 2nd ed OS (2006) 10 – 2.

²² I will be using liberal/representative democracy interchangeably with bourgeois liberal democracy here.

²³ See generally, A Lijphart *Democracy in plural societies: A comparative exploration* (1977).

²⁴ See generally, C Pateman *Participation and democratic theory* (1970).

²⁵ See for instance, R Plant ‘Social democracy’ in A Carrter & G Stokes (eds) *Democratic Theory Today* (2002) 249.

²⁶ See for instance, C Mouffe *On the political: Thinking in action* (2005).

This is the earliest form of democracy known to man and is said by some scholars to have its roots in the ancient Athenian city-states and Rome.²⁷ Direct democracy as a type of human government has a long and chequered history in the West. According to Dahl, popular government first appeared in the Greek city-states of Athens around 500 B.C.E. Under Athenian democracy, an assembly was responsible for public decision-making. Membership of this assembly was open to all freeborn adult members of Athens (slaves and women were excluded) who participated in the deliberation and decision of the assembly on equal footing with other members of society without regard to hierarchy or status. The assembly directly elected a few key officials of state while vacancies for other public offices were filled by lot in which every adult member of the assembly had an equal chance of being selected for public office whatever his status. In this arrangement, ‘...an ordinary citizen stood a fair chance of being chosen by lot once in his lifetime to serve as the most important presiding officer in the government’.²⁸

According to Dahl, democracy now referred to as republic also made an appearance in the city of Rome, at about the same period of time as the one in Athens.²⁹ In the Roman arrangement, every adult male aristocrat was initially entitled to participate in an assembly similar in terms to that of Athens. Right of participation was subsequently extended to every adult male citizen of Rome after a struggle by the common people. Popular government (republic), however, perished in Rome with the assassination of Caesar in about 44 B.C.E. and disappeared from the rest of Europe for about a millennium until it again re-emerged in Italian city-states around 100 C.E.³⁰ Under the Italian city-states’ version of democracy, popular participation was again initially restricted to the members of upper class and later extended to the common people after a successful struggle. Democracy ceased again in Italy around 1300 and was replaced by authoritarian rule. It re-emerged again in England and other parts of Europe as representative

²⁷ Dahl has rendered a rather comprehensive historical account of this type of democracy in his book: R A Dahl *On democracy* (1998) 7 – 25.

²⁸ Id at 12.

²⁹ Id at 13.

³⁰ According to Dahl’s account, democracy disappeared from Southern Europe and the face of Earth for nearly a thousand years (id) at 14 – 15. This is a very bold assertion which is not supported by either historical and/or anthropological evidence. Available evidence seems to even point in opposite direction. For instance, my examination of popular government in pre-colonial Africa later in this chapter shows that popular government/democracy were independently invented and was being practiced in pre-colonial Africa thousands of years before the arrival of the colonists.

parliaments out of assemblies summoned at intervals between 1272 and 1307. This representative form of democracy as opposed to the more or less direct form of earlier times became an entrenched form of government in England in 1700 from where it spread to the rest of the world.³¹

Although not a Greek invention, direct democracy is identified more in contemporary times with the ancient Athenian city-states where public decisions were directly taken by all adult males in an Assembly where final decisions were made by the majority – oftentimes, through raised hands.³² The Assembly is recorded to have met about 40 times a year. Administrative responsibility for the meetings of the Assembly was vested in a Council of Five Hundred split into ten committees of 50 persons.³³ Athenian citizens became members of the Council of Five Hundred by lot; served one year at a time and maximum of two years per person.³⁴ However, because Athenian democracy excluded women, children, slaves and strangers, it has for that reason been said not to be democratic in the modern sense.³⁵ Other scholars are, however, of the view that Athenian democracy is the purest form of democracy yet and that modern democracy is a corruption of this authentic democracy.³⁶ While the practice of direct democracy can hardly be found in any modern government today, traces of it are still found in most democratic constitutions through provisions mandating the direct participation of citizens in defined and restricted aspects of governance. A good example is provision requiring certain decisions to be by referendum.³⁷

³¹ Ake, however, disagreed that the Roman republic, the Italian city-states and others following thereafter can be called a democracy in the mode of the Athenian one. According to him, true democracy arose and perished with the rise and decline of Athens. Other civilisations after Athens practiced nothing but a negation of what was practiced in Athens. C Ake *The feasibility of democracy in Africa* (2000) 7 – 9.

³² J Keane ‘Democracy – A short history’ available at <http://johnkeane.net/36/topics-of-interest/democracy-a-short-history> (accessed on 3 May 2013).

³³ T Roux ‘Democracy’ in S Woolman *et al* (eds) *Constitutional law of South Africa* 2nd ed OS (2006) 10 – 5.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ K Malan *Politocracy* trans J Scott (2012) 197 – 203.

³⁷ See for instance, section 8 (1) (b) and (3) (b) of the Constitution of the Federal Republic of Nigeria 1999, as amended, which require that proposal to create a new state or a new local government area is to be supported by two – thirds majority of the people in the area of proposed state or local state in a referendum.

3.1.2 Liberal/Representative democracy

This is the dominant form of democracy today. Kolakowski³⁸ identified three components of representative democracy thus: One, ‘...a set of institutions aimed at assuring that the power and influence of political elites correspond to the amount of popular support they enjoy’. Two, ‘...the independence of the legal system from the executive power; the law acts as an autonomous mediating device between individual or corporate interests and the state, and is not an instrument of ruling elites’. And three, ‘...enforceable barriers built into the legal system that guarantee both the equality of all citizens before the law and basic personal rights, which (though the list is notoriously contestable) include freedom of movement, freedom of speech, freedom of association, religious freedom, and freedom to acquire property’. The basic ideal of representative democracy is a government based on the authority and consent of all adult members of a political community. This authority and consent is given by all adult members of the political community to the rulers under a system of universal adult suffrage in elections at periodic intervals. As rightly observed by Nwabueze: ‘The underlying idea [of representative democracy] is the popular basis of government, the idea that government rests upon the consent of the governed, given by means of elections at periodic intervals of time, in which the franchise is universal for all adult men and women and that it exists for their benefit’.³⁹

Quite a number of theorists have, however, argued, first; that representative democracy is a trivialised concept. Two, that the alleged authority and consent of the ruled is nothing but a myth; and, three that the alleged sovereignty of the people under representative/liberal democracy is nothing but a farce. For instance, Ake has strongly argued that bourgeois liberal democracy is in fact not democracy at all but a trivialisation of authentic democracy found in ancient Athens.⁴⁰ According to Ake, despite the controversy surrounding the meaning of democracy, democracy is in fact a very precise political concept. He states thus: ‘For a political concept, ‘democracy’ is uncharacteristically precise. It means popular power, or in a famous

³⁸ L Kolakowski ‘Uncertainties of a democratic age’ (1990) 1 (1) *Journal of Democracy* 47.

³⁹ B Nwabueze *Judicialism and good governance in Africa* (2009) 22.

⁴⁰ C Ake *The feasibility of democracy in Africa* (2000).

American version, government of the people, for the people, by the people.’⁴¹ Ake notes that democracy within the ambit of foregoing definition was practiced only in Athens and with the decline of Athens authentic democracy also declined and never recovered.⁴²

Ake notes further that the so called founding fathers of bourgeois liberal democracy viz: Thomas Hobbes and John Locke, were not in fact theorising forms of popular government. This is so because both were in fact actuated by entirely different motives. Their motivation was thus not how to ensure citizen sovereignty or participation in government at all. According to Ake, the driving force of Thomas Hobbes’ theory was how to ensure political order in the political society of England of his time and not any theory of democracy.⁴³ This he said stemmed from Hobbes’ experience in Britain of his time which was characterised by civil strife and political instability. Hobbes thus conceived man in a disordered state of nature of ‘war of all against all’⁴⁴ and sought therefore to provide a theory of political order without which the formation and survival of any political society will be impossible. This theory of order Hobbes found in the theory of social contract whereby members of a political community came together and agreed among themselves to surrender their natural rights to the Leviathan, a neutral person or group of persons who will act as sovereign. The main purpose of the surrender of rights by members of the political community to a neutral sovereign was not for the purpose of participation in government but so that the sovereign will maintain order in the political society.⁴⁵

For John Locke on the other hand, Ake argued that his driving motivation was ordered enforcement of the law of nature.⁴⁶ According to Ake, Locke’s pre-political society in contradistinction to that of Hobbes was a peaceful and lawful one where everybody has the right and obligation to enforce the law of nature. Since it will however occasion disorder to allow everybody to enforce this law; a mechanism has to be found whereby this most important

⁴¹ Id at 7.

⁴² Id at 7 – 9.

⁴³ Id at 13.

⁴⁴ Id at 12.

⁴⁵ Id at 12 – 14.

⁴⁶ Id at 15.

function will be entrusted to a group of persons constituting the government to perform. It is for this purpose therefore that members of Locke's pre-political society came together and agreed among themselves to form a political society and to form also a government that will act as an enforcer of the law of nature on behalf of everybody.⁴⁷ Ake, having thus examined the real basis of the theories of the founding fathers of liberal democracy concludes as follows:

...the classical theory of liberal democracy is less an expression of democracy than its restriction. It does away entirely with the idea of popular power and it replaces the idea of self-government with that of the consent of the governed. Even so the consent of the governed is largely an abstraction which is not operationalized, especially by universal suffrage. It does not set much value on the idea of political participation or the active development of human settles (sic) for a negative conception of freedom as the absence of constraint by the state. It is not about involvement in government but about minimizing government and its nuisance value.⁴⁸

After concluding that the founding fathers of liberal democracy were not actuated by motives of popular participation, Ake then traces the development of liberal democracy first to its trivialisation into class/group interests or competition by social theorists (pluralists) seeking to explain the actual practice of government in western Europe of the 20th century;⁴⁹ and then into multiparty elections as full blown capitalism took hold.⁵⁰

Ake is not alone in his critical view of bourgeois liberal democracy as a trivialised concept. Pateman, for instance confirmed that the modern notion of liberal democracy is grounded in the concept of elite rule and periodic elections.⁵¹ According to her, the modern theory of democracy:

...refers to a political method or set of institutional arrangement at national level. The characteristically democratic element in the method is the competition of leaders (elites) for the votes of the people at periodic free elections. Elections are crucial to the democratic method for it is primarily through elections that the majority can exercise control over their leaders. Responsiveness of leaders to non-elite demands, or 'control' over leaders, is ensured primarily through the sanction of loss of office at elections; the

⁴⁷ Id at 14 – 17.

⁴⁸ Id at 16 – 17.

⁴⁹ Id at 17 – 20.

⁵⁰ Id at 21 – 26.

⁵¹ C Pateman *Participation and democratic theory* (1970) 1 – 14.

decision of leaders can also be influenced by active groups bringing pressure to bear during inter-election periods.⁵²

According to Mamdani also, what is handed down to Africa as western tradition during the colonial period is none other than the standpoint of some dominant classes in the West.⁵³ And what is called 'democracy in America' was no more than the core of Republican thought and practice in the United States the main purpose of which is to place legal limits on democratic practice and '...set parameters on popular sovereignty'.⁵⁴ In Malan's view also, liberal democracy is a deterioration of authentic Athenian democracy.⁵⁵ He states as follows:

The differences between Athenian and modern democracy are therefore much more fundamental than the mere fact that the former was direct, while the latter is representative. Each displays a different approach to man, the world and social ties. Whereas Athenian democracy was communitarian and holistic, modern democracy is individualistic. Athenian democracy defined citizenship in terms of the origins of the citizens of the *polis* and made provision for active civic political participation in the affairs of the *polis*. In contrast, modern democracy engages with citizens as atomised individuals, viewed through the prism of abstract egalitarianism. Athenian democracy was founded on the notion of an organic community, in contrast to modern democracy's focus on the realisation of individual interests.⁵⁶

In the foregoing scholars' view, bourgeois liberal democracy does not qualify to be called democracy, because for all intents and purposes its aims and objectives are other than securing citizens participation and popular power.

Of course, some of the objections to viewing Athenian democracy as authentic form of democracy by advocates of bourgeois liberal democracy are the arguments that direct democracy is only practicable in small and simple societies and unsuitable for complex and large societies of contemporary times. Also, it is argued that ordinary citizens are apathetic to and uninterested in

⁵² Id at 14.

⁵³ M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359 at 360 – 361.

⁵⁴ Id at 361.

⁵⁵ K Malan *Politocracy* trans J Scott (2012) 197 – 203.

⁵⁶ Id at 199 – 200.

politics. These arguments have, however, been debunked as untrue and without factual basis by other scholars. According to Pateman,⁵⁷ for instance, there is no empirical evidence to bear out the argument that citizens are apathetic to or uninterested in politics, the reverse in fact appears to be the case. What appears to be the problem is that ordinary citizens have not been given the necessary opportunities to learn civic participation.

In addition, Ake⁵⁸ also opines that the trivialisation of Athenian democracy into modern day representative democracy is the handiwork of the founding fathers of the American Republic as a result of political elites' fears of popular power. It was therefore not because direct democracy was not practicable in large and complex societies that representative democracy was invented. Representative democracy was invented specifically to do away with popular power. Complex and large societies were just convenient excuses.

Theory apart, there is also evidence in real life which points to the fact that direct democracy may not be impracticable in large and complex societies after all. For one, robust provisions for direct participation exist, for instance, in the Constitutions of both South Africa and Nigeria. For another, the governments of both countries have also, when it suits their politics, convened town hall meetings, consulted and enabled broad based participations of the citizens.⁵⁹ And there is ample evidence also that when citizens' participations are facilitated the latter have in fact actively participated.⁶⁰ Thus, arguments that citizens are apathetic or that direct democracy is impracticable in all circumstances are oftentimes grossly overstated.

⁵⁷ C Pateman *Participation and democratic theory* (1970) 105 – 111.

⁵⁸ C Ake *The feasibility of democracy in Africa* (2000) 10 – 12.

⁵⁹ Examples are the town hall meetings initiated by the government of Nigeria sequel to the removal of fuel subsidy on 1st January, 2012. It is also on record that South African government routinely enable broad based participation of citizens when boundaries of municipalities are to be altered. This is in order to discharge their constitutional obligations to enable broad based participation on such issues.

⁶⁰ For instance, when town hall meetings were initiated by the government of Nigeria sequel to the removal of fuel subsidy on 1st January, 2012, citizens turned out in large numbers to actively participate. Same was the case in South Africa when government routinely enabled broad based participation of citizens when boundaries of municipalities are to be altered in order to discharge constitutional obligations to enable broad based participation on such issues. Evidence gathered from the cases that later ensued in those cases is to the effects that ordinary people actively

Another criticism that has been levelled against representative democracy is that it is synonymous with neo-liberal agenda and policies. As rightly pointed out by Sader, ‘Liberal democracy and the capitalist economy constitute the core of liberal hegemony’.⁶¹ The link between capitalism and democracy has been more clearly explained by Ake.⁶² Ake argues that democracy not only has close affinity to capitalism but is actually driven by it. According to him, both capitalism and democracy have the same core values of egotism, property, formal freedom and equality.⁶³ As regards the first, both systems presuppose persons to be acting in pursuit of their self-interests only and see others as means to their own ends. A more explicit explanation or illustration of this point is by Schumpeter who is of the view that democracy is better conceived as a market where voters acting like common consumers choose among the policies (products) of political parties on offer, while the latter also acts like producers offering attractive policies (products) in order to attract enough voters (consumers) to win power (make profit).⁶⁴

As regards property, the core value of capitalism and democracy, Ake argues that both systems envisage a society of commodity exchanges by property owners who exchange what they possess for what they are lacking. Societies envisaged by both here do not accommodate those who have no value or property to exchange. And as regards the freedom value, persons in both systems must be free to enter into agreements and carry on their exchanges with very little or no interference from the state. And lastly, both capitalism and bourgeois liberal democracy assumes the formal equality of persons in their respective societies. Ake goes further to explain that both systems privilege the law which expresses the attributes of a market society over sovereignty of the people.⁶⁵

participated. In fact, the main complaint of citizens in many of the cases was that government did not allow the citizens sufficient scope for participation. Some of the cases are examined in Chapter Four of this thesis.

⁶¹ E Sader ‘Towards new democracies’ in B De Sousa Santos (ed) *Democratizing democracy: Beyond the liberal democratic cannon* (2005) 447 at 448.

⁶² C Ake *The feasibility of democracy in Africa* (2000) 21 – 26.

⁶³ Ibid.

⁶⁴ See for instance, J Schumpeter *Capitalism, socialism and democracy* (1943) 269.

⁶⁵ C Ake *The feasibility of democracy in Africa* (2000) 23.

In addition to sharing the core values of capitalism, bourgeois liberal democracy is said to in fact subordinate politics to economics and the state to markets. Ake explains this point thus:

In previous political theory, politics was always the moment of universality, the acting out of collective identity, the occasion for marrying the individual to the collectivity, setting collective goals and realizing them. It has always been the defining moment of our sociability. Liberal democracy changes this completely. In liberal democratic theory, polity and politics become the moment of particularity, completely divorced from those considerations which led humankind to refer to the state as 'res publica' or even 'the commonwealth', the instance of sociability and solidarity. Liberal democracy economicizes politics so that it is all about egotism, interests in conflict and no common interest. This is the antithesis of politics.⁶⁶

This privileging of the market over the sovereignty of the people meant that capitalism drives bourgeois liberal democracy. The privileging of the market also meant shifts of the regulatory authorities from the state to the market. Baxi has thus argued in this regard that contemporary capitalism requires states to pursue, and they are all busying pursuing the three Ds of de-regulation, de-nationalisation and disinvestment in contemporary time.⁶⁷ This has resulted in current disavowal of any redistributive role or function of the state to society⁶⁸ The effect of the foregoing has been the perpetuation of economic inequality of the less privileged in terms of material resources. This economic inequality in turn fosters and perpetuates political inequality of the poor through the constant placement of the rich and the privileged in political offices and positions of power. The effect of this has been to hinder the liberating potential of liberal democracy through the opposition and truncation of the liberating and redistributive potentials of liberal bourgeois democracy by the rich and the powerful. The *status quo* is thereby perpetuated and representative democracy becomes counter-revolutionary.

Furthermore, the foregoing has also meant that bourgeois liberal democracy is exclusionary. As pointed out by Ake above, one of the common core values of both capitalism and bourgeois

⁶⁶ Id at 25.

⁶⁷ U Baxi 'Voices of suffering and the future of human rights' (1998) 8 *Transnational Law and Contemporary Problems* 125 at 164.

⁶⁸ Ibid.

liberal democracy is property.⁶⁹ The society envisaged by both capitalism and bourgeois liberal democracy is a society of property owners. A person without property is therefore excluded from bourgeois liberal society by the operation of the market since such persons have no property (something of value in terms of the market) to exchange or trade with. This, of course will mean, the exclusion of the poor who are called poor because they lack things of value within the meaning of the market for exchange. By this exclusion of the poor and the vulnerable, representative democracy is a corruption of the very ideal of democracy within the meaning of popular government where everybody is supposed to participate as peers without regard to wealth or status.

In summary, bourgeois liberal democracy is not in fact aimed at popular power or popular sovereignty. It is in fact aimed at and is a disavowal of any concept of popular government. Its practice is also exclusionary and economically and politically disempowering and therefore counter-transformative. These defects, among others, have resulted in the search for and emergence of some new theories and alternative conceptions/forms of democracy some of which are discussed below.

3.1.3 Participatory democracy

As I mentioned above, Ake has argued that social theorists (pluralists) seeking to explain the actual practice of government in Western Europe into class/group interests or competition further trivialised democracy during the 20th century.⁷⁰ This argument of Ake is confirmed by Pateman.⁷¹ Pateman points out that 20th century scholars of democracy all deny any participatory element to democracy beyond the prisms of elections.⁷² She observes that this view was so predominant with the literature of that era that the existence of any classical theories of

⁶⁹ C Ake *The feasibility of democracy in Africa* (2000) 22 – 23.

⁷⁰ Id at 17 – 20.

⁷¹ C Pateman *Participation and democratic theory* (1970).

⁷² Id at 1 – 19.

democracy which emphasised citizens' participation as essential element of democracy was denied as myth.⁷³ And it was as a result of this that she sets to identify the so called mythical classical theorists and examine the concept of participation in classical theories of democracy.

Pateman identifies Rousseau as the first of the classical theorists and father of the theory of participation in political philosophy. This is because of Rousseau's emphasis on liberty and equality of citizens.⁷⁴ Pateman correctly identified Rousseau's ideal society as one where the citizens can assemble freely as equals. According to Rousseau, equality and freedom is to be the end of every system of law:⁷⁵ '...freedom, because any individual dependence means that much strength withdrawn from the body of the state and equality, because freedom cannot survive without it.'⁷⁶ Rousseau, therefore, disavowed any situation that will breed civic inequality and consequently advocated a society of economic equality and independence. According to him, the word 'equality':

...must not be taken to imply that degrees of power and wealth should be absolutely the same for all, but rather that power shall stop short of violence and never be exercised except by virtue of authority and law, and, where wealth is concerned, that no citizen shall be rich enough to buy another and none poor as to be forced to sell himself....⁷⁷

Although I am of the view that the requirement of participation in public decision-making is not that explicit in Rousseau's treatise, it is upon Rousseau's pre-occupation with equality and liberty that Pateman bases her argument of his theory of participation.

John Stuart Mill is another classical theorist of participation identified and discussed by Pateman.⁷⁸ The theory of participation is made much more explicit in Mill's writings. For

⁷³ Id at 14 – 17.

⁷⁴ Id at 22 – 27.

⁷⁵ J J Rousseau *The social contract* trans M Cranston (1968) Bk 2 Chap 11 p 96.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ C Pateman *Participation and democratic theory* (1970) 27 – 35.

example, in his *Representative government*,⁷⁹ Mill clearly expresses the necessity of citizens' participation in government. According to him, contrary to the views of some, '...the political machinery does not act of itself...'⁸⁰ In Mills' view, political machinery '... has to be worked, by men, and even by ordinary men. It needs, not their simple acquiescence, but their *active participation*; and must be adjusted to the capacities and qualities of such men as are available'.⁸¹ Pateman is therefore right to assert popular participation as the main basis of Mill's theory.⁸² Although Mill harboured the idea of representative government by educated elites, he is of the opinion that the requisite democratic training the citizens in an industrialised societies need can be obtained at industry's shop floors.

The shop floors as democratic training grounds for citizens - argument of Mill was carried forward by Cole, the third classical theorists discussed by Pateman.⁸³ According to Pateman 'Cole's social and political theory is built on Rousseau's argument that will, not force, is the basis of social and political organisation. Men must co-operate in associations to satisfy their needs....'⁸⁴ Cole shared the view of Mill that in modern industrialised societies, the shop floor is a veritable ground for the training of the citizens as democrats. He therefore tried to proffer a theory that will synthesise, in democratic terms, the two aspects of human relations.⁸⁵

After the examination of the views of classical democratic theorists discussed above, Pateman summarises the principle of participatory democracy that can be garnered from their different theories as follows:

The theory of participatory democracy is built round the central assertion that individuals and their institutions cannot be considered in isolation from one another. *The existence of representative institutions*

⁷⁹ J S Mills *Representative government* (1861) available at http://www.constitution.org/jsm/rep_gov.htm (accessed on 12 August 2013).

⁸⁰ Id at Chap 1.

⁸¹ Ibid (emphasis supplied).

⁸² C .Pateman *Participation and democratic theory* (1970) 29.

⁸³ Id at 36 – 42.

⁸⁴ Id at 36.

⁸⁵ In his *Self-government in industry* for instance, Cole states as follows: 'Political democracy must be complemented by democracy in the workshop; industrial democracy must realise that, in denying the state, it is falling back into a tyranny of industrialism' G D H Cole *Self-government in industry* 5 ed. (1917) 32

*at national level is not sufficient for democracy; for maximum participation by all the people at that level of socialisation, or 'social training', for democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed. This development takes place through the process of participation itself.*⁸⁶

After the initial and rather narrow confines of classical theories of participation, there is now a world-wide movement of theorists whose major focus is theorising a more participatory form of democracy in contemporary times. One of such is a growing counter-hegemonic movement across countries generally understood as developing democracies. Scholars across Latin America and Africa are looking at alternative forms of democracy and theorising ways to make bourgeois liberal democracy more participatory. Notable among these is the international research project spearheaded by Boaventura de Sousa Santos in conjunction with other scholars from across the developing democracies divide which resulted in the publication of *Democratizing democracy: Beyond the liberal democratic canon* in 2005.⁸⁷ The book is an examination of the notion of participatory democracy and the hesitant steps being taken towards participatory democracy in five countries forming part of the world's developing democracies. The countries examined are Brazil, Colombia, India, Mozambique and South Africa.

That is not all. There is also noticeable growth on the theorisation of different strands of participatory democracy by scholars in contemporary times.⁸⁸ It should, however, be pointed out that in spite of the enhanced attention paid to the theory of participatory democracy in contemporary times it remains just that, a theory. The concept is still largely normative while the hegemony of bourgeois liberal democracy continues unhindered in practice.

3.1.4 Constitutional democracy

⁸⁶ C Pateman *Participation and democratic theory* (1970) 42 (emphasis supplied).

⁸⁷ B De Sousa Santos (ed) *Democratizing democracy: Beyond the liberal democratic cannon* (2005).

⁸⁸ See for instance, C Mouffe *The return of the political* (1993) 1; A Giddens *Beyond left and right: The future of radical politics* (1994) 1; J Cohen & C Sabel 'Directly-deliberative polyarchy' (1997) 3 *European Law Journal* 313; C Mouffe *On the Political: Thinking in action* (2005) 1; S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 1; A W Dzur 'Four theses on participatory democracy: Towards the rational disorganization of government institutions' (2012) 19 *Constellations* 305; among others.

This form or conception of democracy is not associated with a particular theory or theorists. The term is purely a descriptive term which is used to describe a political system in which the authority of the people to make collective decision is made subject to a written constitution 'or at least a received set of institutional practices that is regarded as being incapable of ordinary amendment'.⁸⁹ In a constitutional democracy, the written constitution or the institutional practices not capable of ordinary amendment spell out the powers and duties of the various organs of government in the texts of the constitution and the powers and authority of the people in an entrenched bill of rights which an independent judiciary is established to rigorously enforce through judicial review. Basically, citizens in a constitutional democracy participate as rights bearers as these entrenched rights serve as limitation on the powers of the majority to make binding decisions.⁹⁰ Thus, entrenched bills of rights play a particularly important role in a constitutional democracy, more so than in any other form of democracy. Three constitutive elements of a constitutional democracy have been identified by Nwabueze.⁹¹ One, constitutional democracy connotes a constitutional government. Not just a government under a constitution, but a government '...under a constitution which has the force of a supreme, overriding law and which imposes limitations on it'.⁹² Two, the constitutional prescription of free and fair periodic elections under a system of universal adult suffrage and the constitutional subjections of all political groups to electoral competition for public offices in this regard. And three, the constitutional limitation of governmental power especially through a guarantee of fundamental human rights policed by an independent judiciary.

The virtue and benefits of this form of democracy has been highly extolled. According to Nwabueze: 'No other form of rule so far devised by human kind conduces as much to the realisation of ends of human existence upon this earth as one limited by a guarantee of the liberty of the individual under a constitution that has the force of supreme, overriding law'.⁹³ Little

⁸⁹ T Roux 'Democracy' in Woolman S *et al* (eds) *Constitutional law of South Africa* 2nd ed OS (2006) 10 – 18.

⁹⁰ R Dahl *Democracy and its critics* (1989) 220.

⁹¹ B Nwabueze *Judicialism and good governance in Africa* (2009) 8 – 29.

⁹² *Id* at 13 – 14.

⁹³ *Id* at 2.

wonder that this is the form that representative democracy has taken in most new and emerging democracies the world over. African countries are not an exception in this regard. However, the essential role played by an entrenched bill of rights and the centrality of judicial review powers of the courts in this model of democracy is the subject of very serious objections and controversy by democratic theorists. While one group of theorists asserts that the limitation placed on majority decision making by entrenched bills of rights and judicial review diminishes or negates democracy,⁹⁴ others argue that these are the actual preconditions of a democratic society.⁹⁵

According to the former, the removal into the courtrooms of the sovereignty of the majority to make binding decisions in a democracy through the instrumentality of courts-policed rights legalises politics and politicises the judiciary.⁹⁶ With regard to the latter, there are two responses they often give in response to the counter-majoritarian arguments of judicial review of rights as framed above. The first is that freedom, dignity and equality and other fundamental human rights are the very definition of democracy so that enforcing these rights through the mechanism of judicial review, although contrary to majoritarian wishes, is in fact enforcing democracy,⁹⁷ or as Donnelly will put it, civilising democracy itself.⁹⁸ The second is that contemporary democracy is in fact defective in the sense that it excludes participation of those at the margins of society. Judicial review therefore becomes an avenue for participation, first; because it allows for the voice of the marginalised to be heard and; second, because it at the same time constitutes courtrooms as venues for democratic participation and action not otherwise provided for the marginalised by mainstream institutions.⁹⁹

⁹⁴ See for instance, J Waldron 'A rights based critiques of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

⁹⁵ See for instance, R Dahl *Democracy and its critics* (1989) 220.

⁹⁶ See for instance, H Corder 'Lessons from (North) America (Beware the "legalization of politics" and the "political seduction of the law")' (1992) 109 *South African Law Journal* 198 and D M Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

⁹⁷ C Heyns 'A "struggle approach" to human rights' in A Soeteman (ed) *Pluralism and law* (2001) 171 at 186.

⁹⁸ J Donnelly 'Human rights, democracy and development' (1999) 29 *Human Rights Quarterly* 608 at 630.

⁹⁹ J Raz 'Rights and politics' (1995) 71 *Indiana Law Journal* 27 at 42 – 43; F Michelman, 'Welfare rights in a constitutional democracy' (1979) *Washington University Law Quarterly* 659 and C Fabre 'Constitutionalising social rights' (1998) 6 *The Journal of Political Philosophy* 263.

Democratic objections to rights and judicial review in contemporary democracy continue. I, however, align myself with the view of scholars who hold that both entrenched bills of rights and judicial review power of courts are preconditions for the survival and maintenance of democracy. This is in view of the fact that participation by citizens in representative democracy has effectively been reduced to only questionable periodic elections, which I think constitutes a tenuous ground upon which to ground the legitimacy of governments. Also, majoritarian democracy as currently practiced through constitutional forms has been found to be exclusionary in a variety of ways and is incapable of affording a platform for the participation of the vulnerable members of the society as pointed out above. Avenues have to be found therefore which will allow the enforcement of rights to dignity and equal worth of all human beings so central to the egalitarian tenets of democracy and which will at the same time provide much needed forum for the voice and participation of those at the periphery of society for a truly democratic society. If these avenues are provided by the courts, and if this constitutes a restriction or watering down of democratic politics as alleged by opponents of judicial review of rights, I think it is a justified restriction to ensure the continued viability of the democratic order itself. For I think no social order can forever be sustained on the kind of unequal and oppressive condition of contemporary democracy, especially as it presently obtains in most of the states in Africa.

Judicial enforcement of rights will appear, however, to be insufficient to save the legitimacy and relevance of constitutional democracy in contemporary times. This is because as Tully has pointed out, for a constitutional democratic system to be legitimate, it must be both constitutional and democratic.¹⁰⁰ It must be constitutional in the sense that exercise of rights, duties and powers in the system must follow the path of constitutionalism i.e. be subject to the dictates of the constitution. And it must be democratic in the sense that citizens must not only be able to participate but must also be able to take a step back, dissent, question and challenge the founding rules themselves, including the constitution. A constitutional democracy where the democratic principle is missing privileges constitutionalism over democratic deliberation and is for that

¹⁰⁰ J Tully 'The Unfreedom of the Moderns in Comparison to their ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204 – 206.

reason suffering a democratic deficit and is illegitimate. On the other hand, a constitutional democracy that privileges democratic deliberation over constitutionalism is operating a system of the tyranny of the majority and is also for that reason deficient and cannot be said to be truly democratic.¹⁰¹

Tully has noted also that there are three illegitimate trends bedeviling constitutional democracy in the 21st century.¹⁰² The first he calls global juridification and constitutionalisation. According to Tully, the rise and continuing onslaught of global capitalism have given rise to the first trend. This trend he says is the consequence of the proliferation of numerous international treaties and regulatory frameworks which are aimed at furthering the continued advance of global capitalism. These regulatory regimes lay down conditions for the expansion of global capital which economically weaker states of the world are compelled by economic necessities to comply with. He points out that these imposed regulatory regimes may sometimes override national constitutions in economically weaker states. The effect of all these is ‘...to free the economy from the democratic control of existing nation states.’¹⁰³

The second trend he refers to as ‘devolution and dispersion of political power and forms of political association’.¹⁰⁴ According to Tully, decolonisation of the 1960s has given rise to proliferation of nation states and city states which lacked the political power to challenge the onslaught of global capital and transnational corporations. These weak nation states are then forced to reduce their democratic practice to mere elections and provisions of security and private autonomy that will further the interests of global capital in order to attract foreign investment that will make them remain economically viable.

¹⁰¹ Id at 205.

¹⁰² Id at 211 – 214.

¹⁰³ Id at 212.

¹⁰⁴ Id at 212.

The third trend identified by Tully is the decline of democratic practice in traditional democratic institutions in nation states. According to him, decisions and policies are increasingly being made by unaccountable ministries and a small circle of rich elites with access to representative institutions. Constitutional reforms (where they take place at all) are by unelected experts. Political powers are also ceded to the markets or global capital regimes through negotiation by unelected negotiators in private meetings. The results of all these is decreasing citizens' participation and increasing political apathy.

The effects of these illegitimate trends on citizens participation is summarised by Tully thus:

Finally, these three trends work together to insulate the growing global social and economic inequalities from public democratic discussion and reform. The only way to struggle effectively against these enormous inequalities in wealth and wellbeing is through the exercise of democratic freedoms in the most effective fora and also, by these means, to fight for formal democratic freedoms for the worst off (who can then exercise them as they see fit). Yet, the trends make this difficult in the best circumstances (where democratic freedoms are constitutionalised) and an offense punished by exclusion, disappearance or death in the worst (where democratic rights cannot even be discussed). As a result, the unchecked inequalities further erode the very basic prerequisites of diet, health, knowledge and organisation necessary to exercise democratic freedom for an increasing percentage of the world's population, even though their condition is the direct effect of a global constitutional system of property rights over which they, by the principle of democracy, should have a right to a say. This is a 'negotiated' constitutional order, to be sure, but it is negotiated by powerful, non-democratic actors, not by the democratic citizens and representatives....¹⁰⁵

In summary, global capitalism has eroded the democratic element from contemporary constitutional democracies.

That the trends identified by Tully above apply and are operational in Africa is not in doubt. There is ample literature detailing these effects of global capitalism on rights and politics in countries with weak economies in Africa and elsewhere.¹⁰⁶ In addition to this, there is also the

¹⁰⁵ Id at 212 – 213 (fns omitted).

¹⁰⁶ See for instance, U Baxi 'Voices of suffering and the future of human rights' (1998) 8 *Transnational Law and Contemporary Problems* 125 and M Pieterse 'Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa' (2003) 14 *Stellenbosch Law Review* 3.

noticeable tendency in the judiciary of constitutional democracies in Africa to privilege the constitutional element of constitutional democracy over the democratic element as I show in relation to both South Africa and Nigeria in Chapters Four and Five of this thesis. The result of this is that the citizens are not allowed the democratic space to step back and question, dissent or challenge the founding rules of their social orders as required by the democratic element of constitutional democracy. As a result of the foregoing, therefore, constitutional democracy will appear not to be a suitable conception of democracy that is capable of opening up the political space for action and participation of the poor for a more effective transformation of socio-economic rights.

3.1.5 Deliberative democracy

This is a recent addition to democratic theory. It is a product of 20th century attempts by theorists to theorise a more substantive form of democracy spearheaded by Jurgen Habermas.¹⁰⁷ Deliberative democratic theory involves the idea that public/collective decision-making is only legitimate if it results from ‘free and unconstrained public deliberation’ of all matters of mutual concern.¹⁰⁸ This model of democracy, therefore, consists in the giving and taking of reasons in the process of making collective decisions.¹⁰⁹ As pointed out by Eriksen and Fossum,

¹⁰⁷ M Kohn ‘Language, power and persuasion: Towards a critique of deliberative democracy’ (2000) 7 (3) *Constellations* 408.

¹⁰⁸ S Benhabib ‘Towards a deliberative model of democratic legitimacy’ in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 67 at 68.

¹⁰⁹ M Warren ‘Deliberative democracy’ in A Carter & G Stokes (eds) *Democratic theory today: Challenges for the 21st Century* (2002) 182. See also J Cohen & C Sabel ‘Directly-deliberative polyarchy’ (1997) 3 *European Law Journal* 313 at 320 where the authors posit thus: ‘Democratic collective decision-making can be either aggregative or deliberative, depending on how we interpret the requirement that collective decisions treat citizens *as equals*. Understood aggregatively, a democratic decision is collective just in case the procedure gives equal consideration to the interest of each person: it treats people as equals by giving their interests equal weight in making a binding decision. Conventional rationales for majority-rule as a method of collective decision rest on the idea that it gives direct expression to this requirement of equal consideration. Understood deliberatively, democratic decisions are collective just in case they proceed on the basis of free public reasoning among equals: Interests unsupported by considerations that convince others carry no weight. Put otherwise, in deliberative decision-making, decisions are to be supported by reasons acceptable to others in the polity of decision-makers; the mere fact that decisions are supported by a majority of citizens, deciding on the basis of their interests, does not suffice to show that the decisions are democratically authorized. On the deliberative interpretation, then, democracy is a framework of social and institutional conditions that both facilitates free discussion among equal citizens by providing favourable conditions for expression, association, discussion and ties the authorisation to exercise public power and the

‘[d]eliberative theories of democracy are grounded on the centrality of reason-giving in collective decision-making processes: actors are seen as coordinating their actions through giving and responding to reasons’.¹¹⁰ Three criteria have been identified as critical to the deliberative process. One, that participation in such deliberations is to be governed by the norms of equality and symmetry. Two, that all participants must have the right to question the agenda of the deliberation; and three, that all participants should have the right to initiate argument on the procedural rules of and its application to the deliberation.¹¹¹

When properly conducted deliberative democracy should serve three basic functions: the political, the ethical and the epistemological.¹¹² When serving the political function, deliberative democracy should be able to influence changes in the interests, preferences, opinions and judgment of persons. This is said to be necessary to resolve political conflicts and to legitimate political authorities and decisions.¹¹³ In serving the ethical function, deliberative democracy enlarges the space for the discussion of moral issues much more than other theories of democracy. And in serving the epistemological function, deliberative democracy bridges the gap between democratic and expert decisions. This, according to Warren, takes care of the objection of the expert judgment theorists who object to democratic decision-making on the ground that it is more likely to be worse than decisions made by experts who are better qualified by virtue of their expertise.¹¹⁴ Warren further argues in this respect that decisions arising from deliberative democracy when properly structured are in fact ‘...likely to be truer or more right or more truthfully related to needs – than decisions made by experts acting alone’.¹¹⁵

exercise itself – to such discussion, by establishing a framework ensuring the responsiveness and accountability of political power to it.’

¹¹⁰ E O Eriksen and J E Fossum ‘Representation through deliberation: The European case’ (2012) 19 (2) *Constellations* 325 at 328.

¹¹¹ S Benhabib ‘Towards a deliberative model of democratic legitimacy’ in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 67 at 70.

¹¹² M Warren ‘Deliberative democracy’ in A Carrter & G Stokes (eds) *Democratic theory today: Challenges for the 21st Century* (2002) 182 at 186 – 192.

¹¹³ Id at 186 – 187.

¹¹⁴ Id at 192.

¹¹⁵ Ibid.

In spite of the recognised attractiveness and potentials of deliberative democratic theory in fostering a more robust conception of democracy and rights realisation, however,¹¹⁶ several objections and criticisms have been levelled against deliberative democratic theorists by some other scholars. For instance, Kohn¹¹⁷ has rightly pointed out that the assumption of deliberative theorists that their discourse theory will foster a more inclusive society is misconceived. According to Kohn, language is not socially and politically neutral as assumed by deliberative democratic theorists. It reflects existing power relations and contexts. Thus, the more powerful are much more likely to be more vocal and given more voice in deliberations.¹¹⁸

Egalitarian preconditions for successful deliberations assumed by deliberative theorists is also said to be misplaced.¹¹⁹ According to Kohn, such preconditions are not to be assumed as given. They are otherwise products of struggle, mobilisation and collective action. The author thus states: ‘Empirical studies such as Piven Cloward’s Poor Peoples’ Movements shows that authorities were willing to initiate programs to deal with critical needs like urban poverty only after significant mobilization and collective action. It is these crucial dimensions of mobilization and power which advocates of deliberative democracy ignore’.¹²⁰

Furthermore, it is also noteworthy that deliberative democratic theory is mainly proceduralist in nature.¹²¹ This proceduralist nature of deliberative democracy is capable of being abused by a dishonest government who already has a pre-determined objective or agenda. This point is well illustrated through what happened in Nigeria between the last quarter of 2011 and January of 2012, when the Nigerian government was planning to remove subsidy on petroleum products.

¹¹⁶ Liebenberg, among other scholars, has in fact prescribed the deliberative model of democracy as the model most suited to realisation of human rights. See S Liebenberg ‘Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’ (2012) 12 *African Human Rights Law Journal* 1.

¹¹⁷ M Kohn ‘Language, power and persuasion: Towards a critique of deliberative democracy’ (2000) 7 (3) *Constellations* 408.

¹¹⁸ Id at 409 – 417.

¹¹⁹ Id at 417 – 425.

¹²⁰ Id at 425.

¹²¹ S Benhabib ‘Towards a deliberative model of democratic legitimacy’ in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 67 at 73.

The Federal Government of Nigeria set up town-hall meetings in several parts of the country to enter into dialogue and deliberate with relevant stakeholders and the general public on the need to and the modalities for the removal of the subsidy. While deliberation was ongoing, however, the government unilaterally announced the removal of the subsidy on 1st January, 2012. The nation-wide protests and civil disobedience that greeted this unilateral removal of subsidy forced the government to partially re-instate the subsidy a week later. What this scenario illustrates, in essence, is that governments and authorities with pre-determined agendas may kick start the deliberative procedure just in order to appear righteous and then present their pre-determined objectives as if it results from good-faith deliberation.

In addition to the above, Ake has also argued that modern technology in the form of information and communication technology (ICT) has shrunk the public space and may have made the practice of deliberative democracy impossible.¹²² According to him, modern technology is desociational and non-dialogical. Ake explains that in the new public space fostered by modern technology:

Our visibility to each other ...is abstract as is the space itself. It has hardly any boundaries; it is too fluid, too amorphous to elicit a sense of sharing in a social entity or to nurture political projects and democratic activism. How can people organize against oppressive power which is impersonal, invisible and fluid, power which is always flowing into spaces beyond our grasp and immune to the institutional constraints in our locality? It is not just power that is fluid. We too are fluid and despatialized. Unfortunately, the expansion and porosity of our space gives us only a disorienting sense of spacelessness and very little room for political action.¹²³

More recent literature in this area of study appears, however, not to share the pessimistic view of Ake regarding the impact of modern technology on the public space and politics.

For instance, both Diamond¹²⁴ and Green¹²⁵ show that liberation technologies (ICT) can have both a positive and negative impact on democracy and politics. According to Diamond,

¹²² C Ake *The feasibility of democracy in Africa* (2000) 27 – 28.

¹²³ Id at 28.

¹²⁴ L Diamond ‘Liberation technology’ (2010) 21 *Journal of democracy* 69.

liberation technologies are capable of widening the public sphere and creating a more pluralistic public arena.¹²⁶ This assertion Diamond shows to be true in fact with illustration of how these technologies have been used to open up the public sphere and human rights under authoritarian regimes in places like Malaysia, China and others. He also shows how liberation technologies can and have been used in some of these places to stifle opposition and dissenting voices.¹²⁷ Green also shows in relation to religious pluralism in Africa, that social media can facilitate democratic and constitutional debate but so can they also be deployed to ignoble uses like fostering hate speech and religious intolerance, among others.¹²⁸ Diamond has therefore rightly concluded in my view, that in the struggle to expand the public sphere and freedom, '[i]t is not technology, but people, organizations, and governments that will determine who prevails'.¹²⁹

Finally, deliberative democracy is not a description of any existing form of democracy but an ideal of what could be. In view of the foregoing, therefore, and notwithstanding the watering down of the negative impact of liberating technologies on deliberative democracy, I think other objections levelled against this model of democracy by scholars are well founded. Thus, identified defects of this model of democracy like the likelihood of it privileging dominant/powerful voices over weaker ones, its assumption of non-existent egalitarian conditions and its mainly proceduralist nature will appear to make the theory unsuitable for expansion of the requisite space for participation and action of those at the margins of society.

3.1.6 Radical democracy

¹²⁵ M C Green 'From social hostility to social media: Religious pluralism, human rights and democratic reform in Africa' (2014) 14 *African Human Rights Law Journal* 93.

¹²⁶ L Diamond 'Liberation technology' (2010) 21 *Journal of democracy* 69 at 71.

¹²⁷ Id at 71 – 82.

¹²⁸ M C Green 'From social hostility to social media: Religious pluralism, human rights and democratic reform in Africa' (2014) 14 *African Human Rights Law Journal* 93. The views of Diamond and Green about the potentials of liberating technologies to further citizens mobilisation and politics was borne-out by the fuel subsidy protests of 1st of January 2012 in Nigeria. It is a notorious fact that the organisers of the protests made ample use of liberating technologies in the form of mobile telephony technologies, social media and other ICT technologies to mobilise Nigerians for the fuel protest that has been referred to as the first among many in the history of protests in Nigeria. See for instance, National Mirror 'One year after Occupy Nigeria protests' Available at <http://nationalmirroronline.net/new/one-year-after-occupy-nigeria-protests/> (accessed on 18 January 2014).

¹²⁹ L Diamond 'Liberation technology' (2010) 21 *Journal of democracy* 69 at 82.

This is another recent addition to democratic theories. The main worry of radical democratic theorists is the exclusionary effect of bourgeois liberal democracy. According to Giddens for instance: ‘However it be organized, representation democracy means rule by groups distant from the ordinary voter and is often dominated by petty party-political concerns’.¹³⁰ The main project of radical democratic theorists is, therefore, to make democracy more inclusive and participatory. In Giddens’ view, democratic theories have today gone beyond the traditional socialist/conservative distinctions because both conservatism and socialism have coalesced in contemporary times; conservatism has embraced radicalism while socialism has retreated from radicalism.¹³¹ In this scenario the third way proposed by Giddens that will make for a more inclusive democracy is the concept of dialogic democracy.¹³²

According to Giddens, dialogic democracy

...is not an extension of liberal democracy or even a complement to it; in so far as it proceeds, however, it creates forms of social interchange which can contribute substantially, perhaps even decisively, to the reconstructing of social solidarity. Dialogic democracy is not primarily about either the proliferation of *rights* or the representation of *interests*. Rather it concerns the furthering of *cultural cosmopolitanism* and is a prime building block of that connection of autonomy and solidarity I have spoken about earlier. Dialogic democracy is not centred on the state but, as I shall argue, refracts back on it in an important way. Situated in the context of globalization and social reflexivity, dialogic democracy encourages the *democratizing of democracy* within the sphere of the liberal democratic polity.¹³³

Giddens is, thus, of the view that dialogic democracy is the only concept that is capable of democratising democracy in an era of social reflexivity engendered by globalisation.

Giddens further distinguishes dialogic democracy from deliberative democracy discussed above on at least two grounds.¹³⁴ One, dialogic democracy does not presume that democratisation is implicit in the act of speech or dialogue itself as does deliberative democracy. Rather, the

¹³⁰ A Giddens *Beyond left and right: The future of radical politics* (1994) 112.

¹³¹ Id at 22 – 69.

¹³² Id at 112.

¹³³ Id at 112 – 113.

¹³⁴ Id at 115 – 116.

concept posits that the potential of dialogue for democratisation is embedded in day to day social reflexivity and the existence and functioning of larger forms of collective organisation. Two, consensus is not the focus of dialogic democracy as it is with deliberative democracy; dialogic democracy rather presumes that dialogue is a means by which parties may live in mutual tolerance of each other.

Of course, not all radical democratic theorists agree with Giddens' charitable assessment of dialogic democracy as the panacea to the ills of liberal democracy. Mouffe, for instance, thinks that Giddens' concept among that of other scholars with similar concepts does not qualify to be called radical.¹³⁵ According to her, dialogic democracy, in as much as it presumes to remove or conflate the we/they distinctions in politics thereby downplaying the agonistic/adversarial dimension of politics and for failing to see or acknowledge the essential role of economic power and the state in social relations and politics, remains within the traditional ambit of liberal politics.¹³⁶ For Mouffe:

...the radicalization of democracy requires the transformation of the existing power structures and the construction of a new hegemony. In our view, the building of a new hegemony implies the creation of a 'chain of equivalence' among the diversity of democratic struggles, old and new, in order to form a 'collective will', a 'we' of the radical democratic forces. This can be done only by the determination of a 'they', the adversary that has to be defeated in order to make the new hegemony possible.¹³⁷

For Mouffe, therefore, any conception of radical democracy must be aimed towards the transformation of existing power relations in 'we'/'they' democratic struggles.

For Cohen and Fung,¹³⁸ radical democrats in crafting their democratic theory have joined together two opposing and sometimes contradictory strands of democratic thought: participation and deliberation.¹³⁹ While these scholars acknowledge the potential of radical democratic theory

¹³⁵ C Mouffe *On the political* (2005) 52.

¹³⁶ Ibid.

¹³⁷ Id at 53.

¹³⁸ J Cohen and A Fung 'Radical democracy' available at http://www.archonfung.com/docs/articles/2004/Cohen_Fung_Debate_SPSR2004.pdf (accessed on 5 July 2013) 23.

¹³⁹ Id at 23 – 24.

in addressing the deficit of liberal democratic theory, they are of the view that participation and deliberation are concepts that pull in different directions and may therefore be contradictory. For instance, to ensure better deliberation a broad based participation may have to be sacrificed in order to weed out less quality voices. Conversely, wider and more direct participation may come at the cost of dispensing with deliberation altogether as where citizens vote in a referendum where responses are usually limited to a ‘yes’ or ‘no’ answer.¹⁴⁰ Accordingly, the challenge facing radical democrats is how to devise reforms that incorporate both while maintaining proper balances.¹⁴¹ In addition, Benhabib has opined that radical democracy as propounded by Hannah Arendt, Chantal Mouffe and others, which privileged and prioritised political deliberation over basic rights can result in the tyranny of the majority and stifle basic rights.¹⁴²

Having discussed the conceptions of democracy I regard as popular and recurring in contemporary times, I now move to discuss and examine African theories of government. In discussing these theories of government, I will start by discussing the political theories of some notable African scholars/philosophers in this regard before I go on to deduce African conception of politics and participation from historical and available anthropological evidence and African philosophical literature.

3.2 PERSPECTIVES OF SOME AFRICAN POLITICAL THEORISTS

Africa has no shortage of political philosophers and theorists propounding theories they think are appropriate to the place and condition of Africa. Notable among these are Kenneth Kaunda of Zambia, Julius Nyerere of Tanzania, Kwame Nkrumah of Ghana and Leopold Senghor of Senegal. These political philosophers, among many others, had at one time or another expressed their thoughts as regards the political arrangements/theories best suited to the African continent.

¹⁴⁰ Id at 27 – 28.

¹⁴¹ Id at 28.

¹⁴² S Benhabib ‘Towards a deliberative model of democratic legitimacy’ in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 67 at 77 – 78.

The discussion under this section, however, is restricted to only the afore-mentioned theorists as the discussion and examination of the political theories of all relevant African political philosophers will probably require a distinct doctoral dissertation. More so, most of the other theories not discussed are similar to the ones discussed here as most of them seek to ground their theories in and deduce same from a African philosophy/worldview as do those discussed here. Not much, I think, will therefore be served by a more extended enquiry into other theorists' views in this regard. Having explained that, the views and perspectives of the afore-mentioned theorists will now be examined in turn.

3.2.1 The African humanist theory of Kenneth Kaunda

According to Kaunda, man lies at the heart of African traditional culture and the gift of human relationship is one that Africa must bequeath to world culture.¹⁴³ Kaunda identified two elements that have gone to make up the African human philosophy. The first is traditional Africa's close contact with nature; the second is the impact on African psychology of centuries of living in tribal societies.¹⁴⁴ According to Kaunda, pre-colonial Africans' lives have always been close to and revolved around nature. This close connection with nature had shaped their worldview differently from their western counterparts as they are able to ask higher philosophical questions although only rudimentary answers may be available. Also, centuries of living in tribal societies had shaped African societal structures and relationships differently from that of the west. Kaunda identified three key features of African tribal societies that set them apart from the west.

The first is that African tribal community was a mutual society. Kuanda explained this feature as follows: 'The tribal community was a mutual society. It was organised to satisfy the basic human needs of all of its members and, therefore, individualism was discouraged'.¹⁴⁵ He explained further that: 'Human need was the supreme criterion of behaviour. The hungry

¹⁴³ K Kaunda *A humanist in Africa* (1966) 22.

¹⁴⁴ Id at 22 – 24.

¹⁴⁵ Id at 24.

stranger, could, without penalty, enter the garden of a village and take, say, a bunch of bananas or a mealie cob to satisfy his hunger. His action only became theft if he took more than was necessary to satisfy his needs. For then he was depriving others'.¹⁴⁶ Thus, the basic unit of life in pre-colonial African culture, according to Kaunda, was the community and not the individual or the immediate family as obtained in the West.¹⁴⁷

The second feature of African tribal societies for Kaunda was that it was an accepting society.¹⁴⁸ African pre-colonial culture valued man for man. It did not treat man as a means to an end. It was the presence of individuals that really mattered; the mere fact that they were there, not their achievements. Thus, the incapable, the aged and the inept were accepted as valid and equal members of the society without discrimination or neglect. The third feature of African traditional societies was that it was an inclusive society.¹⁴⁹ This means that '...the web of relationships which involved some degree of mutual responsibility was widely spread'.¹⁵⁰ Thus, there were extended family systems, which constituted the African social security system. The care of the aged and orphan were not left to institutions but extended family members who regarded it as a privilege to be able to render assistance.

True to the humanist bent of Kaunda, his political theory is that man is to be the centre of governance in Africa.¹⁵¹ He referred to himself as a Christian humanist. And he described Christian humanism as '...unconditional service of our fellow men is the purest form of the service of God'.¹⁵² Also that '...only the recovery of a sense of the centrality of Man will get politics back on the right track'.¹⁵³ His main interest was, therefore, how to humanise politics so that the 'humblest and the least endowed' will occupy the central focus of government.¹⁵⁴ Kaunda, however, appeared to envisage a very limited role, if any, in terms of political action or

¹⁴⁶ Id at 25.

¹⁴⁷ Ibid.

¹⁴⁸ Id at 25 – 27.

¹⁴⁹ Id at 27 – 28.

¹⁵⁰ Id at 27

¹⁵¹ Id at 41 – 47.

¹⁵² Id at 39.

¹⁵³ Id at 41.

¹⁵⁴ Ibid.

participation for citizens in his theory. This is apparent from his defence of one-party states and his active promotion and justification of totalitarianism in Africa through a self-serving appeal to African tradition.¹⁵⁵

3.2.2 *Ujamaa*: African socialism thesis of Julius Nyerere

As far as Nyerere of Tanzania is concerned, socialism is rooted in the African tradition.¹⁵⁶ This assumption formed the basis of his African socialism theory of *Ujamaa*. *Ujamaa* is a Swahili word which literally translated means ‘brotherhood’, ‘togetherness’ or ‘communalism’.¹⁵⁷ According to Nyerere, three basic assumptions made *Ujamaa* (African socialism) possible in African societies.¹⁵⁸ The first basic assumption is respect. This is recognition by Africans of the ‘mutual involvement’ of persons in each other in the society and the recognition and giving of due rights, duties and privileges. In Nyerere’s words: ‘...there is a minimum below which no one could exist without disgrace to the whole family’.¹⁵⁹ The second basic assumption is that all basic goods were held in common and are to be shared among all members of the society according to need. Nobody was allowed to hoard or acquire basic goods far in excess of his/her need where other members of the group are lacking. The third basic assumption is the basic principle that everyone is obliged to work. There must be no idler. This point is aptly put by Nyerere thus: ‘The work done by different people was different, but no one was exempt. Every member of the family, and every guest who shared in the right to eat and have shelter, took it for granted that he had to join in whatever work had to be done’.¹⁶⁰

¹⁵⁵ Id at 105 – 109.

¹⁵⁶ J K Nyerere *Ujamaa: Essays in socialism* (1968) 1 – 12.

¹⁵⁷ See for instance, ‘Definition of Ujamaa in English’ in *Oxford Dictionaries* available at <http://oxforddictionaries.com/definition/english/ujamaa> (accessed on 22 July 2013).

¹⁵⁸ J K Nyerere *Ujamaa: Essays in socialism* (1968) 106 – 108.

¹⁵⁹ Id at 107.

¹⁶⁰ Id at 108.

In Nyerere's view, however, two defects dogged African socialism in traditional societies.¹⁶¹ The first was the acceptance of gender inequality. Women were regarded as inferior to their male counterparts. Thus, even though they did most of the work they were accorded rights and privileges sub-standard to those granted men. The second defect of traditional life was poverty. This is said not to be due to anything that was inherent in traditional system itself, but was the result of ignorance and the small scale of production. Nyerere was of the view that these defects can be cured under modern systems of socialism without negatively impacting on the fundamental principles of mutual respect, common ownership of basic goods and the obligation to work, all of which formed the bedrock of his theory of African socialism.

The political system prescribed by Nyerere as suitable for fulfilling his socialist ideals is democratic socialism where property is owned communally by all citizens and shared in common according to needs and people participate in government at the local and national levels through their representatives and spokespersons.¹⁶² The common good as the basis and ends of citizens' involvement in governance is particularly stressed by Nyerere. Thus he says for instance that:

...there must also be an efficient and democratic system of local government, so that our people make their own decisions on the things which affect them directly, and so that they are able to recognize their own control over community decisions and their own responsibility for carrying them out. Yet this local control has to be organized in such a manner that the nation is united and working together for common needs and for the maximum development of our whole society.¹⁶³

In spite of the glib reference to and emphasis on democracy by Nyerere, the main elements of his thesis appear to be the following: the abolition of private property; participation of citizens mainly at the local levels and at the national levels through representatives and spokespersons; and the co-ordination of everything from the centre to ensure conformity of actions to the common good. These elements are somewhat reminiscent of democratic centralism practiced in Eastern Europe in the heydays of communism. Needless to say that democratic centralism and its

¹⁶¹ Id at 108 – 109.

¹⁶² See for instance, id at 53 – 54.

¹⁶³ Id at 119.

emphasis on one party state and conformity of actions and interests is not particularly democratic and the scope for action by the populace is particularly narrow in such a polity. The idea that there can be conformity or fusion of interests in any society has also been debunked as myth by several scholars who hold that plurality of interests is the basis and hallmark of a truly democratic system.¹⁶⁴

3.2.3 Leopold Senghor's Negritude

Leopold Senghor of Senegal is another African political theorist who theorised on the nature and form of contemporary African society. While not denying the universal validity of institutions, moral, technical and political values and philosophies of other races, Senghor is of the view that these ought to be rooted or adapted to native African realities in Africa.¹⁶⁵ According to him: 'It is now a matter of selecting, among European methods, the most effective ones for an exact analysis of our situation. It is a question of borrowing those of its institutions, values and techniques that are most likely to fecundate our traditional civilizations.'¹⁶⁶ This blending of Europeans values, ethics and norms with traditional African ethics, norms and values he called negritude.

Senghor opines that African politicians have the tendency to subordinate culture to politics; this in his view is a mistake because '... [t]hese two areas [culture and politics], like the others, are certainly closely connected, each reacting on the other. But if one stops to reflect, culture is at once the basis and the ultimate aim of politics.'¹⁶⁷

¹⁶⁴ See for instance, C Mouffe *On the political* (2005) 52; see also Botha H 'Equality, plurality and structural power' (2009) 25 *South African Journal of Human Rights* 1, among others.

¹⁶⁵ L S Senghor *On African socialism* trans M Cook (1964) 8.

¹⁶⁶ *Id* at 9.

¹⁶⁷ *Id* at 48 – 49.

Senghor sees socialism as rooted in traditional African culture. In his view, centuries of sociological and ethnological studies of Africa civilisations showed that Africa achieved socialism long before the coming of the Europeans.¹⁶⁸ He, therefore, shared in this respect Nyerere's view that the West cannot teach socialism or democracy to Africans as both are rooted in African culture and being.

In addition to this, he opines that European socialism cannot be uncritically accepted in Africa for three reasons.¹⁶⁹ The first is that knowledge and propositions of founding fathers of European socialism were conditioned and limited by the epoch in which they lived. Knowledge has since tremendously increased and things have since changed. The second is that a new theory of knowledge: dialectics – 'knowledge by confrontation and intuition' distinct from knowledge through objective detachment and observation of the scientist obtainable during the heyday of founding fathers of European socialism has come into being, which has changed the face of scientific knowledge. The third reason is that dialectics, the new method of knowing, is Negro-African knowledge which is rooted in traditional African epistemology. This implies that Africans are better placed to practice socialism without unnecessary epistemological constraints from the West. Senghor's main pre-occupation is therefore the rethinking of western socialist method in light of African realities.¹⁷⁰

The political system that Senghor proposes for the attainment of its socio-political theory is decentralised federal democracy that guarantees basic civil liberties and the rights of minorities.¹⁷¹ According to him: 'Only democracy, "the government by the people and for the people" will allow the Negro-African to realize himself. After all, democracy is the traditional form of Negro-African societies.'¹⁷² In Senghor's democracy, there must be unanimity of views and positions of the elites and the general populace with the policies of government. Dissension

¹⁶⁸ Id at 49.

¹⁶⁹ Id at 69 – 75.

¹⁷⁰ See for instance, id at 67.

¹⁷¹ Id at 51 – 52.

¹⁷² Id at 51.

and opposition are to be eschewed because of their divisive tendencies.¹⁷³ Opposition parties are to pursue the same goals as the majority party in order to prevent social groups from transforming into antagonistic classes.¹⁷⁴ As can be gathered from the foregoing, Senghor did not articulate a clear theory of action for the citizens in his theory save that they must be united with the government in pursuing what the government may deem the common goal of the state. His presupposition of a common goal and the requirement that citizens ought not to dissent from the government on policies are also symptomatic of centralist democracy of erstwhile European socialist states and is a negation of the plural requirement of democracy properly conceived.

3.2.4 Kwameh Nkrumah's philosophical consciencism

Of the theorists examined here, Nkrumah appears to be the only one who recognised and clearly articulated the significance and importance of philosophy/theory and ideology to socio-political transformation and change. Nkrumah points out the connection between philosophy/ideology and socio-political power thus:

The point which I am anxious to make is not merely that the earliest philosophies carried implications of a political and social nature, and so were warmly connected with the actualities of life; I am suggesting that these philosophies were a reflection of social currents, that they arose from social exigencies. Thus, Thales' philosophy needed, if it was to destroy the allegedly heaven-sanctioned aristocratic society, to assert the irrelevance of a pantheon, and this he did in his attempt to bring all explanation of nature within the ambit of nature itself.¹⁷⁵

This is a clear recognition of philosophy as generator of socio-political power and recognition of the reciprocal influence of philosophy on social milieu and *vice versa*.¹⁷⁶ The pride of place that

¹⁷³ Id at 54 – 57.

¹⁷⁴ Id at 88.

¹⁷⁵ K Nkrumah *Consciencism: Philosophy and ideology for de-colonization and development with particular reference to the African revolution* (1964) 34 – 35.

¹⁷⁶ The reciprocal influence of philosophy on social milieu and *vice versa* is succinctly articulated by Nkrumah thus: 'Social milieu affects the content of philosophy, and the content of philosophy seeks to affect social milieu, either by confirming it or by opposing it. In either case, philosophy implies something of the nature of an ideology. In the case where the philosophy confirms a social milieu, it implies something of the ideology of that society. In the other case in which philosophy opposes a social milieu, it implies something of the ideology of a revolution against that social

history also occupies as one of the subtle ways¹⁷⁷ through which the dominant ideology/philosophy is influenced is also recognized and expressively articulated by Nkrumah. According to him:

In the new African renaissance, we place great emphasis on the presentation of history. Our history needs to be written as the history of our society, not as the story of European adventures. African society must be treated as enjoying its own integrity: its history must be a mirror of that society, and the European contact must find its place in this history only as an African experience, even if as a crucial one. That is to say, the European contact needs to be assessed and judged from the point of view of the principles animating African society, and from the point of view of the harmony and progress of this society. When history is presented in this way ...it can become a map of the growing tragedy and the final triumph of our society. *In this way, African history can come to guide and direct African action, African history can thus become a pointer at the ideology which should guide and direct African reconstruction.*¹⁷⁸

I am in agreement with Nkrumah on this score. Thus, the recognition of the place and importance of history in crafting an appropriate political philosophy for Africa generally; and specifically, in prescribing an appropriate judicial understanding of democracy for political action in contemporary Africa is carried forward later in this chapter through the examination of African political theories as reflected in the different political systems as deduced from historical and anthropological evidence as well as from relevant African philosophical literature.

In Nkrumah's opinion, contemporary Africa is composed of three different strands which must be merged/unified for proper development of the continent. These are traditional Africa, Islamic Africa and Euro-Christian Africa.¹⁷⁹ This merging/unification must, however, take account '...at all times, of the elevated ideals underlying the traditional African society'.¹⁸⁰ According to this scholar:

milieu. Philosophy in its social aspect can therefore be regarded as pointing up an ideology.' K Nkrumah *Consciencism: Philosophy and ideology for de-colonization and development with particular reference to the African revolution* (1964) 56.

¹⁷⁷ Other subtle ways identified by Nkrumah includes arts and philosophy.

¹⁷⁸ K Nkrumah *Consciencism: Philosophy and ideology for de-colonization and development with particular reference to the African revolution* (1964) 63 (Emphasis supplied).

¹⁷⁹ Id at 70.

¹⁸⁰ Id at 78.

Social revolution must therefore have, standing firmly behind it, an intellectual revolution, a revolution in which our thinking and philosophy are directed towards the redemption of our society. Our philosophy must find its weapons in the environment and living conditions of the African people. It is from those conditions that the intellectual content of our philosophy must be created.¹⁸¹

The afore-mentioned social revolution has one principal objective, the emancipation of the African continent, which according to Nkrumah equalled the emancipation of man. This emancipation objective has two aims, viz: the restitution of egalitarianism in human society and the mobilisation of all resources towards the attainment of the restitution.¹⁸² And the philosophy that must underpin this objective is what Nkrumah referred to as philosophical consciencism.¹⁸³

Consciencism is defined by Nkrumah as ‘...the map in intellectual terms of the disposition of forces which will enable African society to digest the Western and the Islamic and the Euro-Christian elements in Africa, and develop them in such a way that they fit into the Africa personality.’¹⁸⁴ Philosophical consciencism he defines as ‘...that philosophical standpoint which, taking its start from the present content of the African conscience, indicates the way in which progress is forged out of the conflict in that conscience.’¹⁸⁵

According to Nkrumah, philosophical consciencism suggests a political theory and social-political practice which seeks to outlaw class exploitation and ensure egalitarianism. In his words:

By reasons of its egalitarian tenet, philosophical consciencism seeks to promote individual development, but in such a way that the conditions for the development of all become the conditions for the development of each; that is, in such a way that the individual development does not introduce such diversities as to destroy the egalitarian basis. The social-political practice also seeks to co-ordinate social forces in such a

¹⁸¹ Ibid.

¹⁸² Id at 78.

¹⁸³ Id at 79.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

way as to mobilize them logistically for the maximum development of society along true egalitarian lines.¹⁸⁶

The practical way Nkrumah envisages that the objectives of his theory will be attained in Africa is through revolutionary struggle/positive action of the mass of the people against colonialism in subjugated territories and against neo-colonialism in formally independent territories within the prism of one-party parliamentary democracy underpinned by socialist ideology.¹⁸⁷

From the foregoing, Nkrumah is one of the few African theorists that recognises and gives pride of place to positive action and struggle of the mass of the people in social revolution and transformation. Like most other African political theorists, however, his panacea to the political ills plaguing the African continent is socialism, which he also believes, alongside other African scholars, to be rooted in traditional Africa.¹⁸⁸ Therefore, his theory, in spite of its emphasis on traditional African content has all the bearings of centralist democracy with its limited scope for political action and the invariable common good posturing.

The foregoing analysis shows that socio-political theories of African political theorists have a number of common denominators. The first is that most, if not all of the scholars examined here, place reliance on socialism as the panacea to African socio-political challenges. Two, they are all very strong on the notion of the common good, which invariably is whatever the government of the day or the ruling elites determined as such. Three, the majority of them eschew plurality, opposition and dissent and envisage a very limited scope for the participation and political action of the citizen through the supposition that there is a common good the citizens are obliged to

¹⁸⁶ Id at 98.

¹⁸⁷ Id at 98 – 105.

¹⁸⁸ See for instance, id at 73 where the scholar opines thus: ‘If one seeks the socio-political ancestor of socialism, one must go to communalism. Socialism stands to communalism as capitalism stands to slavery. In socialism, the principles underlying communalism are given expression in modern circumstances. Thus, whereas communalism in an untechnical society can be laissez faire, in a technical society where sophisticated means of production are at hand, if the underlying principles of communalism are not given centralized and correlated expression, class cleavages will arise, which are connected with economic disparities, and thereby with political inequalities. Socialism, therefore, can be and is the defence of the principles of communalism in a modern setting. Socialism is a form of social organization which, guided by the principles underlying communalism, adopts procedures and measures made necessary by demographic and technological developments.’

tailor their action towards; and finally, support of most of these theorists for one party-state. With these common denominators, therefore, it is not surprising that none of them is engaged with the enhancement of the scope for transformative political action by the citizens, nor were they inclined to examine the impact of judicial understandings of democracy in that regard nor to theorise the appropriate judicial understanding of democracy in that respect. This gap in knowledge in this area of the discourse is what this chapter is set to try and bridge through the theorisation of an African perspective of an appropriate judicial understanding of democracy for transformative and effective political action in contemporary Africa.

It is interesting to note, however, that the argument for a uniquely African and culturally compatible form of government/political theories in contemporary Africa is continuing and ongoing. Contemporary African and non-African political and legal theorists are carrying on the tradition. For instance, Justice Mokgoro argues that the South African law and Constitution should be infused with the values of *Ubuntu*, which contained concepts that are unique to African culture.¹⁸⁹ According to her, such infusion ‘...can promote a new patriotism and personal stewardship crucial to the development of a democratic society.’¹⁹⁰ She in fact argued that such infusion is a constitutional imperative and the law. She posits thus:

When we write about the relationship between *ubuntu* and the Constitution, we provide substantive grounds (expressly present in the interim Constitution and implicit in the final Constitution) for how we believe judges on a *South African* bench ought to read the text. Put slightly differently, though *ubuntu* may shadow Western notions of dignity (drawn from the work of Kant) or communitarianism (drawn from the work of Rousseau or Marx), it provides a distinctly Southern African lens through which judges, advocates, attorneys and academics ought to determine the extension of the actual provisions of the basic law. It hardly seems controversial to ground the South African Constitution in the lived experience of South Africans so long as an *ubuntu*-based reading does no violence to the text. That’s not an opinion. It’s *the* law.¹⁹¹

¹⁸⁹ Y Mokgoro ‘Ubuntu and the law in South Africa’ (1998) 4 *Buffalo Human Rights Law Review* 15 at 18.

¹⁹⁰ *Id* at 19.

¹⁹¹ Y Mokgoro and S Woolman ‘Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell’s thoughts’ in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 241 at 242 – 243. (Emphasis in the original).

Cornell has also argued that *ubuntu* and such traditional African principles as *Ujaama* and others like them are at the core of the creation of post-colonial Africa.¹⁹² According to her, *ubuntu* like other African humanism principles emphasises the virtues of mutuality, inclusiveness and acceptance.¹⁹³ She argues that *ubuntu* should thus be regarded as the ethical law of the entire South African Constitution and ground such concept as dignity in the South African Constitution and not the other way round.¹⁹⁴ She argues further that *ubuntu* may well serve as a more adequate ground to oppose the onslaught of neo-liberalism and better guarantee socio-economic rights in the South African Constitution.¹⁹⁵ This is obviously because of the *ubuntu* concept's association with such virtues as communalism, generosity and loyalty.¹⁹⁶

Louw has also noted that although virtues like compassion, warmth, understanding and caring and sharing, among others, may be common to all major world views and ideologies, nevertheless, '...*ubuntu* serves as a *distinctly African rationale* for these ways of relating to others.'¹⁹⁷ Metz has also argued that an *ubuntu* conception of dignity explains the many different elements of the South African Bill of Rights and resolves many of the dilemmas of the South African reform process.¹⁹⁸

¹⁹² D Cornell 'Is there a difference that makes a difference between Ubuntu and dignity?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 221 at 222.

¹⁹³ Id at 231

¹⁹⁴ Id at 223.

¹⁹⁵ Id at 221.

¹⁹⁶ Id at 222.

¹⁹⁷ D J Louw 'Ubuntu: An African assessment of the religious order' available at <http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm> (accessed on 13 July 2013) 1 at 7.

¹⁹⁸ T Metz '*Ubuntu* as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532. Oyewo has, however, disagreed with Metz claims here that Ubuntu reading of dignity is able to achieve results envisaged by Metz. According to Oyewo, Ubuntu and human rights are strange bed fellows and conceptually incompatible. A O Oyewo 'Strange bedfellows: Rethinking *ubuntu* and human rights in South Africa' (2013) 13 *African Human Rights Law Journal* 103.

In addition to the works of scholars above referred to, there appear also to be emerging *ubuntu* based jurisprudence from the South African Constitutional Court. In *S v Makwanyane*¹⁹⁹ for instance, the Constitutional Court declared the death penalty in South Africa unconstitutional because it is a violation of the rights to life, dignity and right against cruel, degrading and unusual punishment. The death penalty is also said to violate the norms of a mature South African society which *ubuntu* is a part of. According to the Court, per Langa J as he then was:

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*.²⁰⁰

The Court, per Mokgoro J as she then was, went further to tease out the precise meaning of *ubuntu* in the following words:

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.²⁰¹

The Court then held that the death penalty runs counter to the kind of society envisaged by the new Constitution, violated the norms of *ubuntu* and is for that reason unconstitutional.²⁰²

*Khosa and Others v Minister of Social Development and Others*²⁰³ is another Constitutional Court decision that Cornell opines is infused with *ubuntu* thinking even though nowhere in the

¹⁹⁹ 1995 (6) BCLR 665 (CC).

²⁰⁰ Id at para 225.

²⁰¹ Id at para 308. (Emphasis in original).

²⁰² Id at para 260.

²⁰³ 2004 (6) BCLR 569 (CC).

judgment was *ubuntu* expressly mentioned or referred to.²⁰⁴ The Constitutional Court had in the case invalidated statutes excluding permanent residents from receipt of social security grants contrary to the provisions of section 27 (1) (c)²⁰⁵ and the section 9 equality provisions of the South African Constitution. Although no mention was made of *ubuntu* by the Court in the case, the main basis of the Court's decision appear to be that the statutes in question failed constitutional muster because they violated the hallowed African cultural virtues of mutuality, inclusiveness and acceptance. Cornell will therefore appear to be right to argue that the decision was in fact infused with *ubuntu* thinking.

The brief recapitulation above shows that there are continuing projects and attempts by political and legal theorists and courts, especially the South African Constitutional Court, to infuse the laws and constitutions in Africa with African values, norms and philosophies consistent with the aims and objectives of this research study.

Having established above that this study is consistent with current trends in that regard, I now go into the theorisation of an appropriate model/conception of democracy for political action in contemporary Africa as deduced from examples of African political systems I consider representative below. Before I do that, however, I want to briefly interrogate first whether there is indeed need to fashion what I call 'home-grown forms of government/democracy' in contemporary Africa. This is having regard to the fact that the Africa and democracy of the period of writing of some of the above-examined theorists (early times of African independence) may be different from Africa of today. This question I address by interrogating the nature of democracy in present day Africa from the works of more contemporary scholars.

²⁰⁴ D Cornell 'Is there a difference that makes a difference between Ubuntu and dignity?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 221 at 234.

²⁰⁵ Section 27 (1) (c) of the South African Constitution provides that everyone has a right to access social security and appropriate assistance.

3.3 THE NATURE OF BOURGEOIS LIBERAL DEMOCRACY IN CONTEMPORARY AFRICA

There appears to be no dispute among scholars that there is a crisis of representation in the practice of bourgeois liberal democracy in post-colonial Africa. There is consequently a large body of literature from both African and non-African scholars alike that bourgeois liberal democracy is in shambles in post-colonial Africa.²⁰⁶ This literature reveals that the practice of bourgeois liberal democracy in Africa is marred by illegitimacy, authoritarianism, repression, mismanagement, corruption, deepening poverty levels and sit-tight public office holders, among other ills. A sample of some of the opinions evidences these facts.

For instance, Howard observes that independent African nation states of the 80s' only paid lip service to democracy and instead of being democratic the political leadership of Africa of that period were enmeshed in egregious human rights violations. These violations were justified by these ruling elites on grounds of exigencies of the time and were largely ignored by western countries.²⁰⁷ This state of affairs Howard traced directly to inherited colonial dictatorship. She consequently opines thus: 'Thus if African nation-states are not democracies in 1980 (sic), it is not because they have abandoned a colonial heritage of democracy; at best, the colonial regime was a benevolent dictatorship.'²⁰⁸ According to Jackson and Rosberg also, post-colonial African

²⁰⁶ R Howard 'The dilemma of human rights in Sub-Saharan Africa' (1980) 35 *International Journal* 724; R H Jackson and C G Rosberg 'Sovereignty and underdevelopment: Juridical statehood in the African crisis' (1986) 24 (1) *Journal of Modern African Studies* 1; Y Bangura 'Authoritarian rule and democracy in Africa: A theoretical discourse' available at [http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=A81C86EE203A8B1780256B67005B6139&parentdoctype=paper&netitpath=80256B3C005BCCF9/\(httpAuxPages\)/A81C86EE203A8B1780256B67005B6139/\\$file/dp18.pdf](http://www.unrisd.org/80256B3C005BCCF9/httpNetITFramePDF?ReadForm&parentunid=A81C86EE203A8B1780256B67005B6139&parentdoctype=paper&netitpath=80256B3C005BCCF9/(httpAuxPages)/A81C86EE203A8B1780256B67005B6139/$file/dp18.pdf) (accessed on 15 May 2014); C Ake 'The congruence of political economies and ideologies in Africa' in P C.W Gutkind and I Wallerstein (eds) *The political economy of contemporary Africa* (1976) 228; M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359; C Ake 'The unique case of African Democracy' (1993) 69 (2) *International Affairs* 239; A E Ifidon 'Transition from democracy in Nigeria: Towards a pre-emptive analysis' (2002) 7 *African Journal of Political Science* 109; S Bhulungu 'Reinventing participatory democracy in South Africa' in B De Sousa Santos (ed) *Democratising democracy: Beyond the liberal democratic cannon* (2005) 38 at 61 – 63; among others.

²⁰⁷ R Howard 'The dilemma of human rights in Sub-Saharan Africa' (1980) 35 *International Journal* 724 at 725 – 728.

²⁰⁸ Id at 278.

states in fact lacked real legitimacy.²⁰⁹ According to them: ‘African states are direct successors of the European colonies that were alien entities to most Africans. Their legitimacy derived not from internal African consent, but from international agreements – primarily among European states - beginning with the Berlin Conference of 1884-5.’²¹⁰ Lacking what the authors called real legitimacy and unable to command the support and co-operation of local populace, ruling elites of newly independent African states resorted to subterfuge, force and repression to maintain their hold on power.²¹¹

In addition to the foregoing, Ake also posits that post-independence African rulers allowed democracy only in appearance and not in substance.²¹² According to him, if post-independence African political elites had allowed democracy in substance they would have had to dismantle the capitalist relations of production that they inherited with bourgeois liberal democracy. However, because the inherited capitalist relations of production are now serving the personal and sectional interests and privileges of these elites they chose to retain it. And in order to maintain the stratification and exploitation that the inherited system engendered, they are obliged to resort to coercion and authoritarianism.²¹³ Ake consequently summed up post-colonial African politics and democracy thus: ‘Political development in postcolonial Africa amount to the usual story of bourgeois revolutions being followed by the dictatorship of the bourgeoisie.’²¹⁴ The above view of Ake finds support from Mamdani who also notes that democracy and politics in post-colonial Africa is marked by self-interest of the political class, the tendency of regimes to monopolise power, exploitation of the peasantry and repression.²¹⁵ And according to Ifidon, Nigeria of the 21st century, whether under military or civilian rule is in fact transitioning from democracy.²¹⁶ And this transition *from* instead of *into* democracy would also seem not to be a

²⁰⁹ H Jackson and C G Rosberg ‘Sovereignty and underdevelopment: Juridical statehood in the African crisis’ (1986) 24 (1) *Journal of Modern African Studies* 1.

²¹⁰ *Id* at 5 – 6.

²¹¹ *Id* at 14 – 19.

²¹² C Ake ‘The congruence of political economies and ideologies in Africa’ in P C.W Gutkind and I Wallerstein (eds) *The political economy of contemporary Africa* (1976) 228.

²¹³ *Id* at 235 – 236.

²¹⁴ *Id* at 238.

²¹⁵ M Mamdani ‘The social basis of constitutionalism in Africa’ (1990) 28 *Journal of Modern African Studies* 359.

²¹⁶ A E Ifidon ‘Transition from democracy in Nigeria: Towards a pre-emptive analysis’ (2002) 7 *African Journal of Political Science* 109.

peculiarity of the Nigerian state as it appears that many other states on the continent are in contemporary times afflicted with the same malady.²¹⁷ As a matter of fact, more recent studies on democracy in Africa confirm the foregoing position. Thus, even a charitable assessment of liberal democracy in terms of multiparty elections and bourgeois democratic rights in Africa by Diamond and Plattner appears to conclude that it has been more of a retreat than progress for liberal democracy in much of the states in Africa.²¹⁸

The above literature, among many others, shows that the inherited bourgeois liberal democracy in contemporary Africa is characterised by illegitimacy, authoritarianism, repression and personal aggrandisement of political elites, among many other ills. Democracy is therefore probably worse off in contemporary times than when earlier African political theorists were writing. The factors that appear to be most likely responsible for this parlous state of bourgeois liberal democracy in Africa are the next focus of my enquiry.

3.4 FACTORS RESPONSIBLE FOR THE PARLOUS STATE OF BOURGEOIS LIBERAL DEMOCRACY IN AFRICA

Three factors appear, generally speaking,²¹⁹ to be responsible for the parlous state of democracy in Africa. The first is what I call the undemocratic origin of bourgeois liberal democracy. The second is the alien nature of bourgeois liberal democracy in Africa; and the third is, of course, colonialism. Each factor is now discussed in turn.

²¹⁷ See for instance, S Bhulungu ‘Reinventing participatory democracy in South Africa’ in B De Sousa Santos (ed) *Democratizing democracy: Beyond the liberal democratic cannon* 38 at 57 – 61.

²¹⁸ L Diamond and M F Plattner (eds) *Democratization in Africa: Progress and retreat* (2010).

²¹⁹ Generally speaking because specific factors responsible for the bad state of democracy may differ from state to state in addition to the ones identified above. Thus, as regards Nigeria for instance, no work on democratic development in the country will be complete without acknowledging the role and impact of military rule.

As regards the first, I point out earlier when I discussed representative democracy in section 3.1.2 above that Ake strongly argues that bourgeois liberal democracy is not democracy at all but a trivialisation of authentic democracy found in ancient Athens.²²⁰ According to Ake, democracy in terms of popular government is a precise concept susceptible to little ambiguity.²²¹ Ake notes further that democracy in terms of popular government was practiced only in Athens and declined with ancient Athens.²²² He argues further that what was handed down to Africa is not the authentic form of democracy within the meaning of popular government, but a trivialised concept. This is because, according to him, the founding fathers of bourgeois liberal democracy were motivated by desires other than popular participation or the sovereignty of the people.²²³

I also make the point in my discussion in the section above, that Ake's view of bourgeois liberal democracy as a trivialised concept is shared by many other scholars. I point out, for instance, that Pateman confirmed that the modern notion of liberal democracy is grounded in the concept of elite rule and periodic elections, an idea to which popular participation is foreign.²²⁴ Mamdani also views the notion of liberal democracy as no more than the standpoint of Republican thought and practice in the United States, the purpose of which is to place legal limit on democratic practice and sovereignty of the people.²²⁵ And that Malan also opines that liberal democracy is a corruption of popular Athenian democracy, the end of which is to defeat popular participation.²²⁶ The conclusion to be drawn from the foregoing views of democratic theorists above will appear to be that the modern notion of democracy is in fact not politics or participation friendly.

²²⁰ C Ake *The feasibility of democracy in Africa* (2000)

²²¹ Id at 7.

²²² Id at 7 – 9.

²²³ Id at 7 – 29.

²²⁴ C Pateman *Participation and democratic theory* (1970) 1 – 14.

²²⁵ M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359 at 360 – 361.

²²⁶ K Malan *Politocracy* trans J Scott (2012) 197 – 203.

To conclude here, if the above is indeed the case (and it does appear to be), if bourgeois liberal democracy is indeed exclusionary and not politics friendly as I have pointed out above; it follows logically that we cannot expect bourgeois liberal democracy to deliver what it does not have in Africa. We can in fact expect the kind of failures and crisis that the notion has witnessed in Africa. Consistent with this conclusion, it should be emphasised here also that the crisis of representation occasioned by liberal democracy is not in fact peculiar to Africa, it is a phenomenon that is witnessed everywhere the notion is dominant as is apparent from my analysis of that form of government in section 3.2.1 above. The crisis of governance and participation occasioned by liberal democracy in Africa is however compounded by factors and peculiarities in Africa which are not operative in other places where liberal democracy is practiced. Two out of those factors is further discussed below.

The second factor that appears to be responsible for the problematic and undemocratic nature of liberal democracy in Africa is the alien nature of the concept in Africa. Quite a body of literature exist confirming the foreign nature of bourgeois liberal democracy in Africa.²²⁷ As I point out above, Jackson and Rosberg have rightly observed that European colonies and their system of government are alien entities that lacked local legitimacy in Africa.²²⁸ Mamdani also opines in the same regard that what is handed down to Africa as western tradition during the colonial period is none other than the standpoint of some dominant classes in the West.²²⁹ An-Naim also states that concepts like constitutionalism, human rights and democracy are Western formulations developed and applied according to the experiences of the societies in which they were first developed and later transplanted to other societies as universal concepts.²³⁰

²²⁷ R H Jackson and C G Rosberg 'Sovereignty and underdevelopment: Juridical statehood in the African crisis' (1986) 24 (1) *Journal of Modern African Studies* 1; M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359; A An-Naim 'Religion, the state and constitutionalism in Islamic and comparative perspectives' (2008-2009) 57 *Drake Law Review* 829; C Ake 'The unique case of African Democracy' (1993) 69 (2) *International Affairs* 239.

²²⁸ R H Jackson and C G Rosberg 'Sovereignty and underdevelopment: Juridical statehood in the African crisis' (1986) 24 (1) *Journal of Modern African Studies* 1 at 5 – 6.

²²⁹ M Mamdani 'The social basis of constitutionalism in Africa' (1990) 28 *Journal of Modern African Studies* 359 at 360 – 361.

²³⁰ A An-Naim 'Religion, the state and constitutionalism in Islamic and comparative perspectives' (2008-2009) 57 *Drake Law Review* 829 at 834.

Furthermore, An-Naim persuasively argues in my opinion that the best principles of concepts like constitutionalism and democracy cannot operate properly without engagement and acceptance by the mass of the people upon whom it is supposed to operate.²³¹ According to him: ‘...the best principles and mechanisms of constitutional governance will not operate properly without sufficiently strong civic engagement by a critical mass of citizens.’²³² That is to say, concepts like constitutionalism and democracy must have relevance for and be understood by a critical mass of the people upon whom it is to operate before such concepts can have any chance of success. It does appear therefore that having regard to the alien nature of liberal democracy in Africa, the critical mass of Africans have not been able to sufficiently engage with the concept. This will appear to account for the failure of the system in much of the states in Africa. It is on this ground that I think An-Naim is right when he states that a ‘...homegrown concept that benefits from the experiences of other societies is more likely to succeed than a crude or coercive imposition of an alien concept.’²³³

The foregoing is not, however, to say that western and non-western societies are fundamentally different from each other or that there is a categorical dichotomy between them. That is not the case and is not the argument here. It is just that as An-Naim has rightly pointed out, the transplantation of a fully developed concept (a concept developed on the lived experiences and cultural peculiarities of one society), from one society to another is not likely to work because of cultural and contextual particularities.²³⁴ And it will also be foolhardy to pretend that these peculiarities are not in existence or unimportant.²³⁵ Ake has in fact showed in his study of the problem of development in Africa, that development practitioners had in fact ignored African cultural context to the peril of development strategies and projects in Africa.²³⁶ According to him:

²³¹ A An-Naim ‘Religion, the state and constitutionalism in Islamic and comparative perspectives’ (2008-2009) 57 *Drake Law Review* 829.

²³² Id at 833.

²³³ Id at 834.

²³⁴ A An-Naim ‘The legal protection of human rights in Africa: How to do more with less’ in A Sarat and T R Kearns (eds) *Human rights: Concepts, contests and contingencies* (2001) 89 at 95 – 110.

²³⁵ Id at 102 – 103.

²³⁶ C Ake *Democracy and development in Africa* (1996) 15 – 16.

Culture, like institutional framework, has been largely ignored as if it, too, had no serious implications for the success of development strategies. It is easy enough theoretically to discount the cultural factor in the development paradigm. But that has been a costly error. African culture has fiercely resisted and threatened every project that fails to come to terms with it, even as it is acted upon and changed.²³⁷

In view of the foregoing, I think An-Naim is right when he counsels that when transplanting concepts from one society to another, generality of universal principles should be mediated by cultural and contextual specificity.²³⁸ I totally agree with him.

The third factor responsible for the parlous state of bourgeois liberal democracy in Africa is colonialism. The nature of colonial politics and its impacts on post-colonial politics confirmed it as one of the factors responsible for the unenviable nature of democracy in contemporary Africa. As has been rightly pointed out by Ake, the colonial state was all encompassing and all powerful.²³⁹ It needed to be all powerful in order to maintain its hold on power and to carry into effect the economic objectives of colonialism. As Ake noted, the colonial state involved itself in practically every sphere of the colonised economic life.²⁴⁰ The state allocated land and decided who was to produce what and how. The state ensures steady flow of labour and saw to the disposal of the produce. The state also provided the necessary infrastructural and human resources support for the colonial economy, determined and facilitated the kind of education for the natives that will complement and support the colonial economy, among many other things. The power of the colonial state had to be and it was absolute.

In addition to being absolute, the power of the colonial state was also arbitrary. It was exercised mainly to fit the exigencies of colonialism and its exploitative economy. Ake notes that these two features of absolutism and arbitrariness framed colonial politics.²⁴¹ These features of absolutism and arbitrariness exacted and prompted similar responses from colonial subjects who at any rate

²³⁷ Id at 15.

²³⁸ A An-Naim 'Religion, the state and constitutionalism in Islamic and comparative perspectives' (2008-2009) 57 *Drake Law Review* 829 at 834 – 835.

²³⁹ C Ake *Democracy and development in Africa* (1996) 1 – 3.

²⁴⁰ Ibid.

²⁴¹ Ibid.

regarded the colonial state as illegitimate. The subjects also, therefore, paid no regard to the norms of legitimacy or legality in the struggle to advance their interests either. Consequently, colonial politics was reduced into crude mechanics of power and violence. Ake succinctly explained this point thus:

Colonial politics was thus reduced to the crude mechanics of opposing forces driven by the calculus of power. For everyone in this political arena, security lay only in the accumulation of power. The result was an unprecedented drive for power; power was made the top priority in all circumstances and sought by all means. As the rulers and subordinates extended their rights to their powers, the idea of lawful political competition became impossible, and politics was inevitably reduced to a single issue: the determination of two exclusive claims to rulership. This politics hardly encouraged moderation and compromise.²⁴²

This violent feature of colonial politics and its impact on the colonised in Africa is confirmed by Fanon.²⁴³

Unfortunately, with the advent of independence, what changed in post-colonial Africa was not the nature and character of the colonial state but its composition. Thus, the unbridled power politics and violence of colonial politics was carried over into post-independence Africa by African political elites. The new political elites came to see political power as an end in itself and were prepared to do anything and everything to capture it. This stems from the fact that political power came to mean not only power and prestige but also a guarantor of material wealth both for those in power and those out of power. For those in power, political power ensured access to the state treasury. For those out of power, it ensures that they get to keep what they have acquired through abuse of office without harassment from opposition. In this kind of climate, pursuit of political power became a zero-sum game. A do or die affair. The nature and character of post-independence politics in Africa is again aptly summarised by Ake thus:

To recapitulate, at independence the form and function of the state in Africa did not change much for most countries in Africa. State power remained essentially the same: immense, arbitrary, often violent, always threatening. Except for a few countries such as Botswana, politics remains a zero-sum game; powers was sought by all means and maintained by all means. Colonial rule left most of Africa a legacy of intense and

²⁴² Id at 3.

²⁴³ F Fanon *The wretched of the earth* trans C Farrington (1963) 35 – 95.

lawless political competition amidst an ideological void and a rising tide of disenchantment with the expectation of a better life.²⁴⁴

Needless to say that in this kind of politics there is of course no place for the sovereignty or participation of citizens in spite of the usual lip-service paid to democracy by post-independence political elites on the continent.

Ake and Fanon are not the only scholars that established a link between colonialism and the unpalatable state of governance and politics in post-colonial Africa. Jackson and Rosberg, for instance, have made a clear link between tyranny, coercion and force in Africa's post-colonial politics and colonialism.²⁴⁵ Howard also thinks that there is a link between the tyranny and undemocratic posture of African political leaders and what she called benevolent dictatorship of colonialism.²⁴⁶ Sampson has also made a clear link in his study between the lawlessness, brigandage and impunity of law enforcement officials in Nigeria's democracy and colonialism in the country.²⁴⁷

Discussions thus far show that most of the problems bedeviling bourgeois liberal democracy in Africa are traceable to its lack of local relevance, legitimacy and absence of cultural and contextual specificities. The system has also been shown to be incompatible with citizens' participation and sovereignty. The above clearly underline the need for an indigenous, locally relevant and culturally compatible notion of democracy that accords with the lived experiences of Africans in Africa and which is more amenable to citizens' participation for more effective political action. The articulation of such a notion as can be deduced from African political theories as deduced from historical and anthropological examination of what I consider

²⁴⁴ C Ake *Democracy and development in Africa* (1996) 6. See also F Fanon *The wretched of the earth* trans C Farrington (1963) 181 – 183.

²⁴⁵ H Jackson and C G Rosberg 'Sovereignty and underdevelopment: Juridical statehood in the African crisis' (1986) 24 (1) *Journal of Modern African Studies* 1.

²⁴⁶ R Howard 'The Dilemma of Human Rights in Sub-Saharan Africa' (1980) 35 *International Journal* 724 at 728

²⁴⁷ I T Sampson "The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria" (2010) 10 *African Human Rights Law Journal* 432 at 441 – 443.

representative examples of African political systems as well as from relevant African philosophical literature is the focus of the next section.

3.5 TRADITIONAL AFRICAN POLITICAL SYSTEMS AND THEORIES

As I state earlier, democracy in terms of popular government is not the invention of the West. It is a concept that is also indigenous to pre-colonial Africa.²⁴⁸ Having said that, however, African models of democracy are not without their downsides, some of them will be discussed later in this chapter. Notwithstanding the downsides, it does appear that African notions of democracy if properly developed and adapted to contemporary times and needs hold very real potential for transforming, in a positive way, the face of politics in Africa. The role of the courts in this endeavour cannot be gainsaid, as I point out in Chapter One. The rest of this chapter therefore focuses on deducing from history, anthropology and relevant African philosophical literature the appropriate judicial conception of democracy for effective political action which is steeped in an African worldview.

African political theories are, however, informed by and grounded in African philosophy. It is consequently desirable first to examine the scope and content of African philosophy before delving into and discussing African political theories and systems.

African philosophy is an emerging discipline/discourse compared to its western counterpart. Its existence or non-existence was consequently enmeshed in serious controversy among scholars. In addition to western ethnographers/philosophers,²⁴⁹ some of who denied the existence of

²⁴⁸ See also V O Edo 'The practice of democracy in Nigeria: The pre-colonial antecedent' (2010) 21 *LUMINA* 1 where the author gave a historical account of the practice of democracy in some of Nigeria's pre-colonial centralised states.

²⁴⁹ Serious opposition have, however, been raised by contemporary African scholars/philosophers who are questioning the competence of the so called western philosophers who purported to write on African philosophy. According to these contemporary African scholars/philosophers, many of the so called western philosophers are not

African philosophy except as based on western notions or ideas;²⁵⁰ there are also many western trained African scholars/philosophers who also question the existence of African philosophy. Notable among these are Bodunrin, Hountondji, Wiredu and Oruka.²⁵¹ According to Bodunrin, philosophy is universal and Africa's version of philosophy,²⁵² ethno-philosophy in particular, do not satisfy the requisite criteria of logic, rationality and rigour of philosophical studies.²⁵³ This is because he is of the view that Africa cannot purport to have a philosophy peculiar to it. On Hountondji's part, African philosophy is not where we are looking for it.²⁵⁴ According to Hountondji, ethno-philosophy where scholars generally look to as source of African philosophy is nothing but a myth. As far as Hountondji is concerned, the writing of African philosophers on philosophy whether western or otherwise, constitutes the whole of African philosophy as African philosophical literature.²⁵⁵ According to him:

If we now return to our question, namely, whether philosophy resides in the world-view described or in the description itself, we can now assert that if it resides in either, it must be the second, the description of that vision, even if this is, in fact, a self-deluding invention that hides behind its own products. African philosophy does exist therefore, but in a new sense, as a literature produced by Africans and dealing with philosophical problems.²⁵⁶

formally qualified philosophers. A good number of them are missionaries, others are anthropologists; others still are sociologists, among others. These observed the customs and cultures of Africans and purport therefrom to derive African philosophy. According to these contemporary African scholars/philosophers, only formally trained and qualified philosophers can purport to do philosophy. Another argument against the works of so called western philosophers on Africa is that since many of these 'western philosophers' are not native Africans, the tendency is for them to judge what they see in Africa in the light of their euro-centric backgrounds, which actually have been proven to be the case in many instances. See for instance, M A Makinde *African philosophy: The demise of a controversy* (2007) 35 – 39.

²⁵⁰ For instance, Levy-Bruhl, a French ethnologist who was sent to Africa to study African traditional system of thought and culture did so using western standards and concluded that African culture and thought systems were prescientific and prelogical. L Levy-Bruhl *Primitive mentality* trans L A Clare (1923).

²⁵¹ P O Bodunrin 'The question of African philosophy' (1981) 56 *Philosophy* 161 at 163.

²⁵² These are ethno-philosophy, philosophic sagacity and nationalist-ideological philosophy. More will be said on these later on in this paper.

²⁵³ P O Bodunrin 'The question of African philosophy' (1981) 56 *Philosophy* 161.

²⁵⁴ P J Hountondji *African philosophy: Myth and reality* trans H Evans (1983) 1 – 64.

²⁵⁵ Id at 63 – 64.

²⁵⁶ Id at 63. It should be noted, however, that some other African scholars/philosophers have questioned the nationality based tendencies of Hountondji's proposition. Some of these are G O Ozumba 'Methodology and African philosophy' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 17; G O Ozumba 'A recapitulation of Paul Hountondji's "African philosophy: myth and reality"' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 26.

Oruka on his part also regards African ethno-philosophy as nothing more than mere mythologies.²⁵⁷ According to Oruka, the term ‘philosophy’ is generally used or understood in two senses: the debased and the exact sense.²⁵⁸ In the debased sense, philosophy refers to the opinion or belief of an individual or a people. This belief or opinion is not open to criticism or subjected to critical enquiry. In the exact sense, philosophy is ‘...a rational and critical reflection on man, society and nature.’²⁵⁹ Oruka is of the opinion that since African philosophy is purportedly derived from the uncritical opinion and communal belief of Africans as a group, as opposed to individual expositions, it qualifies as philosophy only in the debased sense and is therefore nothing more than mere mythologies.²⁶⁰

Other African scholars/philosophers, however, disagree with those who deny or question the status of philosophy to an African worldview and thoughts. According to Makinde, African philosophy surely qualifies as philosophy because western philosophy itself goes beyond logical and analytical philosophy (some of the grounds, upon which Africa philosophy is being disqualified) and includes metaphysics and ethics.²⁶¹ Since there is a robust component of metaphysics and ethics in African philosophy there is no basis for denying the status of philosophy to African thought and worldview. The universality argument of Bodunrin and other scholars has also been debunked by Ozumba who opines that although man has common stock and destinies, diversity in location and cultures has invariably meant diversity in worldview and any attempt to force every world view into one whole will be superfluous.²⁶² According to Ozumba:

There is no doubt that we live in a global setting and as such things should be seen globally, but the fact remains that such attempt may smack of superficiality. It is better to approach reality from a piece meal point of view so that every detail will be taken into account. Africans and those interested in the African existence and the world-view should be allowed to periscope reality from the African point of view, while

²⁵⁷ H O Oruka ‘Mythologies as African philosophy’ (1972) 9 (10) *East Africa Journal* 5.

²⁵⁸ Id at 7 – 8.

²⁵⁹ Id at 7.

²⁶⁰ Id at 8 – 9.

²⁶¹ M A Makinde *African philosophy: The demise of a controversy* (2007) 23 – 66.

²⁶² G O Ozumba ‘Methodology and African philosophy’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 17 – 19.

others with different dispositions should present the picture of reality from their individual standpoints and at the end, the whole intellectual effort will reveal reality in a comprehensive fashion and scope.²⁶³

In the view of this scholar, therefore, it is to the benefit of knowledge and man in general that all worldviews be allowed to co-exist and compete freely for relevance as this will make for a more complete knowledge and understanding. In Uduigwomen's view, however, the controversy surrounding African philosophy today relates more to its precise nature, as there is now an established tradition of African philosophy.²⁶⁴

Be that as it may, I am of the opinion first, that it is a gross misunderstanding for anybody to say that Africans cannot philosophise. Such a view to me in fact smacks of intellectual hegemony or imperialism. Anybody who is familiar with African customs, culture, wise sayings and way of life cannot deny that Africans do have worldviews that are peculiar to them. African philosophy constitutes part of this worldview and it will be erroneous to judge and deny African worldviews based on western perspectives. As rightly pointed out by Ozumba, the differences in time, space and culture mean that Africans cannot have exactly the same world view with the West. To now seek to test the existence or validity of African worldview and philosophy from the perspectives of the West will be erroneous and misconceived.

Second, the objections of many of the African philosophers who deny the status of philosophy to African worldview are mainly directed against ethno-philosophy. Some theorists, like Bodunrin and Oruka, are willing to concede the status of philosophy to other types of African philosophical endeavours like philosophic sagacity and nationalist-ideological philosophy (my present endeavour appear to fall under the latter). Third, even if one is to discount the two earlier points, the existence of African philosophy is put beyond doubt today because it at least exists in the literature as African philosophical literature. A point rightly conceded by Hountoundji above.

²⁶³ Id at 23.

²⁶⁴ A F Uduigwomen 'Philosophy and the place of African philosophy' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 3.

African philosophy has three main historical epochs.²⁶⁵ The first was the epoch of unwritten philosophy and unknown philosophers; the second was the time of re-orientation of African philosophy by colonial ethnographers and ethno-philosophers; the third epoch is the epoch of critical re-orientation of African philosophy by contemporary African philosophers/scholars. The first epoch in the history of African philosophy is marked by the doing and not writing of philosophy by unknown philosophers in Africa. As a result of this fact, this period was largely marked by unrecorded doing of philosophy. This period of time in history is consequently very difficult to determine.²⁶⁶ According to Makinde, however, there is ample evidence that philosophy was done and written between 570 BC ad 430 AD in Africa.²⁶⁷ The scholar surmises that Pythagoras and Plato's immortality and transmigration of the soul doctrines may have been obtained by Plato through the latter's earlier contact with ancient Egypt. The first epoch was therefore a time when unknown African sages philosophised and the philosophy was passed down several generations through oral tradition.

The second historical epoch of African philosophy was a time when colonial ethnographers, ethno-philosophers and indigenous Africans studied and purported to identify African philosophy from their observations of African culture, religion and way of life.²⁶⁸ Colonial ethnographers and ethno-philosophers who wrote African philosophy during these times, however, did so from western premises and invariably concluded and tagged traditional African thought as prescientific and prelogical.²⁶⁹ As I stated earlier, however, objections have been raised by contemporary African scholars and philosophers against the conclusion of these colonial ethno-philosophers on the ground that they are not formally trained philosophers and cannot therefore purport to be doing philosophy. Also, that it was erroneous for these ethno-philosophers to judge pre-colonial African thought from the basis and perspectives of western ideas and premises. It has also been argued that these colonial ethno-philosophers were not

²⁶⁵ M A Makinde *African philosophy: The demise of a controversy* (2007) 34 – 56.

²⁶⁶ Ibid.

²⁶⁷ Id at 34.

²⁶⁸ Id at 35.

²⁶⁹ One of the most notable of the colonial ethnographers at the time was Levy-Bruhl who was credited with tagging traditional African thought as prescience and prelogical. See L Levy-Bruhl *Primitive mentality* trans L A Clare (1923).

sufficiently integrated into pre-colonial African system so as to have been able to effectively understand and appreciate the nuances and dynamics of a pre-colonial African thought system.²⁷⁰

Indigenous Africans who also did African philosophy during this period of time like Mbiti have also not fared well in this respect as most of the objections raised in respect of colonial ethnophilosophers above attaches to them. Mbiti, a Kenyan post-colonial theologian who wrote mainly about religion, God and philosophy in Africa²⁷¹ was also said not to be a formally trained philosopher so that he cannot therefore do philosophy. His subsumption of African philosophy to religion in Africa has also been criticised as erroneous.²⁷²

The third historical epoch of Africa philosophy started off with the debate as to the existence or otherwise of African philosophy among contemporary African scholars/philosophers. In spite of initial hiccups, however, that debate appears to have been resolved in favour of the existence of African philosophy. There now seems to be an established tradition of African philosophy. There is now robust scholarship on African philosophy as scholars have gone beyond the debate regarding whether there is or there is not African philosophy to the examination of pertinent themes and issues in African philosophy.²⁷³

There are four different approaches/trends noticeable in the study of African philosophy. They are ethno-philosophy, philosophic sagacity, nationalist-ideological philosophy and professional

²⁷⁰ See for instance, A F Uduigwomen 'Philosophy and the place of African philosophy' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 3; M A Maknide *African philosophy: The demise of a controversy* (2007) 35 – 39.

²⁷¹ See for instance, J Mbiti *African religions and philosophy* 2 ed (1990).

²⁷² See for instance, M A Maknide *African philosophy: The demise of a controversy* (2007) at 36 – 39; K Wiredu 'Towards decolonizing African philosophy and religion' (1998) 1 (4) *African Studies Quarterly* 17 at 34.

²⁷³ K Gyakye 'Philosophical ideas of the Akans' 1981 (10) (1) and (2) *Second Order* 61; J I Unah 'Ontological – epistemological background to authentic African socio-economic and political institutions' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 107; A F Uduigwomen 'The place of oral tradition in African epistemology' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 36; FN Ndubuisi 'Crime and punishment of an ancient African morality' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 62; K A Ojong 'Metempsychosis and reincarnation in Ibiobio thought' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 82; C O Uchebue 'The concept of man's spiritual companions in Igbo traditional thought' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 90; among many others.

philosophy.²⁷⁴ Ethno-philosophy trend/approaches in the study of African philosophy refers to the works of western and indigenous African ethnographers, anthropologists, sociologists and philosophers of the colonial period who tried to derive African philosophy from the religion, culture, folklores and myths etc. of particular communities in Africa and extrapolate same to the rest of Africa.²⁷⁵ Most of the works of ethnographers and ethno-philosophers during the colonial period fall into this category. The philosophic sagacity approach refers to the articulation and presentation of the sayings, thoughts, ideas and reflections of African sages of particular communities. The basis of this kind of philosophy is to show that the absence of literacy in pre-colonial Africa is not fatal to the existence of African philosophy.

Nationalist-ideological philosophy approach refers to the attempts of African nationalists and freedom fighters to develop a new and unique socio-political philosophy suitable to the place and condition of Africans/Africa.²⁷⁶ Notable among the African nationalists and freedom fighters that had theorised on and tried to develop a unique political theory for Africa are Obafemi Awolowo with his mental magnitude theory;²⁷⁷ Leopold Senghor with his negritude theory examined above;²⁷⁸ and Julius Nyerere with his *Ujamaa* socio-political theory examined above;²⁷⁹ among others. The fourth trend in the study of African philosophy refers to approach of western trained indigenous Africans who look at philosophy as a universal discipline without cultural boundary. Most of the scholars who utilise this approach think of ethno-philosophy as not qualifying as philosophy because it lacks the requisite criteria of philosophy. According to Ozumba:

The members of this school hold that African philosophy is the philosophy done by African philosophers whether it be in the area of logic, metaphysics, ethics or history of philosophy. They go on to say that it is desirable that the works be set in some African context but is not necessary that they be so. This means that

²⁷⁴ G O Ozumba 'An examination of Bodunrin's "The question of African philosophy"' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 10.

²⁷⁵ See for instance, J Mbiti *African religions and philosophy* 2 ed (1990).

²⁷⁶ A F Uduigwomen 'Philosophy and the place of African philosophy' in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 3.

²⁷⁷ See for instance, O Awolowo *The people's republic* (1968).

²⁷⁸ L S Senghor *On African socialism* trans M Cook (1964).

²⁷⁹ J Nyerere *Ujamaa: Essays on socialism* (1964)

what makes a philosophy African is the medium through which such idea or discourse emanate. An African mind-set is what is needed.²⁸⁰

It will appear; therefore, that the nationality of the philosopher is the critical factor in what constitutes African philosophy rather than the content of the work in the view of philosophers in this approach. This nationality based approach has however been questioned by other scholars who wonder whether western trained indigenous African philosophers doing any kind of philosophy qualify as African philosophers.²⁸¹

Having thus tried to deal with the controversy surrounding the existence of African philosophy and other preliminaries matters and concluded that African philosophy is at least an emerging discipline, I now interrogate the constitutive nature of African philosophy below.

The principal basis and form of African society is communal and the principal character and function of an African worldview and way of life is to preserve social equilibrium and harmony.²⁸² Equilibrium and harmony therefore constitute the centre-piece of pre-colonial African worldviews. This worldview has therefore been described as “one of extra-ordinary harmony”, one of synthetic unity and mutual compatibility among all things²⁸³ This tendency cuts across all aspects of African worldview, culture and relations; from ethics and morality to socio-economic and political relations. The ancient African moral and ethical understanding was described in some detail by Gyakye while describing the philosophical understanding of the Akans thus:²⁸⁴

In Akan thinking about the foundations of morality, that is moral rules, consideration is given solely for human welfare, a position which is certainly dictated by Akan humanism, a concept I consider as the hub of

²⁸⁰ G O Ozumba ‘An examination of Bodunrin’s “The question of African philosophy”’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) at 12 – 13.

²⁸¹ See for instance, M A Makinde *African philosophy: the demise of a controversy* (2007) 56 – 60; G O Ozumba ‘A recapitulation of Paulin Hountondji’s “African philosophy: myth and reality”’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 26.

²⁸² See for instance, T O Elias *The nature of African customary law* (1956) 76- 108.

²⁸³ J I Unah ‘Ontological – epistemological background to authentic African socio-economic and political institutions’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 107.

²⁸⁴ K Gyakye ‘Philosophical ideas of the Akans’ (1981) 10 *Second Order* 61.

Akan philosophy. It is human welfare which forms the basis of Akan morality and provides a justification for its existence. *What is morally good is that which in their experience brings happiness, prosperity, dignity and peace to man and society. What is morally evil is that which brings conflict, litigation, misery, misfortune, shame; it is that which disrupts the harmony of the society.*²⁸⁵

That is to say that ancient African moral and ethical understanding is premised on societal harmony and equilibrium.

With regard to the social and economic dimension of pre-colonial African worldview, Unah has this to say:²⁸⁶ ‘In the African cultural world, social and moral actions have ontological dimension. Infringing a taboo does not necessarily produce an uneasiness of conscience in the doer of the action. Instead, infringing a taboo causes an ontological disequilibrium of the community. That is why the way and manner in which a person carries on his social actions is the concern of the community’. In the economic sphere also, ‘...the African cultural world is no less involving’.²⁸⁷ ‘The individualistic capitalistic attitude of “everyone for himself and God for us all” is totally un-hear-off (sic) in the economic life of the African’.²⁸⁸ This same concern for equilibrium, harmony and human welfare also informs and permeates pre-colonial African political philosophy as will become apparent as I discuss the different pre-colonial African political systems below. This is in order to further tease out the pertinent features of African political theories.

There are diverse and disparate forms of political systems in pre-colonial Africa. The various forms have therefore been variously categorised by scholars according to their points of emphasis. Thus, Fortes and Evans-Pritchard categorised pre-colonial African political systems into two broad types according to the presence or absence of government.²⁸⁹ Elias agreed, in the main, with Fortes and Evans – Pritchard’s categorisation but added the political organisations of

²⁸⁵ Id at 77 (emphasis supplied).

²⁸⁶ J I Unah ‘Ontological – epistemological background to authentic African socio-economic and political institutions’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 107 at 114.

²⁸⁷ Id at 118.

²⁸⁸ Ibid.

²⁸⁹ M Fortes and E E Evans – Pritchard ‘Introduction’ in M Fortes and E E Evans – Pritchard (eds) *African political systems* (1940) 1 – 23.

the Muslim north of Nigeria as a separate *sui-generis* category.²⁹⁰ Some other scholars categorised African political systems into four according to the role of lineage in the political systems.²⁹¹ The categorisation of Fortes and Evans-Pritchard accords more with my aim and objective in this paper which is the examination of the governmental structures of pre-colonial African political systems in order to deduce the African theory of government viz: the relationship between the ruler and the ruled. I, therefore, adopt the classification of Fortes and Evans-Pritchard in this Chapter.

As I state earlier, Fortes and Evans-Pritchard categorised the disparate and diverse forms of political systems in pre-colonial Africa into two main types. This is because the different forms outside of the two main types mask structural similarities with the two.²⁹² The first type is societies with centralised systems of government, chiefly classes, administrative machinery and judicial institutions. The second type is segmentary, acephalous societies without chiefly classes and centralised systems of government where the lineage system plays a prominent role in the regulation of the societies. Except for the ancient Kingdom of Zulu in South Africa and the Yoruba kingdoms of South – West Nigeria, among some few others, the main feature of the first type of systems appears to be people of different cultures and language brought together in a territorial unit by conquest and/or assimilation; while the main feature of the second type is characterised by people of homogenous culture, customs and language, except for some few exceptions like the Nuer of Southern Sudan.²⁹³

The political organisation of the first type of systems is well illustrated by the political organisation of the ancient Yoruba kingdoms of South West Nigeria. The ancient Oyo kingdom being typical of the political organisation of the Yoruba, it is used to illustrate the first type of system here. The second type of system is well illustrated by the pre-colonial Igbo political

²⁹⁰ T O Elias *The nature of African customary law* (1956) 11 – 14.

²⁹¹ See for instance, P Brown 'Patterns of authority in West Africa' (1951) 21 *Africa: Journal of the International African Institute* 261; P C Lloyd 'The traditional political system of the Yoruba' (1954) 10 *Southwestern Journal of Anthropology* 366.

²⁹² See for instance, M Fortes and E E Evans-Pritchard 'Introduction' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 1 – 23.

²⁹³ *Ibid.*

system. The Igbo political system is discussed as an example of the second type of political system in pre-colonial Africa in this Chapter.

3.5.1 The ancient kingdom of Oyo

The Yoruba are a linguistically uniform group with a common culture who trace their ancestry to Oduduwa. According to Ibidapo-Obe:

The Yoruba are a linguistically homogenous group, numbering about two hundred million people, permanently resident in at least six Nigerian States with descendants in Edo and Delta States, and three West African States of (Benin, Togo, Sierra Leone). The Yoruba are united by a common culture and tradition of origin tracing its ancestry to Ile-Ife in Osun State of Nigeria, which city, upon archaeological evidence, has been in existence since the 11th Century.²⁹⁴

According to legend and one of the most accepted traditions, Oduduwa migrated from the East (Upper Egypt) to the present locations of the Yoruba today and bore seven children. The first was the mother of Olowu of Owu, the progenitor of the Owu people; the second the mother of Alaketu of Ketu, the progenitor of Ketu Yorubas; the third, a prince, became the Oba of Benin in Edo State of Nigeria; the fourth was the Orangun of Ila; the fifth was the Onisabe of Sabe; the sixth was the Olupopo, the king of the Popos; the last born who was the wealthiest and most renowned, was Oranyan, the first Alaafin (king) of Oyo.²⁹⁵ The other Yoruba nations/tribes sprung from or had affinity with these seven.²⁹⁶ Although the political systems of the Yorubas are similar, it is not identical.²⁹⁷ It will therefore be somewhat misleading to purport to discuss Yoruba political systems under a single heading. As a result of this, I discuss the political system of the ancient Oyo kingdom as an illustration of the Yoruba political system. This system, of course with variations in symbols and institutions, in its broad outlines represents the systems found in most traditional Yoruba political systems.

²⁹⁴ A Ibidapo-Obe 'A discourse on the Yoruba philosophy of law' (2009) 2 *Nigerian Journal of African Law* 23

²⁹⁵ See for instance, S Johnson *The history of the Yorubas* (1921) 1 – 15.

²⁹⁶ Ibid.

²⁹⁷ This fact was brought to the fore by Lloyd in his discussion of the role of lineage in Yoruba traditional political systems. See P C Lloyd 'The traditional political system of the Yoruba' (1954) 10 *Southwestern Journal of Anthropology* 366.

The ancient Oyo political system has been correctly stated to be premised on a system of checks and balances revolving around four institutions/personages: the Alaafin of Oyo (king); the Oyomesi (council of chiefs), prominent among who is the Bashorun; the Ogboni societies; and the Esos (warriors), prominent among who is the Aare-Ona Kakanfo (the generalissimo).²⁹⁸ The status, function, and importance of these powerful figures will now be discussed in turn.

The Alaafin (king) of Oyo was a semi-divine monarch who in theory exercised absolute powers. The King's powers were, however, in practice checked by a combination of institutional, religious and mystical (taboos) mechanisms as will become apparent shortly.²⁹⁹ The Alaafin was feared in ancient times even more than the gods and occupied the position of the supreme head of the princes and kings of all Yoruba nations at that time.³⁰⁰ The selection for this office is done by members of the royal family who often were uncles or cousins of the candidates. These submit the names of qualified candidates to the Oyomesi (the council of chiefs) who must confirm the candidate. In the confirmation of the candidate by the Oyomesi, the Bashorun has the final say.³⁰¹

After being selected and crowned, the Alaafin never again appears in public, except three times a year during specific annual festivals. This was because his public appearance was considered incompatible with the status of his office. He was however allowed evening strolls *incognito*.³⁰² Probably as a result of the seclusion of this monarch and in order not to create too great a gap between him and his subjects, the Alaafin was assisted in the administration of Oyo by three lieutenants: the Ona Efa who was the legal adviser to the Alaafin and dispensed imperial justice in his absence; the Otun Efa who handled the religious dimension of the Alaafin's office and worshipped Sango the deified ancestors of the Alaafin at stated intervals on behalf of all

²⁹⁸ See for instance, J B Webster *et al The growth of African civilisation: The revolutionary years of West Africa since 1800* (1967) 92.

²⁹⁹ J A Atanda 'Government of Yorubaland in the pre-colonial period' (1973) 4 (2) *Tarikh* 1 at 3 – 5.

³⁰⁰ S Johnson *The history of the Yorubas* (1921) 40.

³⁰¹ *Id* at 42.

³⁰² *Id* at 46.

Yorubas; and the Osi Efa who represented the King in civil as well as military matters and can sometimes act in place of the King as the commander-in-chief of the army.³⁰³ Mention must also be made of the *Ilaris* who represented the Alaafin in each subject town and wielded political power on his behalf in those places.

Next to the Alaafin was the Oyo Mesi who collectively acted as the Kingmakers. The Oyo Mesi was composed of seven hereditary chiefs headed by the Bashorun. The Bashorun's status and powers are described in detail by Johnson thus:

The Oshorun [Bashorun]...may be regarded as the Prime Minister and Chancellor of the kingdom and something more. He is not only the president of the council but his power and influence are immeasurably greater than those of the others put together. His is the chief voice in the election of a King, and although the King as supreme is vested with absolute power, yet that power must be exercised within the limit of the unwritten constitution, but if he is ultra-tyrannical and withal unconstitutional and unacceptable to the nation it is the Basorun's prerogative as the mouth-piece of the people to move his rejection as a King in which case His Majesty has no alternative but to take poison and die.³⁰⁴

In addition to the instances described above, the Bashorun also appeared to have been vested with the power of the periodic review of the fitness and rule of the Alaafins. Thus, during the annual Orun festival, the Bashorun conducts divination with kola nuts in private with the Alaafin and the *Iya Oba* (official mother of the King)³⁰⁵ in attendance to determine the continued suitability and acceptance of the Alaafin by the ancestors. If the result of the divination is in the negative, the Alaafin forfeits his right to continue living and must commit suicide.³⁰⁶ It must be noted in this regard that a key determinant of acceptability or otherwise of Alaafin's reign is usually the wellbeing of the subjects and the general prosperity of the realm. The Oyo Mesi, headed by the Bashorun thus had overriding power not only in the selection of the Alaafin but also power to checkmate abusive tendencies of the Alaafins during their reigns.

³⁰³ S Johnson *The history of the Yorubas* (1921) 59 – 60. See also J B Webster *et al The growth of African civilisation: The revolutionary years of West Africa since 1800* (1967) 92 – 93.

³⁰⁴ S Johnson *The history of the Yorubas* (1921) 70.

³⁰⁵ The Alaafin in ancient times cannot have living biological parents. Such parents are forced to commit suicide upon the Alaafin's ascension to the throne because it is forbidden for the Alaafin to be subservient to anyone living.

³⁰⁶ P Morton-Williams 'The Yoruba Ogboni cult in Oyo' (1960) 30 (4) *Africa: Journal of the International African Institute* 364; see also S Johnson *The history of the Yorubas* (1921) 48 – 49.

Next to the Oyo Mesi is the Ogboni secret societies headed by the Oluwo. The Oluwo in turn acted as a countervailing force on the authority and powers of the Oyo Mesi over the Alaafin.³⁰⁷ The Ogboni secret society has two grades of membership: the titled grade which was hereditary and the senior grade which was not. All members of the Oyo Mesi were members of the senior grade of the Ogboni and cannot hold any titled office in the cult. This means first, that no member of the Oyo Mesi can officiate at any of the proceedings or meetings of the Ogboni; and second, that the Oyo Mesi were also strictly bound by the resolutions and decisions of the cult group by virtue of their membership. The significance of this will become apparent shortly. The Alaafin himself is a member but did not directly participate in the meetings and proceedings of the cult but has a permanent representative in the Ogboni who most probably oversaw his interests and reported back to him the goings on in the cult.

The Ogboni performed both religious and judicial functions in ancient Oyo, especially where the proceedings relates to the shedding of blood. And they are closely involved in the selection and rejection of the Alaafin by the Oyo Mesi through the Oluwo who headed the Ogboni and acted as the chief Ifa priest of the kingdom. Thus, either during the verbal rejection of any erring Alaafin by the Oyo Mesi spearheaded by the Bashorun or the rejection of the king by the ancestors during the annual Orun festival, the sanction of the Ifa oracle whose priest the Oluwo was and Ogboni cult in general was required. And since no member of the Oyo Mesi can officiate at any Ogboni meetings or proceedings, this served as a check on the likelihood of the Oyo Mesi abusing their powers to reject the Alaafin as that power is subject to the sanction of another independent institution to which the Oyo Mesi as members were also subject.

On the other hand, the selection of the titled members of the Ogboni was subject to the sanction and approval of the Alaafin. As stated earlier, the titled offices of the Ogboni is hereditary. When

³⁰⁷ A good description of the organisation, membership and function Ogboni cult in ancient Oyo is that by Morton-Williams. See P Morton-Williams 'The Yoruba Ogboni cult in Oyo' (1960) 30 (4) *Africa: Journal of the International African Institute* 364. See also J B Webster *et al The growth of African civilisation: The revolutionary years of West Africa since 1800* (1967) 92 – 93.

there is a vacancy in the ranks of the Ogboni titled office, the members of lineage whose turn it was to occupy the office will propose a successor to the Ogboni members. If the candidate was acceptable to the members, the Ifa oracle will be consulted. If acceptable to the ancestor, then the selection will be put to the Alaafin for acceptance. This way the Alaafin has at least a say in the appointment of the titled members of the Ogboni cult and exercise considerable influence therein.

Next to the Ogboni cult are the Esos (war chiefs) headed by the Aare Ona-Kakanfo.³⁰⁸ The Eso institution or order was said to have been founded by Oranyan, the warlike Alaafin of Oyo.³⁰⁹ Unlike the Oyo Mesi titles and titled grades of the Ogboni which were hereditary, the Eso titles were not but were dependent on merit. Only tested and tried individuals get to become an Eso. The Aare Ona-Kakanfo is the commander or generalissimo of the order. The title of Aare Ona-Kakanfo was usually conferred on the soldier and tactician of the day. The Kakanfo did not reside in the capital with the Alaafin but stayed in the outskirts of the city. Normally obstinate and headstrong, a trait said to be as a result of the serious initiation rituals and ingredients ingested upon their installation; they gave way to no one, not even the King. And since there cannot be two masters in a ship, the Kakanfos stayed outside of the capital. In addition to this, the Kakanfo, if he goes to war must win or die trying. He must not return defeated. Next to the Kakanfo are 70 Esos or war chiefs who assisted the Kakanfo in safeguarding the territorial integrity of the land. The Esos while expected to owe allegiance to the Alaafin, their promotion and advancement was dependent on the Oyo Mesi.

The Esos in theory appeared to be removed from the politics of the day. History showed, however, that the Esos were able to assert their will in cases of political deadlock or civil disturbance as happened during the reign of Alaafin Abiodun. During Alaafin Abiodun's reign, Bashorun Gaha had usurped the delicate balance of power in the ancient Oyo political system.

³⁰⁸ A more detailed discussion of the origin, structure and composition of the Esos (warlords) is contained in S Johnson *The history of the Yorubas* (1921) 73 – 75. See also J B Webster *et al The growth of African civilisation: The revolutionary years of West Africa since 1800* (1967) 94.

³⁰⁹ S Johnson *The history of the Yorubas* (1921) 143.

He had raised four Alaafins to the throne and had been responsible for the death of all four. Alaafin Abiodun was the fifth one. Alaafin Abiodun while prostrating daily in the house of Bashorun Gaha to appease him plotted secretly with Kakanfo Oyabi who entered the capital with Oyo troops, massacred Gaha's family and supporters and restored authority back to the Alaafin.³¹⁰

As can be seen from the foregoing, the ancient Oyo political system was a '... complex and delicate balance with checks and counterchecks against concentration of power in one man's hand'.³¹¹ This is not to say that tyrannical kings and chiefs did not arise occasionally in ancient times. They did. The structure of the system was, however, such that such aberration cannot but be temporary. Thus, although there was no formal representation or election in the modern sense, pre-colonial political systems of the Yorubas was popular government and could be rightly referred to as a democracy. The councils of chiefs served as the mouth piece of the people to the king and as the mouth piece of the king to the people. More so, where the will of the people is not being reflected in governance and the king has thereby become unpopular, the people can ask the council of chiefs to effect the deposition of an unpopular king. And where the Oba refused to yield, he could be removed by the people in general uprising with the support of the chiefs. Thus, not only the chiefs but also the people were able to exercise checks on the powers of the kings.³¹²

The kinds of checks and counter-checks examined here as an example of centralised political systems is also noticeable in similar types of political systems across pre-colonial Africa as anthropological evidence revealed. As Audrey for instance revealed in his study of the political system of the Bemba tribe, that the powers of Bemba chiefs were tempered by the powers of hereditary priests, military chiefs, and the authority and influence of paramount's mothers.³¹³

³¹⁰ A detailed historical account of Bashorun Gaha's rule and atrocities and how he was overthrown is in S Johnson *The history of the Yorubas* (1921) 178 – 186.

³¹¹ J B Webster *et al The growth of African civilisation: The revolutionary years of West Africa since 1800* (1967) 94.

³¹² See also J A Atanda 'Government of Yorubaland in the pre-colonial period' (1973) 4 (2) *Tarikh* 1 at 4 – 5.

³¹³ See A I Richards 'The political system of the Bemba tribe – North-Eastern Rhodesia' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 88 – 120. See also the account of Gluckman on the Zulu Kingdom

In addition to the above, the fact as can be gathered from evidence is that in spite of the centralised systems of government of chiefly societies there was scope for involvement and effective participation and political action of the subjects/citizens in government as have been pointed out by various scholars. A number of scholars have thus rightly identified consultation, deliberation and consensus as founding principles of pre-colonial African politics.³¹⁴ The rationale for deliberation and consensus as principles of decision-making in pre-colonial African societies is clearly explained by Wiredu when discussing the political organisation of the Ashantis of Ghana thus:

...pursuit of consensus was a deliberate effort to go beyond decision by majority opinion. It is easier to secure majority agreement than to achieve consensus. And the fact was not lost upon the Ashantis. But they spurned that line of least resistance. To them, majority opinion is not in itself a good enough basis for decision making, for it deprives the minority of the right to have their will reflected in the given decision. Or, to put it in terms of the concept of representation, it deprives the minority of the right of representation in the decision in question.³¹⁵

According to Wiredu, the main purport of consensus in decision-making in pre-colonial African societies is so that the will of the individual can be reflected in the decision affecting his interests. This according to the scholar is considered a fundamental human right in pre-colonial African political theory. Wiredu explained this point thus:

Two concepts of representation are involved in these considerations. There is the representation of a given constituency in council, and there is the representation of the will of a representative in the making of a given decision. Let us call the first formal and the second substantive representation. Then, it is obvious that you can have formal representation without its substantive correlate. Yet, the formal is for the sake of the substantive. On the Ashanti view, substantive representation is a matter of a fundamental human right.

of South Africa. M Gluckman 'The kingdom of the Zulu of South Africa' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 25 – 55.

³¹⁴ See for instance, C Ake 'The unique case of African Democracy' (1993) 69 (2) *International Affairs* 239 at 243; K Wiredu 'Democracy and consensus in African traditional politics: A Plea for a non-party polity' available at <http://them.polylog.org/2/fw-k-en.htm> (accessed on 14 July 2013) paras 1 – 6.

³¹⁵ K Wiredu 'Democracy and consensus in African traditional politics: A Plea for a non-party polity' available at <http://them.polylog.org/2/fw-k-en.htm> (accessed on 14 July 2013) para 13.

Each human being has the right to be represented not only in council, but also in counsel in any matter relevant to his or her interests or those of their groups. This is why consensus is so important.³¹⁶

Thus, deliberation, which has substantive representation as its end constitutes the very basis of pre-colonial African politics.

True to this character, a closer analysis of the centralised political systems of the Yorubas shows that deliberation and consensus are important features of decision-making. Although, to a lesser degree than that obtained in the Igbo political systems (which I examine below) and other acephalous societies in Africa, the role that consultation, deliberation and consensus play in pre-colonial African politics is seen, for instance, in the area of law-making in the political systems of the Yorubas. According to Atanda:

...in pre-colonial Yorubaland, law-making in any one town or kingdom, in normal circumstances, was the duty of the *oba* [king] and his *igbimo*[council of chiefs]. Issues needing legislation were brought to and debated by the *igbimo*, meeting in the *oba*'s palace. *It was after the debate that a decision agreeable both to the oba and his igbimo was taken.* It was this decision which was promulgated to the people in the name of the *oba* and the *igbimo*.³¹⁷

A somewhat similar view to the above is echoed by Ibidapo-Obe thus:

... all sectors of the Yoruba society contribute to lawmaking (sic)-the ordinary folks, the men and women of status, the elders and young persons. Whilst general consultation is a pre-requisite of Yoruba legislation: the elders are given a prominent role.... Consultation and deliberation take place at the town-or village square. Where the proposed legislation is of a specialized nature, the groups who are directly affected and versed in the specific field of legislation may propose legislation. For example, commercial legislation would enjoy greater inputs from the appropriate guilds – market women, carvers, blacksmiths, medical corps, *etcetera*.... Ultimately, the entire community subscribes to a new legislation after full consultation and deliberation has been done....³¹⁸

³¹⁶ Id at para 14. Although, Eze criticizes Wiredu's position which seems to hold consensus as the end of democracy and holds the view that consensus should be regarded as one of the moments of democracy rather than its ends. See E C Eze 'Democracy or Consensus? Response to Wiredu' available at <http://them.polylog.org/2/fee-en.htm> (accessed on 14 July 2013). Eze's criticisms are, however, not directed against the argument that consensus was the basis of decision-making in traditional African societies. This is as well since this fact of traditional politics is well established by scholars. More so, the scholar agrees that '...the best form of democracy is one that *culturally* reconciles both centripetal and centrifugal political forces of its constituents – while preserving each current in its most vital élan. In fact, only such a political culture may be called truly democratic.' Para 33. (Emphasis supplied).

³¹⁷ J A Atanda 'Government of Yorubaland in the pre-colonial period' (1973) 4 (2) *Tarikh* 1 at 5. (Emphasis supplied)

³¹⁸ A Ibidapo-Obe 'A discourse on the Yoruba philosophy of law' (2009) 2 *Nigerian Journal of African Law* 23 at 31.

While these scholars disagree on the scope and extent of the involvement of the whole community in the legislation process in pre-colonial governments of Yorubaland, what is made very clear in both of their submission is the fact that consultation, deliberation and consensus were essential component of the legislation process in pre-colonial Yoruba political systems.

Consultation, deliberation and consensus as essential components of public decision-making processes in centralised pre-colonial political systems were not a peculiarity of the Yoruba systems. The accounts of the political organisation and structure of the Ashantis of Ghana as recounted by Wiredu³¹⁹ and that of the Zulus as recounted by Gluckman³²⁰ among those of other pre-colonial African political systems, show clearly that consultation, deliberation and consensus were essential components of their decision-making processes. The conclusion that I draw from the foregoing is that while the degree of their operation and importance may vary from political systems to political systems, consultation, deliberation and consensus are important features of most centralised political systems in Africa. The importance and operation of these features were, however, much more apparent in pre-colonial acephalous African societies as the discussion in the next section shows.

3.5.2 Pre-colonial Igbo political system

The people constituting the Igbo live in the Eastern part of Nigeria bounded in the north by the Igala, Idoma and Ogoja peoples; bounded in the east by Ibibio people; on the south by the Ijaw people of Nigeria's Niger-Delta region; and in the west by the Edo-speaking of Edo State.³²¹ Theirs is a segmentary political system organised along lineage identity and allegiance where descent is patrilineal and residence is consequently patrilocal. The Igbo territorial unit is made up of a household composed of the husband and his wife or wives, his children and grandchildren. A number of households tracing descent from the same ancestor make up a compound; and closely related compounds also tracing descent from the same ancestor compose a lineage.

³¹⁹ K Wiredu 'Democracy and Consensus in African Traditional Politics: A Plea for a Non-party polity' available at <http://them.polylog.org/2/fwk-en.htm> (accessed on 14 July 2013)

³²⁰ M Gluckman 'The kingdom of the Zulu of South Africa' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 25.

³²¹ P A Oguagha 'The Igbo People' in B W Andah and A I Okpoko (eds) *Some Nigerian peoples* (1988) 127.

Related lineages make up a village and villages descended from a common ancestor federate into a village group or town.³²²

Within the households, final authority resides in the husband/father who is head of the households. Authority within the compounds vests in the father/husband or the first male child of the father where the father is deceased. ‘At the lineage level, the oldest man in the unit called Okpara is the focus of ritual and political authority’.³²³ Things are, however, differently arranged within the village structure, which constitutes the first political unit and within the village group or town, which constitutes the second political unit.

Afigbo, a renowned Igbo historian, is of the view that the political systems of the Igbo can be divided into two types: the presidential monarchy types and the village republic types.³²⁴ The presidential monarchy systems were found among those Igbo communities which shared borders with and have consequently borrowed aspects of chiefly and centralised systems of government from their neighbours while the village republic types were found among those communities that had not been exposed to the corrupting influence of neighbours with chiefly and centralised political systems.³²⁵ Practices and process of government in the village republic is, however, the same as the presidential monarchy but devoid of title, regalia and ceremonies which characterised the latter.³²⁶

Afigbo further identifies four types of political organisations or structures in Igboland using the dominance and prominence of the kinship system in the political structure as a criterion.³²⁷ The first types were communities where ‘...politics and government depended overwhelmingly on

³²² See for instance, A I Okpoko ‘Traditions of genesis and historical constructions: The Umueri of Igboland as a case study’ in B W Andah and A I Okpoko (eds) *Some Nigerian peoples* (1988) 103 at 106.

³²³ P A Oguagha ‘The Igbo People’ in B W Andah and A I Okpoko (eds) *Some Nigerian peoples* (1988) 127 at 134.

³²⁴ A E Afigbo ‘The indigenous political system of the Igbo’ (1973) 4 (2) *Tarikh* 13 at 15 – 16.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Id* at 16.

the kinship system.³²⁸ In these types of societies, secret societies and age-grades where they existed at all exercised no political power or control. The second types were those where titles and the kinship systems played a more or less equal role. The third types were communities where the kinship systems and secret societies jointly played prominent roles. The fourth types were societies where political power and control revolved around the age-grade systems and the kinship systems. Thus, although the political system of the Igbo varied in degrees (not really in substance) spatial variations and influences of neighbouring communities, the village republic type described in the next paragraph is regarded as typical and constitutes the purest form of Igbo political organisation.³²⁹

At the village level, which constituted the first political unit of the Igbo political system, direct democracy was obtained. The system is aptly described by Oguaha as follows:

Government at the village level is in the hands of the village assembly composed of all the male adults. However, this assembly has as its core an inner council (*ama ala*) made up of lineage heads, title holders, and other wise and respected elders who are selected *ad hoc*. Public matters are openly discussed, and every member is free to make a contribution. At the end of the debate, the *ama ala* withdraws for consultation (*izuzu*) after that a spokesman who is a reputable orator announces the decision. If it is accepted by the assembly that is the end of the matter, otherwise the process is repeated until there is a general consensus.³³⁰

What is described above approximates direct democracy as practised in ancient Athens and Rome in the early history of western human government.

At the village group/town level, government among the Igbo approximates more the representative type of democracy we have in contemporary times. Government at the village group level was by representatives from the different villages. These consisted of lineage heads, titled holders and respected elders all chosen *ad hoc* when and as necessary. The procedure for

³²⁸ Ibid.

³²⁹ See A E Afigbo 'The indigenous political system of the Igbo' (1973) 4 (2) *Tarikh* 13 at 15; see also P A Oguagha 'The Igbo People' in B W Andah and A I Okpoko (eds) *Some Nigerian peoples* (1988) 127 at 134 – 137.

³³⁰ P A Oguagha 'The Igbo People' in B W Andah and A I Okpoko (eds) *Some Nigerian peoples* (1988) 127 at 135.

making decisions is the same as that obtained in the village assembly. Such decisions are then enforced by the age-grades and secret societies of component villages to preserve the autonomy of the villages. Afigbo, among other scholars and ethnographers, refers to this type of political system as the village republic type.³³¹

Five different principles are said to be deducible from the Igbo political system.³³² The first is that is that the Igbo political unit is not just an assemblage of fellow citizens ‘but a sort of spiritual commonwealth’³³³ consisting of living blood relatives, dead relatives and community gods. Thus, government and politics to the Igbo are family affairs. The second principle of Igbo politics is the principle of equality and equivalence. The third principle is that government in Igboland has a religious and ritual character as in most other pre-colonial government in Africa. The fourth principle is that government/politics in pre-colonial Igbo political system were not seen as ways of making new rules to govern peoples’ lives rather than making the (good old) rules fashioned at the beginning by the gods and ancestors work. While the fifth principle of pre-colonial Igbo politics is that competition was seen as a ‘life principle’. This kept the people and the system as a whole on top of their games and ensured the efficient and effective working of the political system by ensuring that only the best emerged to take up and remain in leadership position.

The village republic type of government as discussed above was not peculiar to the Igbo people. It appeared to have been a feature of segmentary societies in pre-colonial Africa. Consequently, the village republic type has been noted among the Tallensi of Ghana and the Nuer of Southern Sudan. According to Fortes, describing the political system of the Tallensi:

The *kpeem* is the principal representative of the lineage, the focus of the forces maintaining its corporate unity and identity. All inter-lineage transactions are conducted formally through lineage heads; but

³³¹ See for instance, A E Afigbo ‘The indigenous political system of the Igbo’ (1973) 4 (2) *Tarikh* 13 at 15.

³³² Id at 20 – 22.

³³³ Id at 20.

whatever the issue, the whole unit must be consulted. Every member may express his opinion, greatest weight being attached to that of anyone directly implicated, economically or jurally.³³⁴

In relation to the Nuer, Evan-Pritchard has this to report: 'Every Nuer, the product of a hard and equalitarian upbringing, deeply democratic, and easily roused to violence, considers himself as good as his neighbour; and families and joint families, whilst coordinating their activities with those of their fellow villagers, regulate their affairs as they please.'³³⁵

Needless to say that in the village republic system of segmentary societies as the ones discussed above, there is little scope, if any, for arbitrary, irresponsible or tyrannical leadership. It is in this kind of political arrangement that the largest scope for political action and participation is found. This is because it is in this kind of political system that we see consultation, deliberation and consensus play very prominent roles in decision-making processes.

3.6 CHANGES WROUGHT BY COLONIALISM ON AFRICA'S TRADITIONAL SYSTEM OF GOVERNMENT

The impacts of colonialism on the socio-political and economic fabric of Africa are diverse and multi-various and have been discussed at some length by a number of scholars.³³⁶ Rodney discusses at least five features/impacts of colonialism in Africa.³³⁷ The first is that colonialism resulted in the intensification of economic subordination and socio-political subjugation of African women. The second was the giving of pejorative meaning and content to the term 'tribe' and 'tribalism' and the fostering of the system of divide and rule in Africa. The third is the disintegration and technological impoverishment of African economies. The fourth is that

³³⁴ M Fortes 'The political system of the Tallensi of the Northern Territories of the Gold Coast' in M Fortes and E E Evans – Pritchard (eds) *African political systems* (1940) 239 at 252.

³³⁵ E E Evans – Pritchard 'The Nuer of the Southern Sudan' in M Fortes and E E Evans – Pritchard (eds) *African political systems* (1940) 272 at 294.

³³⁶ See for instance, A I Richards 'The political system of the Bemba tribe – North-Eastern Rhodesia' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 88 at 112 – 120; M Gluckman 'The kingdom of the Zulu of South Africa' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 25 at 46 – 53.

³³⁷ W Rodney How *Europe under-developed Africa* (1973) Chap 6 pp 37 – 57.

colonialism fostered the dependence of Africa in terms of trade and socio-economic well-being on Europe. Finally, that colonialism stunted the physical and mental growth and well-being of Africans.

With specific reference to African politics and governance, the impact of colonialism is graphically painted by Rodney thus:

To be specific, it must be noted that colonialism crushed by force the surviving feudal states of North Africa; that the French wiped out the large Muslim states of the Western Sudan, as well as Dahomey and kingdoms in Madagascar; that the British eliminated Egypt, the Mahdist Sudan, Asante, Benin, the Yoruba kingdoms. (sic) Swaziland, Matabeleland, the Lozi and the East African Lake kingdoms as great states. It should further be noted that a multiplicity of smaller and growing states were removed from the face of Africa by the Belgians, Portuguese, British, French, Germans, Spaniards and Italians. Finally, those that appeared to survive were nothing but puppet creations.³³⁸

To put it summarily, colonial rule resulted in the effective abrogation of African political power throughout the continent of Africa.³³⁹

In places where traditional rule was not abrogated, traditional rulers became stooges of colonists bound to act within the ‘...narrow boundaries laid down by colonialism, lest they find themselves in the Seychelles Islands as “guests of His Majesty’s Government”’.³⁴⁰ The colonists disrupted the harmony and balance hitherto present in African traditional political systems. They installed chiefs where there were none previously and gave their new inventions unfettered powers and authority hitherto unknown in those places. For instance, in some places in Igbo land, Eastern Nigeria where there was no culture of chiefly classes, the colonists created chiefs by warrant and imposed them on the populace.³⁴¹ Where there were chiefly classes, the chiefs were turned into instruments of indirect rule and all traditional restraints on the powers of these chiefs were removed contrary to what hitherto obtained in traditional politics. As rightly

³³⁸ Id at 35.

³³⁹ Id at 36.

³⁴⁰ Ibid.

³⁴¹ See for instance, O Awolowo *The people’s republic* (1968) 24.

summarised by Mamdani:³⁴² ‘From African tradition, colonial powers salvaged a widespread and time-honoured practice, one of a decentralised exercise of power, but freed that power of restraint, of peers or people. Thus they laid the basis for a decentralized despotism’.³⁴³ The colonists thereby invented despotism in colonial Africa and the despotic system of government noticeable in most African states today could be said to be directly traceable to colonialism in Africa. It is in this regard that I think Howard is on point when she points out in effect that if African states are not democracies in the 80s, it is not because they have abandoned their heritage of democracy but rather that they are practicing the dictatorship they learnt under colonialism.³⁴⁴

3.7 APPROPRIATE JUDICIAL CONCEPTION OF DEMOCRACY FOR POLITICAL ACTION IN AFRICA

It has been seen from the foregoing that consultation, deliberation and consensus were essential features and governing principles of the public decision making processes of both types of pre-colonial African political systems identified and discussed above. Although these features appeared to be much more emphasised and better practiced in the segmentary or acephalous political systems than the centralised types of systems, they are nevertheless features common to both types of political systems. The analysis also revealed that politics and governments of pre-colonial African systems were inclusive and foster robust scope for participation and political action through the instrumentalities of consultation, deliberation and consensus which are considered fundamental human rights under pre-colonial African political theories and principles of government.

³⁴² M Mamdani *Citizen and subject* (1946) 35 – 137.

³⁴³ *Id* at 48.

³⁴⁴ R Howard ‘The dilemma of human rights in sub-Saharan Africa’ (1980) 35 *International Journal* 724 at 728.

This is not to say that pre-colonial African governance systems or political theories do not have what may be regarded as its downsides.³⁴⁵ A number of them can be identified. First, African socio-political theory appeared to be plagued by gender-inequality. For instance, as discussed above, only adult males of the Igbo society were members of the village assembly, the women were excluded. This means that women were excluded from decision-making at the public/political level. Too much stress need not, however, be placed on this defect. This is because the Igbo society is a patrilineal one. In other African societies which are matrilineal, the reverse was actually the case. In matrilineal societies in Africa, women occupied chiefly positions and wielded political authorities over men.³⁴⁶ Even in some other patrilineal societies like the Yorubas for instance, women were historically known to have had and wielded political control and power and occupied chiefly positions. In fact, up till today, the chiefly position of *Iyalode* (the representative of the market women and the womenfolk generally on the council) is a permanent feature of Yoruba council of chiefs throughout Yorubaland. Rodney has in fact argued in this regard that the intensification of economic subordination and socio-political subjugation of women in Africa is a feature of colonialism.³⁴⁷ I agree with his analysis. This is because the extent to which women were subjugated in Africa and excluded from political power is often overstated and was in any event worsened by colonialism.

Second, African political socio-political thought/theory is believed to subsume the individual into the group and thereby impinge the autonomy of individuals by virtue of the communal structure of African society. Too much premium need not be placed on this view either. I believe an-in-depth analysis of African socio-political structure did not subsume the individual in that way. I think the correct reading of African socio-political thought in this regard is not that

³⁴⁵ See generally D Cornell 'Is there a difference that makes a difference between Ubuntu and dignity?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 221; Y Mokgoro and S Woolman 'Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 241; T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532 for a discussion of some of the criticisms normally levelled against pre-colonial African socio-political thought.

³⁴⁶ See for instance, the anthropological account of Richards on the Bemba tribe of South and Central Africa in this regard: A I Richards 'The political system of the Bemba tribe-North-Eastern Rhodesia' in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 83.

³⁴⁷ W Rodney How *Europe under-developed Africa* (1973) Chap 6 pp 37 – 38.

African communalism subsumed the individuality of persons but that the individual is encouraged rather to put the community before himself/herself. This point of view is supported by quite a number of African scholars.³⁴⁸

The above point I think is put beyond doubt by Elias thus: ‘The individual certainly has fairly well defined rights and duties within his group.’³⁴⁹ The scholar then goes ahead to illustrate this by pointing out that land-holding in traditional societies although communal was subject to specific assignments to individual members old enough to exploit same. And that such assignments once allocated were transmissible to descendants without any restriction at all, save that such land cannot be alienated by individual members of the group without prior consent of the family. The exception to this rule is where the land in question has been divided among all entitled members.³⁵⁰ Thus, although the degree of allowable individual rights and interests in pre-colonial African societies may differ from that of the West, it will be erroneous to assume African communalism completely subsumed the individual.³⁵¹

Third, some pre-colonial African political systems could also be said to be aristocratic by virtue of the fact that political power and authority was in some political systems, especially the centralised political systems, vested in hereditary chiefs and personages. Too much importance need not also be attached to this argument. This is because, as I already point out in my discussion of the systems, there existed at the time ample checks and balances to ensure that these hereditary chiefs and personages did not abuse their powers. As rightly noted by Ibidapo-Obe, pre-colonial African governance systems exhibited robust democratic norms because of its ample checks and balances on excesses of political power.³⁵² That African constitutional schemes provided for more than enough of the required checks and balances is confirmed by Elias thus:

³⁴⁸ See for instance, K Kaunda *A humanist in Africa* (1966) 24.

³⁴⁹ T O Elias *The nature of African customary law* (1956) 83.

³⁵⁰ Ibid.

³⁵¹ See also id at 83 – 87.

³⁵² A Ibidapo-Obe *Synthesis of African law* (2005) 82.

The schemes of constitutional checks and balances, especially that of devolution of central authority upon regional chiefs, is not a mere administrative device. It involves the vital principle that all sections of the people as well as all major interests (e.g. the West African ‘secrete societies’) in the community are enabled, in the final analysis, to have effective say in the ordering of public affairs.³⁵³

Finally, some philosophers/scholars have also argued that religion and the spiritual permeated African socio-political thought³⁵⁴ with the implication that this characteristic renders pre-colonial African political thought unsuitable for use in contemporary African secular political environment. While it is true that religion and ritual played a major role in pre-colonial Africans’ lives, it may not be strictly correct to assert that they did not or cannot separate religion or the spiritual from other aspects of their lives.

A number of African philosophers have actually shown that this view of pre-colonial Africans is in fact erroneous. For instance, Gyakye has shown that, contrary to the assertion of some scholars that religion was the foundation of all things in pre-colonial Africans lives, in relation to the Akans of Ghana religion was/is not the foundation of their ethical values and norms.³⁵⁵ The scholar argues that the view of the Akans about gods is utilitarian only. Non-performing gods were liable to be discarded.³⁵⁶ This argument is also supported by Wiredu who argues that the fact that Akans can discard non-performing gods in favour of more effective ones is incompatible with an all pervasive notion of religion in pre-colonial times.³⁵⁷ According to him, ‘[a]n attitude of genuine religious devotion cannot be thus conditional.’³⁵⁸

However, even if any or all of these objections or defects are made out, they are defects that can be corrected without affecting the substance of the African political theory. More so, since not all

³⁵³ T O Elias *The nature of African customary law* (1956) 19.

³⁵⁴ See for instance, J Mbiti *African Religions and philosophy* (1990) where the author argued that traditional African did not separate religion from other sphere of life; in fact that religion pervaded the whole existence of traditional African people.

³⁵⁵ K Gyakye ‘Philosophical ideas of the Akans’ 1981 (10) (1) and (2) *Second Order* 61 at 75 – 77.

³⁵⁶ *Ibid*

³⁵⁷ K Wiredu ‘Towards decolonizing African philosophy and religion’ (1998) 1 (4) *African Studies Quarterly* 17

³⁵⁸ *Id* at 34.

aspects of pre-colonial African political theory or practice is practicable or realisable in contemporary times in Africa; pre-colonial notions of governance can be developed and infused with universal ideals like equality, plurality, autonomy and fundamental human rights to make the developed systems more robust and suited to 21st century democracy.

Having examined the political systems I consider representative in Africa and concluded that consultation, deliberation and consensus are pertinent features of the decision-making processes of the systems; and having also examined some of the downsides that may be said to be inherent in the systems, I now turn to the identification of pertinent features that I think can be deduced from the political theories as deduced from the political systems and philosophical literature examined for a proper articulation and fashioning of an African based model of democracy that will form the basis of an African based judicial conception of democracy.

There are at least five pertinent features or principles that I think are deducible from my examination and analysis of the African political systems and theories. The first feature is harmony and equilibrium of the systems. The second is the human centred and welfare focussed authority of African systems. The third is its communitarian tilt. The fourth is the egalitarian form and orientation of the systems. The fifth is the requirement of consultation, deliberation and consensus in decision-making processes. These features/principles will now be discussed in turn.

As regards the first feature, I already point out that African socio-political theory is a system rooted in harmony and equilibrium. This feature frowned upon the concentration of wealth, resources or power in a few hands to the detriment of others in society. As rightly pointed out by Nyerere, all goods and resources in the community were presumed to be held in common by all members of society and were to be shared among them according to needs.³⁵⁹ Consequently, members were not permitted to acquire or hoard goods or resources beyond their basic needs while other members of society were lacking. In fact, as I have stated already, there is a standard

³⁵⁹ J K Nyerere *Ujamaa: Essays in socialism* (1968) 1 – 12.

below which no person in traditional African society can exist without bringing shame to the whole family and his/her immediate community.³⁶⁰ Kaunda,³⁶¹ Unah,³⁶² and Gyakye,³⁶³ among others, all echo this reading of pre-colonial African societies. This same concern for equilibrium in socio-political relations also informed the extensive checks and balances noticeable in the political systems as discussed above.

This emphasis on harmony and equilibrium of African thought also disavowed any rigid private/public distinctions. Thus, while it appears that pre-colonial African societies recognised some kind of dichotomy between the private and the public realms, it seems that such dichotomies were more or less fluid.³⁶⁴ What is beyond doubt, however, is that whatever distinctions traditional African societies made between the private and public realms clearly excluded distinctions that will privatise extreme poverty. This is because it is apparent from the foregoing analysis that pre-colonial African society regarded the welfare of every member of the society as the business of all members of the society.

The second pertinent feature of African political theories is that every exercise of political power and authority is human-centred and carried with it the responsibility to attend to and ensure the welfare of subjects.³⁶⁵ Kaunda has rightly argued in this regard that ‘African humanism has always been Man centered’.³⁶⁶ Governance must therefore revolve around the people and that this conviction of the centrality of man in the scheme of things is what will get African politics back on the right track.³⁶⁷ Oculi has also in this respect stated that: ‘The concept of citizenship was thus tied to this economic obligation of those in authority to those in their domain. ...The

³⁶⁰ Id at 107.

³⁶¹ K Kaunda *A humanist in Africa* (1966) 22 – 25.

³⁶² J I Unah ‘Ontological – epistemological background to authentic African socio-economic and political institutions’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 107 at 118.

³⁶³ K Gyakye ‘Philosophical ideas of the Akans’ (1981) 10 *Second Order* 61 at 77.

³⁶⁴ See for instance the discussion of Elias on traditional African ideas of private and public law in T O Elias *The nature of African customary law* (1956) 110 – 129.

³⁶⁵ O Oculi ‘The limits of power: Lessons from Egyptology’ in J Ayoade and A Agbaje (eds) *African traditional political thought and institutions* (1989) 45.

³⁶⁶ K Kaunda *A humanist in Africa* (1976) 22.

³⁶⁷ Id at 41.

concept of a “citizen” starving and living under the terror of poverty while the ruling classes enjoy economic surplus, security and well-being is clearly alien to this [African] constitutional framework.’³⁶⁸ And as I also point out above when examining the Yoruba political systems, the key determinant of whether a monarch was performing well and thus qualified to continue in office throughout Yoruba various political systems was the prosperity and welfare of the subjects of the realm. If the reverse happened to be the case, the monarch will be compelled to commit ritual suicide. Such a monarch has forfeited his right to live or continue in office.

The human welfare feature of the exercise of political authority and power will appear not to be a peculiarity of the Yoruba alone. In his description of Tallensi political organisation, Fortes also notes that the contemporaneous existence of authority and this kind of responsibility was a feature of Tallensi political system.³⁶⁹ According to him: ‘Every grade of right and authority is matched by an equivalent grade of responsibility. Those who can exact economic services from their dependants are economically and ritually responsible for their welfare and publicly liable for their actions’. ...‘This hierarchy of rights balanced against a hierarchy of obligations is the foundation of Tale jural relations.’³⁷⁰ Other studies have noted a similar principle of authority in other pre-colonial African political systems.³⁷¹

The communitarian feature of African political theories is another important principle of African socio-political relations. According to Menkiti, pre-colonial African thought views man in relation to his surrounding community.³⁷² It is consequently the community that defined the African man as man and not some abstract features of a lone individual deriving existence from

³⁶⁸ O Oculi ‘The limits of power: Lessons from Egyptology’ in J Ayoade and A Agbaje (eds) *African traditional political thought and institutions* (1989) 45 at 48.

³⁶⁹ M Fortes ‘The political system of the Tallensi of the Northern Territories of the Gold Coast’ in M Fortes and E E Evans – Pritchard (eds) *African political systems* (1940) 239.

³⁷⁰ Id at 252.

³⁷¹ See A I Richards ‘The political system of the Bemba tribe – North-Eastern Rhodesia’ in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 88 at 104; M Gluckman ‘The kingdom of the Zulu of South Africa’ in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 25 at 34.

³⁷² I A Menkiti ‘Person and community in African traditional thought’ in R A Wright (ed) *African philosophy: An introduction* 2 ed (1979) 157.

natural law.³⁷³ Menkiti also notes that attaining personhood in African pre-colonial thought is something that happened through a process i.e. puberty initiation.³⁷⁴ A man thus becomes a full person only after a process of incorporation and personhood into the community. This personhood once attained does not also stop immediately after death. This gives rise to the concept of ancestors or the living dead in traditional African thought. Community in African thought is therefore maximally defined to include the collectivities (not merely an aggregation) of the unborn generation, the living and the ancestors.³⁷⁵ In traditional African thought, therefore, it is the whole that constitutes the individual and not the other way round.³⁷⁶ The pre-colonial South African rendering of this concept is *umuntu ngumuntu ngabantu* which is often translated to mean ‘A person is a person through other persons.’³⁷⁷

As I point out earlier, Kaunda also argues that there are three key virtues of African thought viz: mutuality, acceptance and inclusiveness.³⁷⁸ According to Kaunda, pre-colonial African society was a mutual/reciprocal society which was organised and structured to satisfy basic human needs of all members (whether citizens or strangers) who were also under a duty to render reciprocal obligations to the society.³⁷⁹ Pre-colonial African societies were also accepting societies. It was the presence of the individual that really mattered and not their achievement. The incapable, the aged and the inept were therefore accepted as part and parcel and valid members of the society.³⁸⁰ Africa tribal societies were also an inclusive society. Everybody was accepted without regard to status, hierarchy or material wellbeing.³⁸¹

³⁷³ Id at 158.

³⁷⁴ Id at 158 – 159.

³⁷⁵ Id at 166.

³⁷⁶ Ibid.

³⁷⁷ Y Mokgoro and S Woolman ‘Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell’s thoughts’ in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 241 at 245 fn 11.

³⁷⁸ K Kaunda *A humanist in Africa* (1966) 24 – 28.

³⁷⁹ Id at 25

³⁸⁰ Id at 25 – 27.

³⁸¹ Id at 27 – 28.

This communitarian feature of African system appears to be one of the most profound of all its features. It defines and underlies all of pre-colonial African socio-political relations and philosophies. Ibidapo-Obe in fact opines that the communitarian thought is one of the philosophical ideas that the continent of Africa bequeathed to world's philosophical thought.³⁸²

The above is not to say, however, that pre-colonial African societies have no notion of the individual or individual right. As I already point out above when considering some of the downsides of pre-colonial African philosophies, the correct reading of pre-colonial African socio-political thought in this regard is not that pre-colonial African philosophies have no notion of the individual. It is that African communalism encouraged individuals to put community interests before his/her own.³⁸³ That pre-colonial African society has a notion of individual autonomy and rights have been well illustrated by Elias³⁸⁴ through a recapitulation of pre-colonial land-holding system among the Yorubas as I already point out above.

The fourth feature of African political thought is that African political societies were egalitarian in form and orientation. This feature of pre-colonial Africa is most noticeable in the acephalous societies. According to Afigbo for instance, the principle of equality and equivalence was one of the hallowed principles of Igbo political societies.³⁸⁵ He aptly explained the principle thus:

All who are morally worthy are basically equal, differences in wealth notwithstanding. In the same manner all segments at the same level of social organism are considered equal and equivalent irrespective of territorial spread and population size. Work and food have to be shared equally among all participants and each must take his share in order of seniority. If all men are equal and all segments equivalent and each must have his fair share of work and reward, then all must be allowed to participate in the process of decision-making.³⁸⁶

Equality and equivalence will, however, appear not to be a principle peculiar to the Igbos of Eastern Nigeria alone. Similar observation is made with regard to the Nuer of Southern Sudan by

³⁸² A Ibidapo-Obe *A synthesis of African law* (2005) 90 – 92.

³⁸³ K Kaunda *A humanist in Africa* (1966) 24

³⁸⁴ T O Elias *The nature of African customary law* (1956) 83.

³⁸⁵ A E Afigbo 'The indigenous political system of the Igbo' (1973) 4 (2) *Tarikh* 13 at 21

³⁸⁶ Ibid.

Evan-Pritchard.³⁸⁷ According to Evan-Pritchard, every Nuer, being a product of equalitarian upbringing considered himself as good as anybody else in the community and participated as peer with everybody else in his society.³⁸⁸

Although most noticeable in African acephalous societies, the principle of equality and equivalence was also a feature of centralised or chiefly African societies. For instance, Ibidapo-Obe notes, in his study of Yoruba philosophy of law, that all sectors of the society are usually involved in law-making.³⁸⁹ Thus, while the elders were regarded as first among equals in this respect, all were allowed to propose and participate fully in the legislative process on equal footing.

The fifth feature of African politics is the requirement of consultation, deliberation and consensus in decision-making processes. This feature of African politics I have already discussed extensively earlier. Suffice to state here that consultation, deliberation and consensus was regarded as fundamental human rights in pre-colonial African societies without which a public decision may not stand. The nature of African democracy is correctly explained by Louw thus:

Democracy the African way does not simply boil down to majority rule. Traditional African democracy operates in the form of (sometimes extremely lengthy) discussions. Although there may be a hierarchy of importance among the speakers, every person gets an equal chance to speak up until some kind of an agreement, consensus or group cohesion is reached. This important aim is expressed by words like *simunye* ("we are one", i.e. "unity is strength") and slogans like "an injury to one is an injury to all".³⁹⁰

Having thus identified some pertinent features of African political thought, I now proceed to fashion a conception of democracy which I think will facilitate political action better.

³⁸⁷ E E Evans – Pritchard 'The Nuer of the Southern Sudan' in M Fortes and E E Evans – Pritchard (eds) *African political systems* (1940) 272.

³⁸⁸ Ibid.

³⁸⁹ A Ibidapo-Obe 'A discourse on the Yoruba philosophy of law' (2009) 2 *Nigerian Journal of African Law* 23 at 31.

³⁹⁰ D J Louw 'Ubuntu: An African assessment of the religious order' available at <http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm> (accessed on 13 July 2013) 1 at 3. (References omitted).

The appropriate model of democracy that I recommend African courts to adopt for a more robust and effective political action and participation is a model developed from African political philosophy as discussed above. Such a developed model I call the WABIA model of democracy. WABIA is a word I derived from WAZOBIA. WAZOBIA is a word which denotes the unity of the diverse languages and cultures of Nigeria. WAZOBIA is a unified form of words from three major Nigerian languages (Yoruba, Hausa and Igbo respectively) which all translate to ‘come’ in English. But since I left the Muslim North of Nigeria out of the two main types of African political systems I analysed because the political system of the Muslim North of Nigeria is identified as a theocracy by scholars and is in that regard *sui-generis*, I consequently omitted the ‘ZO’ aspect of the word belonging to Northern Nigeria to arrive at WABIA. Thus, my WABIA model of democracy. The WABIA model of democracy is a conception of democracy that infuses and takes as foundational values the African political ideals and features identified and discussed above into constitutional adjudication processes for a more substantive participation, action and voice of those at the margins of society in contemporary Africa.

I think it is necessary that I point out here that my discussion of African models of governance and democracy is idealised, that is, it moves on the conceptual level and is intended to feed into an ideal form of democracy. Nevertheless, the likely effects/impacts of the infusions of these ideals/features as discussed above on constitutional adjudication by African courts are teased out briefly below. A more detailed and particular description of its effects will become apparent in Chapter Five where I examine how the WABIA conception of democracy is likely to make a difference in the cases examined there.

A court that takes the equilibrium and harmony of African politics as foundational value will eschew any constitutional interpretation that is likely to promote dislocation, disquiet and disequilibrium of societal harmony. Such a court will privilege inclusion over exclusion in societal relations consistent with African political ideals of an inclusive society. More

importantly, any public/private dichotomy that will privatise want and suffering cannot be part of the interpretation of such a court.

Also a judiciary that imbibes and takes as a foundational value the African political ideal that political power and authority entails socio-economic and welfare responsibilities to the governed will be less deferential to the governments on socio-economic and welfare issues as appear to be the feature and bane of existing judicial conceptions of democracy in both South Africa and Nigeria as I show in Chapters Four and Five. Such judiciary will recognise that the main end of exercise of political power and authority is the prosperity and welfare of those subject to those exercises of power. Consequently, extreme poverty of many in contrast to the wealth of the few in society will be rightly seen as incompatible with the duties of the poor to give habitual obedience to those exercising such public powers where the latter is not fulfilling its responsibilities.

Furthermore, a judiciary that takes the communitarian principle of African socio-political thought to heart will recognise that the well-being and development of society is dependent on the well-being and all round development of every member of the society. Such a judiciary will eschew an interpretation that may foster pejorative individualism and the attitude of ‘everybody for himself and God for us all’. While recognising individual autonomy and rights, a judiciary imbibing African communitarian principles will seek to foster the spirit of *ubuntu* in its interpretive work.

Further still, a judiciary that imbibes the ideal of equality and equivalence of African politics will tend toward an interpretation that facilitates the inclusion and participation of all as peers in society regardless of wealth or status. Such a judiciary will choose that interpretation that minimises the impact of wealth and resources in political participation and ensure that everybody, including those at the periphery of the society, is given a voice in the determination of issues affecting them consistent with African political ideals of equality and equivalence.

Finally, a judiciary that takes the principles of consultation, deliberation and consensus as guiding theories of constitutional interpretation will rightly regard as the right of every citizen the consultation of citizens, appropriate facilities to participate in deliberations and as much as possible that citizens' voice in deliberations to be reflected in final decisions consistent with African ideal of consensus in all public decision-making processes.

While illustration of the precise impact of the incorporation of the above ideals in real life cases is left to Chapter Five, I think that it is already emerging that the WABIA model of democracy is more likely to satisfy the triple conditions of redistribution, recognition and political participation and voice according to Frazer's parity of participation principle which I discuss in Chapters One and Two of this thesis. This is because as can be gathered from foregoing discussions, the WABIA model of democracy regards the socio-economic and material well-being of every member of society as inalienable. The model also emphasises equality and equivalence and for that reason places recognition, regardless of wealth or status, at the forefront of political principles. The model also appears to further inclusion, participation and action through its doctrine of consultation, deliberation and consensus.

3.8 CONCLUSION

In this chapter, I made the point that democracy as a popular form of human government is not a peculiarity of the West. It is a form of government that was also found in pre-colonial African political theory and practice. I also made the point that the infusion of African values and ideals into contemporary issues in Africa is not a novel idea but an ongoing discourse. There are already steps towards that way at the regional level through the adoption of various treaties dealing with diverse subject-matters which all acknowledge the necessity and applicability of Africans world views and ways of life. There are in addition attempts by African political

theorists to propound and fashion what they consider more culturally compatible forms of human government in Africa.

Having made these preliminary points, I then first examined what I consider the more popular forms/theories of democracy noticeable in contemporary discourse. After this, I examined some of the culturally-based political theories put forward by African political theorists regarding what they consider the best theory of politics for the continent and concluded that none of the theories examined hold sufficient potential or promise for effective political action. After this, I note that the infusion of African values and philosophies into law and politics is a contemporary and an on-going discourse. This I established through the examination of the views of some of the more contemporary African and non- African political and legal theorists who are arguing for same.

Having done the above, I interrogate whether indeed the theory of democracy in Africa needed recasting or reformulation. This I did through the interrogation of the nature of democracy in Africa. It was found that democracy in contemporary Africa is characterised by a crisis of representation, totalitarianism, exclusion, corruption and mismanagement, among other ills. The factors that appear to be responsible for this untoward state of democracy in present day Africa was also examined.

After this, I examine African theories of politics as can be deduced from pre-colonial African political systems and relevant African philosophical literature and identified ideals and features suitable for incorporation as an African democratic ideal. From these ideals is developed an African based model of democracy which I think is more contextually and culturally compatible and suitable for enlargement of the political space and the deepening of democracy in contemporary Africa. This model of democracy I called the WABIA model of democracy. This model or understanding of democracy I thereafter recommend as an appropriate judicial conception of democracy which will enable effective political action for socio-economic rights transformation in Africa.

Having thus teased out the appropriate conception of democracy that African courts should adopt to enable sufficient scope for participation and action in aid of social transformation in Africa, I go in the next chapter to analyse and tease out the extant understanding of democracy of South African and Nigerian courts and the impact of such understandings on participation and action of the citizens through examination and analysis of relevant cases from both jurisdictions.

CHAPTER FOUR

JUDICIAL UNDERSTANDING OF DEMOCRACY IN SOUTH AFRICA AND NIGERIA: IMPLICATIONS FOR POLITICAL ACTION

4. INTRODUCTION

In the last chapter, I examine the democratic theories that are regarded as the most popular in democratic discourse and went on to theorise an appropriate understanding of democracy for effective political action in Africa. The WABIA model of democracy, which is rooted in the African political philosophy is argued to be the most suited and appropriate for political action and the most likely to vindicate the poor's parity of participation and same was recommended as the most appropriate conception of democracy for African courts to have. My aim in this chapter is to do a comparative examination of the existing judicial conception of democracy in South Africa and Nigeria and the scope created by the conception for democratic participation and action generally. This is in order to underscore the essential importance of the interpretive work of courts in fostering democratic space and participation and political action regardless of constitutional texts. The next chapter will specifically interrogate the impact of these courts' conception of democracy on socio-economic rights and socio-economic rights related action and tease out ways in which the WABIA conception of democracy articulated in the previous chapter makes a difference.

Judicial understanding of democracy which is the focus of this chapter is, however, not a new discourse as such in legal and political discourses. One of the early pioneers of this field of study is Michelman who in the 80s pioneered the study of the impact of US Supreme Court's understanding of democracy on transformative dialogue, inclusion, liberty and jurisgenerative

politics in America through a series of articles.¹ This area of study is also an emerging discourse in South Africa since the adoption of the country's post-apartheid constitutions. However, most of the works in this area of the law in South Africa are either narrow, being focused on specific area of South African courts jurisprudence;² or are now quite dated.³ For instance, Brand has examined six socio-economic rights cases decided in the early days of the 1996 South African Constitution both at the Supreme Court of Appeal and Constitutional Court in the light of strategies being employed by these courts to depoliticise poverty.⁴ Botha followed suit and juxtaposed two different constructions of democracy identified from a limited number of cases vis-à-vis the implication of those conceptions on the representation of the poor and the vulnerable.⁵ Brand again, more recently, has evaluated the South African Constitutional Court's policy of judicial deference in socio-economic rights cases against the South African Constitution's stipulation of a more robust conception of democracy.⁶

Granted, Roux has done a ground-breaking and much more elaborate work in this area of study in relation to the 1996 Constitution of South Africa.⁷ My line of enquiry in this chapter, however, differs from that of Roux in at least three significant respects. One, my focus area is much more specific than Roux's. Thus, while Roux was concerned with deducing the nature of South African democracy from both the texts and the jurisprudence of South African courts, I am mainly concerned with the understanding of democracy that is deducible from the courts' interpretive work and will therefore not be considering the texts of the constitutions under inquiry but only in so far as and to the extent that they relate to the cases under consideration. Two, while Roux's works were restricted to South Africa, mine is

¹ F Michelman 'Foreword: Traces of self-government' (1986-1987) 100 *Harvard Law Review* 4; F Michelman 'Law's republic' (1987-1988) 97 *Yale Law Journal* 1493; F Michelman 'Conceptions of democracy in American constitutional argument: The case of pornography regulation' (1988 – 1989) 56 *Tennessee Law Review* 291.

² See for instance, D Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17; H Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stellenbosch Law Review* 521; D Brand 'Judicial deference and democracy in socio economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

³ T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional law of South Africa* 2nd ed OS (2006) 10 – 1.

⁴ D Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17.

⁵ H Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stellenbosch Law Review* 521.

⁶ D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

⁷ T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional law of South Africa* 2nd ed OS (2006) 10 – 1. The more recent follow up to this work is T Roux 'The principle of democracy in South African constitutional law' in S C Woolman and M Bishop (eds) *Constitutional conversations* (2008) 79.

comparative. This is in order to see how the issue of judicial conceptions of democracy plays out under different constitutional frameworks/milieus. The purpose is to underline and bring into sharp focus the importance of the interpretive work of courts in fostering democracy and participation regardless of constitutional texts. Third, a number of cases have been decided in this area of enquiry since the publication of Roux's works which I include in mine. My work is therefore more recent in this area of discourse.

As has been rightly pointed out by Botha, the interplay between judicial conceptions of democracy 'calls for a far more extensive study' as the subject cuts across various areas of judicial activities and decisions than I think were undertaken in most of the works above referred to.⁸ My aim in this chapter is therefore to conduct a bit more elaborate and broader examination of the record of South African courts to determine whether the judicial conception of democracy of South African courts, especially the Constitutional Court, remains as identified and discussed by these scholars or has changed since the time of their writings. I will, in this regard, be using the rich South African jurisprudence as a basis for understanding and systematising Nigerian courts' conception of democracy where I am not yet aware of any literature on the subject-matter. South Africa and Nigeria's constitutions are both based on the constitutional democratic framework albeit under differing constitutional texts and structures. The purpose of the comparison is to examine and contrast the dynamics and play of judicial conceptions of democracy in the two different constitutional regimes and the implications of the resulting jurisgenerative politics on effective political action.

In furtherance of the afore-mentioned objectives, this chapter is divided into three different sections apart from this introduction. Section one below is an examination of South African courts' conception of democracy. Section two is an examination of Nigerian courts' conception of democracy as deduced from the examination of relevant cases. Section three is the conclusion where I undertake a contrast of both courts' conceptions of democracy and discuss the implications of these conceptions for inclusiveness, participation and political action and concludes the chapter.

⁸ H Botha 'Representing the poor: Law, poverty and democracy' (2011) 22 *Stellenbosch Law Review* 521 at 522.

4.1 SOUTH AFRICAN COURTS' UNDERSTANDING OF DEMOCRACY

In order to deduce South African courts' conception of democracy in this section, I examine at some length the following kinds of cases. First are cases that deal with or touch upon the involvement and participation of the citizens in public decision-making processes. Notable among these are cases that deal directly with the South African parliament's constitutional obligation to facilitate public participation and involvement in its law-making processes and cases to similar effect. This I refer to as the borderline cases. Second, I examine cases dealing with the rights to political participation in section 19 of the South African Constitution; and the third class of cases comprises those dealing with the right to freedom of expression in section 16 of the South African Constitution. The foregoing rights are part of the rights considered essential for democratic deliberations from which I think the courts' conception of democracy can more properly be deduced. However, I left out some other rights which are also considered essential in this regard viz; rights to freedom of association and assembly which I examined with regard to Nigeria in addition to other classes of cases examined. This is not because I think freedom of association and assembly are less important in the South African case, but because I think that South African courts' conception of democracy has been adequately and sufficiently deduced from the cases examined and that the examination of the rights left out will not make any useful addition to the discussion. This is even more so, since the conception of democracy identified in relation to those cases examined appears to be the same as with those left out. I had to examine in Nigeria those democratic rights left out in South Africa because of the relative paucity of direct constitutional provisions and cases on democracy and participation in Nigeria and the need to more properly deduce and articulate the courts' conception in the face of this challenge. Having dispensed with this explanation, I now turn to the examination and discussion of those cases I referred to as borderline cases in South Africa.

4.1.1 Borderline cases



One of the earlier cases which appeared to have charted the course that judicial conceptions of democracy will follow in South Africa is *De Lille & Another v Speaker of the National Assembly*.⁹ In the case, the applicant, a member of the National Assembly was suspended for allegedly making disparaging remarks about other members of the House. She was thereafter suspended by the House for contempt. The applicant consequently approached the Cape High Court for relief. The Court nullified her suspension on the ground that section 57 (1) (a)¹⁰ of the South African Constitution that the House relied on to suspend her envisaged no such authority - in effect, that the National Assembly has no constitutional authority to punish members of the Assembly for contempt. The Court is also of the view that the suspension of the applicant will operate not only against her but also against the constituency she was voted in to represent. The Court held that the principles of representative democracy lie at the heart of South African democracy, and that the suspension of the applicant which will operate not only against her but also against the party, the constituency and the electorate that voted for her is inconsistent with the requirement of representative democracy underlying South African democracy.¹¹ The decision of the Constitutional Court here is I think as it should be. This is because since, according to the Court, the principles of representative democracy lie at the heart of South African democracy, to allow arbitrary and free suspension of people's representatives in parliament will impinge negatively on the democratic rights and interests of the constituency that the suspended representative was voted to represent in parliament. This will be through the suspension or abrogation of the voice and presence of the constituency through the representative during the period of the suspension.

Also, in *The President of the Republic of South Africa and Others v SARFU and Others*,¹² the President of the Republic of South Africa had appointed a commission of inquiry and conferred coercive powers of *subpoena* on it to investigate the respondents and the administration of the rugby game in South Africa without giving the respondents a hearing contrary to earlier understandings between the parties. The respondent wrote a letter to the

⁹ 1998 (7) BCLR 916 (C).

¹⁰ Section 57 (1) (a) of the South African Constitution vests power in the National Assembly to determine and control its internal proceedings and procedures.

¹¹ *De Lille & Another v Speaker of the National Assembly* 1998 (7) BCLR 916 at para 27 (C). This decision of the High Court was affirmed by the Supreme Court of Appeal in *The Speaker of the National Assembly v Patricia De Lille MP and Another* 1999 (11) BCLR 1339 that respondent's objectionable allegations against some other members of the Assembly enjoyed constitutional protection and that there was no constitutional authority in the National Assembly to punish respondent for the objectionable statement.

¹² 1999 (10) BC LR 1059 (CC).

President requesting for his reasons for appointing the commission. When the reasons furnished by the President failed to satisfy the respondents, they instituted legal action for an injunction to restrain the appointment and investigation by the commission of the respondents on the ground that the President is incompetent under section 84 (2) (f) of the South African Constitution¹³ to appoint a commission of enquiry and/or confer coercive powers of subpoena upon it under the South African Commissions Act because the subject-matter of the inquiry is not within the ambit of public concern as stipulated under the Commissions Act. Also, that the appointment of the commission without giving the respondents a hearing violated the right to fair administrative action under section 33 (1) (d) of the Constitution. The main gist of the complaints of the respondents in this case as can be gathered from arguments canvassed before the courts appear to be that the President denied them the necessary voice and deliberation in the making of public decision directly affecting their interest contrary to democratic norms and practice.

The High Court held in favour of the respondents. On a direct appeal to the Constitutional Court, the Court held that the appointment of a commission under section 84 (2) (f) of the South African Constitution is one of the discretionary powers under section 84 (2) which are related to policy and not expressly constrained by any provision of the Constitution.¹⁴ The Court also held that the appointment of the commission and the conferment of coercive powers while it may violate section 33 (1) (d) of the Constitution is justifiable in terms of the objectives and purposes of the commission which is to investigate a matter of public concern. The Court clearly envisaged a very limited role for individuals in this case except where exercise of public power implicated fundamental human rights. The Constitutional Court view rights as counterpoise to state power. The Court pronounces thus: ‘An overarching bill of rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers.’¹⁵

¹³ Section 84 (2) (f) of the South African Constitution provides that: ‘The President is responsible for – appointing commissions of inquiry’.

¹⁴ *The President of the Republic of South Africa and Others v SARFU and Others* 1999 (10) BC LR 1059 at para 146 (CC).

¹⁵ *Id* para at 132.

The viewing of rights as counterpoise to and limitation on governmental exercise of powers is a classical liberal-legal conception of politics.¹⁶ This conception of politics separates and protects democracy from rights and rights also from democracy and views participation of individual(s) in public decision-making processes as mandated only when rights of individual(s) is/are implicated.¹⁷ Thus, the viewing of rights as counterpoise or limitation on governmental exercise of powers by the Constitutional Court above, as can be gathered from the Court's pronouncements, mirrors a liberal-legal understanding of democracy. It requires no repetition to state that this kind of democratic understanding or conception foreshadowed participation only within the narrow confines of guaranteed fundamental rights of citizens and nothing more.

A limited scope for the participation of individuals and groups consistent with a liberal-legal theory of democracy as discussed above is also identifiable from the decision of the Constitutional Court in *Democratic Alliance & Another v Masondo N.O. and Another*.¹⁸ In this case, appellants who were the main opposition party in the Johannesburg metropolitan council had complained that the mayoral committee appointed by the first respondent, which excluded members of minority political parties is contrary to the provisions of section 160 (8) of the South African Constitution, which provides that members of municipal councils are entitled to participate in the proceedings of the council and those of its committees in a way which allows parties and interests within the council to be fairly represented and consistent with democracy. The majority of the Constitutional Court held that on a proper construction of sections 160 (8) and 60 of the Constitution and the Structures Act¹⁹ respectively (which authorised the first respondent to set up the mayoral committee) respectively, there was no stipulation that minority party members are required to be represented on the council. In other words, there is no provision(s) of the South African Constitution or laws conferring the right of participation on the appellants. This is against the background of the fact that the mayoral committee in question in this case is responsible for policy formulation and execution within the council. O'Regan J was, however, of the opinion that the exclusion of minority party members from the mayoral committee in question is unwarranted as it violates section 160

¹⁶ See for instance, S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 64.

¹⁷ See for instance, J Nedelsky 'Reconceiving rights as relationship' (1993) 1 *Review of Constitutional Studies* 1.

¹⁸ 2003 (2) BCLR 128 (CC)

¹⁹ Act 117 of 1998.

(8) of the South African Constitution which requires a more robust inclusion and cohesiveness than that envisaged by the majority of the Court. The majority decision of the Court in this case represents, again, the narrow and exclusionary tendency of liberal-legal democracy in the very important sphere of government policy formulation and execution that seem to be characteristic of this model or understanding of democracy. More will be said on this point later in this chapter.

The narrow and exclusionary conception of democracy displayed by the courts in the above cases was jettisoned by the Constitutional Court for a more robust and inclusive conception in *Matatiele Municipality and Others v President of the Republic of South Africa and Others No. 2 (Matatiele II)*²⁰ where the Court held that the 1996 Constitution of South Africa contemplates a representative democracy with a participatory element. In *Matatiele Municipality and Others v President of the Republic of South Africa and Others (Matatiele I)*,²¹ applicants challenged the constitutionality and the competence of the South African Parliament to enact the Constitution Twelfth Amendment Act of 2005 (the Twelfth Amendment Act) and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act.²² The two enactments together effected alteration of the boundaries of the Eastern Cape and KwaZulu-Natal provinces. While the thrust of applicants' challenge in *Matatiele I* was that national parliament through the Twelfth Amendment Act usurped the constitutional authority and function of the Municipal Demarcation Board in the re-determination of the boundaries, the gist of the inquiry in the *Matatiele II* was whether provincial legislatures of Eastern Cape and KwaZulu-Natal provinces adopted the boundary alteration effected by the Twelfth Amendment Act consistently with the obligations of the provincial legislatures to facilitate public involvement and participation as stipulated by the Constitution with regard to such matters.

According to the Constitutional Court, the combined reading of section 74 (8),²³ section 118 (1) (a)²⁴ and section 21 (3)²⁵ of the South African Constitution imposes an obligation on

²⁰ 2007 1 BCLR 47 (CC).

²¹ 2006 (5) BCLR 622.

²² Act 23 of 2005.

²³ Section 74 (8) of the South African Constitution provides as follows: 'If a Bill referred to in subsection (3) (b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces

provincial legislatures to facilitate the involvement and participation of the citizens in the process of adopting the alteration of their boundaries. In holding that the Eastern Cape provincial legislature, which conducted public hearings and received written representation from the public before the adoption of the boundary alteration complied with constitutional procedures while the KwaZulu-Natal parliament which did not was held to be in violation of the constitutional procedures, the Court held that the kind of democracy envisaged by the South African Constitution is a representative and participatory one. According to the Court:

Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the preamble openly declares, what is contemplated is “a democratic and open society in which government is based on the will of the people”. Consistent with this constitutional order, section 118(1)(a) calls upon the provincial legislatures to “facilitate public involvement in [their] legislative and other processes” including those of their committees.²⁶

In the Court’s view, the duty to ensure public involvement and participation in legislative process entails two things. The first is to provide meaningful opportunities for participation. The second is to take measures which will ensure that citizens have the ability to take advantage of opportunities provided for participation.²⁷ Although the precise modalities or methods for facilitating such public involvement and participation is left by the Court to the legislature, some examples approved by the Court include the holding of public hearings, receipt of written representations from the public, among others.

Furthermore, the Constitutional Court elaborated upon the obligation of the legislature to facilitate public involvement and participation in furtherance of the representative and participatory understanding of democracy of the courts in *Doctors for Life International v Speaker of the National Assembly and Others*²⁸ where the Court also identified constitutional representative democracy with participatory elements as the defining feature of South African democracy. In the case applicant had impugned four different statutes of the South African

may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.’

²⁴ Section 118 (1) (a) of the South African Constitution provides thus: ‘A provincial legislature must – facilitate public involvement in the legislative and other processes of the legislature and its committees’.

²⁵ Section 21 (3) of the South African Constitution provides that: ‘Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic’.

²⁶ *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No. 2)* 2007 1 BCLR 47 at para 40 (CC).

²⁷ *Id* at para 54.

²⁸ 2006 12 BCLR 1399 at para 111 (CC).

legislatures: the Choice on Termination of Pregnancy Amendment Act (the CTOP Amendment Act);²⁹ the Sterilisation Amendment Act;³⁰ the Traditional Health Practitioners Act (the THP Act)³¹ and the Dental Technicians Amendment Act³² as invalid because the procedure for their enactment violated the public participation and involvement stipulations of sections 72 (1) (a) and 118 (1) (a) of the South African Constitution. The Court confirmed again its rulings in the *Matatiele II* that sections 72 (1) (a) and 118 (1) (a) of the Constitution mandates the legislature to facilitate public involvement and participation in its law-making processes. Although the precise means and modalities of achieving this are left to the legislature, the means chosen by the legislature must appear to be objectively reasonable to achieve this objective. Some of the means sanctioned by the Court as appropriate in this regard include petition, public hearings and representations.

The Court, based on the foregoing premise, invalidated two of the impugned Acts: THP Act and the CTOP Amendment Acts because the South African National Council of Provinces (NCOP) and the provincial legislatures failed in their duty to facilitate public participation in relation thereto. With respect to the Dental Technicians Amendment Bill, the Court held that the NCOP and the provincial legislatures did not breach their duties under sections 72 (1) (a) and 118 (1) (a) of the Constitution to facilitate public involvement and participation because the Dental Technicians Amendment Bill did not elicit public interest as did the THP and CTOP Amendment Bills. With respect to the Sterilisation Amendment Act, the Court held that it has no jurisdiction to pronounce upon statutes that have not been assented to by the President. And since the challenge to the Act was brought before presidential assent, the challenge against it had to fail.

With respect to this decision, Roux has correctly expressed the opinion that the Court evinces a more robust conception of democracy than some earlier cases.³³ In spite of the more participatory conception of democracy expressed by the Court in the case, however, I think a closer study of the case revealed that it still envisaged a rather narrow scope for participation

²⁹ Act 38 of 2004.

³⁰ Act 3 of 2005.

³¹ Act 35 of 2004.

³² Act 24 of 2004.

³³ T Roux 'The principle of democracy in South African constitutional law' In S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) 79 at 96 (fn 33).

and political action by the citizens. This conclusion is premised on the following: First, although the Court correctly thinks that the Constitution constituted the courts as the ultimate guardians of the Constitution, it still considers separation of powers as one of the essential features of South African democracy. The judiciary is not to interfere in the workings and processes of other organs of government unless mandated by the Constitution.³⁴ The foregoing view of the Court is consistent with liberal legal theory of democracy which maintains a strict separation of powers and functions between the arms of government. As rightly pointed out by Liebenberg, the problem of reconciling judicial enforcement of rights by unelected judges against the will of democratic majorities gave impetus to a strict separation of powers doctrine in liberal theory of democracy.³⁵ Therefore, the Court's position here with its implication for a rather limited scope for judicial intervention in governmental matters mirrors a liberal-legal theory of democracy.

Second, the Court in this case divided legislative process into three stages. One is the stage when parliament has concluded deliberation on a bill but before assent by the President. Two is the post- assent stage when a bill has been presented and assented to by the President but before it is brought into operation/force. Three is the deliberative stage before parliament concludes its deliberation on a bill. As regards the first stage, the Court held that the jurisdiction of the courts to inquire into whether parliament has complied with a constitutional obligation (to facilitate public involvement) under section 167 (4) (e) of the Constitution is limited to challenges brought by the President as stipulated under section 167 (4) (b) of the Constitution. According to the Court, challenges to law can only be brought by the general public after the bill is enacted into law.³⁶ The Court declared in this regard thus:

...the President has a constitutional duty to uphold, defend and respect the Constitution. The role of the President in the law-making process is to guard against unconstitutional legislation. To this end, the President is given the power to challenge the constitutionality of the bill. The President represents the people in this process. The members of the National Assembly perform a similar task and have a similar obligation. Thus during the entire process, the rights of the public are protected. The public can always exercise their rights once the legislative process is completed. If Parliament and the President

³⁴ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 12 BCLR 1399 (CC) at paras 36 – 38.

³⁵ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 63. See also generally, M H Marshall 'The separation of powers: An American perspective' (2006) 22 *South African Journal on Human Rights* 10.

³⁶ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 12 BCLR 1399 (CC) at para 52.

allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost. The rights of the public are therefore delayed while the political process is underway. They are not taken away.³⁷

It was on this basis that the Court declined to pronounce on the validity of Sterilisation Amendment Bill which has not been assented to and therefore not enacted into law as at the time proceedings were instituted.

As regards the second stage, the Court held that the judiciary has jurisdiction to interfere at this stage of the law-making process.³⁸ The distinction that the respondents sought to draw between bills that have been assented to by the President but not yet brought into force/operation and bills that have been brought into operation was rejected by the Court. With regard to the third stage, the Court held that the general principle is that courts are usually wary of interference at the deliberative stage of the law-making process based on the hallowed doctrine of separation of powers. Courts will however intervene in exceptional cases where the process will irredeemably prejudice citizens without the hope of redress once the process is completed. The Constitutional Court however declined to reach any firm conclusion on the issue in the case at hand because, according to the Court, none of the laws being questioned in the case fell into that stage of law-making process.³⁹

As can be gathered from above, of the three stages identified by the Court, citizens are allowed to participate or raise questions through the courts only in one. The other two stages: the stages when parliament has concluded deliberation but before presidential assent and the stages falling within the period of deliberation of parliament in my opinion constitutes the core of the political process. These are the very stages where the participation and involvement of the citizens are circumscribed by the Court. The clear implication of this holding is that even this more robust conception of democracy by the Court envisaged a very narrow scope for citizens' participation and inclusiveness. This conception is consistent with representative democratic norms which posit that public decision-making powers have been ceded by the citizens to their elected representatives.

³⁷ Id at para 55.

³⁸ Id at paras 60 – 65.

³⁹ Id paras 67 – 71.

Another interesting case in this area where the Constitutional Court appears to evince a more participatory approach for citizens is *Shilubana & Others v Nwamitwa*⁴⁰ where the Constitutional Court held that traditional authorities have the competence to change rules of customary law in order for customary rules of law to comply with the tenets of the South African Constitution. In *Shilubana*, the traditional authorities of the Valoyi traditional community in Limpopo were held by the Court to be entitled to change the age-old customary rule and practice of male primogeniture to install a woman as chief (Hosi) of the community. The traditional authorities had in December 1996 met and decided that contrary to earlier rule of customary law and practice in the community, a woman will henceforth be entitled to be installed as Hosi in the community because both the male and female gender are now equal under the new South African Constitutions and are equally entitled to occupy the office of Hosi. They consequently installed the appellant as Hosi. The respondent, the male heir to the immediate past Hosi and who under the old rule was entitled to be installed as Hosi in the community interdicted the installation of the appellant on the ground that she was installed contrary to the customary norms and practice of the community. The High Court and the Supreme Court of Appeal found in the respondent's favour on the ground that the traditional authorities in the community had unlawfully changed the applicable rule of customary law. On appeal to the Constitutional Court, the Court found in favour of the appellant on the ground that the traditional authorities were entitled to change the applicable rule of customary law to bring the rule in line with the South African Constitution.

Several criticisms had generally trailed the decision of the Constitutional Court in *Shilubana*, especially the law-making powers that the Court appears to have conferred on traditional authorities by the decision. According to Bekker and Boonzaaier for instance,⁴¹ the decision of the Constitutional Court in the case is not based on sound legal principles. According to these scholars, contrary to what the Court held in the case, customary law is not cast in stone; it is inherently flexible and operates sometimes to admit women to traditional leadership. They argued therefore that what happened in *Shilubana* was not any development of

⁴⁰ 2008 (9) BCLR 914 (CC).

⁴¹ J C Bekker and CC Boonzaaier 'Succession of women to traditional leadership: Is the judgment in *Shilubana v Nwamitwa* based on sound legal principles?' (2008) 41 *Comparative and International Law Journal of Southern Africa* 449.

customary law as was held by the Constitutional Court but an evolution. They also criticise the conferring of law-making powers on traditional authorities entailed by the Court's judgment as contrary to existing South African constitutional structure, which only recognises the law-making competences of South Africa's national, provincial and local legislatures.⁴² The conferring of legislative competence on traditional authorities, the scholars think, may bring about unintended consequences.

Ntlama has also argued that the outlawing of the customary rule of male primogeniture in *Shilubana* is misconceived.⁴³ This scholar argues that the Court's decision amounts to viewing customary law through the lens of the common law, a development that to her is most likely to retard the due development of customary law within its own context. In Cornell's view,⁴⁴ however, the Constitutional Court did not in fact go far enough in the case in seeing customary law as a way of doing justice differently from a liberal-legal conception of law and justice. This is in terms of the argument advanced by one of the amici, an NGO, the National Movement of Rural Women in the case.

Despite the various criticisms that have been levelled against *Shilubana*, however, I think the significance of the decision, for the purposes of this thesis, lies in the very fact that the Constitutional Court conceded the competence to amend or develop obsolete customary rules of law to traditional authorities and communities directly concerned with the law. Rather than leaving same to some group of 'outside experts' who may know nothing or very little about the dynamics and intricacies of such laws. This, I think, furthers the participation of the local population better. Also, the development is more likely to ameliorate the tendency to view such customary rules of law from the prism of western construct or understanding as may otherwise be the case. The development will also go a long way in aiding the due development of customary law within its own context as argued by Ntlama above.⁴⁵

⁴² Id at 460.

⁴³ N Ntlama "'Equality" misplaced in the development of customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' (2009) *Stellenbosch Law Review* 333.

⁴⁴ D Cornell 'The significance of living customary law for an understanding of law: Does custom allow for a woman to be Hosi?' (2009) 2 *Constitutional Court Review* 395.

⁴⁵ N Ntlama "'Equality" misplaced in the development of customary law of succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)' (2009) *Stellenbosch Law Review* 333.

*Tongoane and Others v National Minister of Agriculture and Others*⁴⁶ is another case that is relevant to this discourse. In that case, the Constitutional Court referred to the South African system of government as a constitutional democracy which has supremacy of the constitution as its founding value.⁴⁷ On this basis, the Court invalidated, in its entirety, the provisions of the Communal Land Rights Act, 2004 (CLARA)⁴⁸ which was incorrectly tagged as a section 75 of the South African Constitution bill in parliament (bills not affecting the interest of the provinces) instead of as a section 76 of the South African Constitution bill (bills affecting the interests of the provinces). Tagging CLARA a section 76 bill would have meant that the provincial legislature is mandated to facilitate public involvement in terms of section 118 (1) (a) of the South African Constitution in the process of the passage of the bill. Section 75 bills dispense with such a procedure. The Court held that having followed a procedure different from the constitutionally prescribed one, the resulting law is unconstitutional.

The Constitutional Court in *Tongoane* has, however, been strongly criticised by Mailula for failing in its constitutional obligation to develop customary law in terms of the provisions of section 39 (2) of the South African Constitution.⁴⁹ The Constitutional Court avoided the core issue in *Tongoane* which is whether CLARA will undermine applicants' security of tenure on lands hitherto administered according to their customary land laws. (The application of the provisions of CLARA was going to change the rules of customary law applicable to the applicant's land). The Court opted to decide the case on the procedural issue of whether the bill which gave birth to the law has been correctly tagged. Mailula opines that this avoidance of the core issue by the Court is an abdication of its constitutional obligation to develop South African customary laws in terms of the spirit and purport of the Bill of Rights pursuant to section 39 (2) of the South African Constitution.⁵⁰

Finally, there is *Albutt v Centre for the Study of Violence and Reconciliation and Others*⁵¹ where the Constitutional Court reaffirmed that the South African Constitution demands not

⁴⁶ 2010 (8) BCLR 741 (CC).

⁴⁷ Id at 107.

⁴⁸ Act 11 of 2004.

⁴⁹ D Mailula 'Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?' (2011) 4 *Constitutional Court Review* 73.

⁵⁰ Id at 106 – 110.

⁵¹ 2010 (5) BCLR 391 (CC).

merely a representative democracy but also a participatory one.⁵² The case was a fall out of the special dispensation granted by former President Thabo Mbeki to pardon persons who claimed to have been convicted of politically motivated offences under or immediately after apartheid and who were unable to take advantage of the Truth and Reconciliation Commission (TRC) processes as a result of the cut-off date for eligibility and participation. The special dispensation was to be exercisable under the President's powers of pardon pursuant to section 84 (2) (j) of the South African Constitution. After invitation to eligible convicted persons and compilation of names for pardon, the respondents approached the state to request that the process of the pardon be made more open. The respondents also request that victims of the crimes subject-matter of the pardon be allowed to participate in the process before any pardon is granted. The state refused both requests of the respondents. The latter consequently obtained an interdict from the North Gauteng High Court, Pretoria (the High Court) restraining the President from granting any pardon until the victims of the crimes had been allowed to participate in the process. The High Court granted the respondent requests and interdicted the President.

The applicant, one of those set down for pardon joined the case as an interested party and appealed directly to the Constitutional Court. At the Constitutional Court, the applicant supported by the state contended that the victims of the offences had no right to participate in the pardon process, among other contentions. In finding for the respondents and affirming the High Court decision, the Constitutional Court held that the South African Constitution demands not merely a representative democracy but also a participatory one.⁵³ Instructively, the Court, per Froneman J in a concurring opinion of the majority opinion of Ngcobo J pronounces thus:

The notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper "punishment" for offenders in traditional African society. It was an expression of the participatory democracy practiced in those societies. That is my understanding of African tradition. The main judgment therefore finds support in the African legacy of participation of citizens in affairs of the society, not as direct authority for its particular application to the facts of this case, but as further legitimisation that it accords with a tradition that runs deep in the lives of many people in this country. It is indeed difficult to escape the conclusion that this remarkable tradition of participation and capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process. Without it the

⁵² Id at para 90.

⁵³ Ibid.

amnesty process would have been impossible, or at least it would have been immeasurably more difficult than it was. The same can be said for the ongoing duty to promote national unity.⁵⁴

The Court therefore traces the notion of participatory democracy in the South African Constitution back to pre-colonial African socio-political systems.

With respect to this decision, Le Roux⁵⁵ has correctly opined that *Albutt* is one of a number of cases forming part of the Constitutional Court's democratic turn.⁵⁶ He is of the view that the celebration of participation by Froneman J in the case evinced '...a shift away from archival and monumental sites, to new civic spaces where individuals and groups can come together to debate and negotiate the past and, through this process, define their future.'⁵⁷

However, whatever gains or robust conception of democracy that were inherent in *Matatiele II*, *Albutt* and similar cases forming part of the Constitutional Court's democratic turn appear to be already in retreat. The Constitutional Court in more recent times appears to be on the path of a more narrow and exclusionary conception of democracy. In *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*,⁵⁸ a case with very similar facts with both *Matatiele II* and *Doctors for Life International*, for instance; the obligation of the legislature to facilitate public involvement and participation in boundary demarcation processes under the Constitution was also in issue.

In the *Merafong*, the Gauteng provincial legislature had voted for the transfer of the Merafong community, a border community between Gauteng and North-West provinces, to the North-West province under the Twelfth Amendment Act contrary to the will and intention of Merafong community members expressed in the public-hearings conducted by the Gauteng provincial legislature. Applicants challenged the Gauteng legislature's action in relation to the demarcation on two grounds. First, the applicants' alleged that Gauteng's

⁵⁴ Id at para 91. (Fn omitted).

⁵⁵ W Le Roux 'The democratic turn and (the limits of) constitutional patriotism after the Truth and Reconciliation Commission: *Albutt v CSV*' (2011) 4 *Constitutional Court Review* 51.

⁵⁶ Id at 52.

⁵⁷ Id at 70.

⁵⁸ 2008 10 BCLR 968 (CC).

legislature did not facilitate public involvement and participation in the process because the public hearings that were held were already pre-determined. The main complaint of the applicants in this regard was that contrary to the expressed wishes of Merafong community members who in the various public hearings conducted by the respondents rejected without equivocation the merger or transfer of Merafong to the North-West, the Gauteng legislature who had earlier agreed with the Merafong community members not to transfer Merafong to the North-West later changed their minds and voted for the transfer of Merafong to the North-West without recourse back to the community. Second, applicants also alleged that the decision of the Gauteng provincial legislature to ratify the transfer was irrational.

The majority of the Constitutional Court in holding that the legislature complied with its constitutional obligation to facilitate public participation and involvement held that being involved does not mean that the community views⁷ must prevail. According to the Court:

There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. *The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.*⁵⁹

The majority of the Court thus held that the failure of the provincial legislature to report back and consult the Merafong community when it changed its position contrary to the declared wishes of the community is only probably disrespectful and not unreasonable.⁶⁰ Also that the choice of where to locate Merafong although debatable is for the legislature to make and the courts cannot second guess the legislature. The decision of the provincial legislature was therefore not irrational.⁶¹

However, the minority justices of the Court who delivered dissenting judgements expressed a different opinion on these issues. According to the minority justices, the public participation

⁵⁹ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 10 BCLR 968 Para 50 (CC) [Emphasis supplied].

⁶⁰ Id at paras 55 – 56.

⁶¹ Id at para 114

facilitated by the Gauteng legislature was not meaningful because the outcome was already a done deal. They also held that the decision of the legislature to change direction midstream in the process against the declared wishes of Merafong citizens was irrational. According to them: ‘The new decision of the Provincial Legislature was not taken to pursue a legitimate governmental purpose but to prevent consequences which, at best, were imaginary.’⁶²

In opposition to the views of the minority, what can be clearly deduced from the views of the majority is that the constitutional system operative in South Africa is a liberal/representative one where the citizens play a marginal role through the prisms of general elections and majority rule. This is made clearer from the Court’s statement emphasised in the quotation above that the participation of the public in government as envisaged by the Constitution is ‘...supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.’⁶³ This statement clearly showcases the liberal democratic understanding of the Court which limits the participation of the generality of the citizens to often questionable periodic elections.

With respect to *Merafong* above, Bishop has strongly argued that the Constitutional Court decision is capable of two different readings: either as a vampire or as a prince.⁶⁴ According to Bishop, read as a vampire, *Merafong* could be seen as removing the listening requirement that *Doctors for Life* and similar cases promises; subordinating participation to representation.⁶⁵ Read as a prince on the other hand, *Merafong* could be viewed ‘...as giving dormant citizenship the kiss of life by focusing attention on alternative forms of participation.’⁶⁶ Bishop contends that neither reading is complete or satisfactory. He argues that participation and deliberation are committed to the same ideal of listening in a democracy.⁶⁷ And that the disparate elements of *Merafong* are better understood as speaking to the same ideal of listening.

⁶² Id at para 192.

⁶³ Id at para 114.

⁶⁴ M Bishop ‘Vampire or Prince? The listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa and Others*’ (2009) 2 *Constitutional Court Review* 313 at 318.

⁶⁵ Id at 340 and 343.

⁶⁶ Id at 318.

⁶⁷ According to Bishop, ‘[t]here is, here, a big difference between listening and hearing. In any free society people ‘hear’ each other. They know that people have different views and sometimes they are confronted with

In order to make his case, Bishop outlines and expatiates on three types of participation.⁶⁸ The first is traditional participation. This is initiated by government and is trumped by representative democracy. The second is radical participation. This type of participation is citizens-driven and initiated; it happens outside of formal political system and occurs in the form of protests, marches, boycotts, etc. The third type is mutual participation. This lies between the other two mentioned earlier. It can be initiated by anybody and is characterised by parties listening to each other. In Bishop's view, all three types of participation is contained in the South African Constitution and reflected in the Constitutional Court's decisions.

Bishop argues further that while cases like *Merafong* represents the Constitutional Court's jurisprudence on traditional participation, the reasonable engagement eviction cases represent the Court's jurisprudence on mutual participation, while the Court's jurisprudence on the freedoms of association and assembly represents the Court's jurisprudence on radical participation.⁶⁹ Bishop stresses the point that *Merafong* is not about participation generally but about traditional participation with its narrow scope for citizens' involvement. The decision is consequently to be regarded as part of a larger participatory puzzle of the Constitutional Court.⁷⁰ He avers further that the restricted scope for participation evinced by the Court in *Merafong* is for the overall good of participation. This is in order to encourage the citizens to explore other available avenues of participation and not close off other available spaces for politics.

Bishop validates his argument by reference to the aftermath of the Constitutional Court's decision in *Merafong*. He notes that after the dismissal of the Merafong's residents' case, the

those views, but they don't react. 'Hearing' is an entirely passive activity. Listening is active. It requires real engagement and a willingness to change your mind. If you interact with a person when you have no intention of changing your mind, or when the system prevents you from changing your mind, you are not listening, you are merely hearing.' M Bishop 'Vampire or Prince? The listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa and Others*' (2009) 2 *Constitutional Court Review* 313 at 323.

⁶⁸ Id at 359 – 361.

⁶⁹ Id at 337 – 364.

⁷⁰ Id at 364.

residents resorted to sustained violent protests, schools and services boycotts, among others. The sustained protests coupled with a change of a *probably* more listening political leadership in Merafong resulted in the reversal of the Court's decision and re-incorporation of Merafong into Gauteng province on 9th April 2009, three years, one month and two days after the initial separation.⁷¹

I want to point out two things with regard to Bishop's analysis above. The first is that his conclusion confirms my argument in this thesis about the potential potency of political action in transformative changes, especially where coupled with law. Second, I am a little worried about the implication of Bishop's other conclusions. My worry stems from two principal issues. First, the Constitutional Court does not seem to be aware of the different strands of participation articulated by Bishop or that restricting the scope of participation in one sphere will encourage or motivate the citizens to explore other participation avenues. So it appears to me that the Court could really not be said to be working towards a particular end(s) when it was rendering this decision. Second, Bishop's supposition and assertion that there is a radical participation evidenced by the Court's jurisprudence in freedoms of expression and assembly will appear to me not to be made out. As a matter of fact, my examination and analysis of the Constitutional Court's jurisprudence on freedom of expression later in this Chapter negates any claim of jurisprudence supporting Bishop's radical participation.

In addition to *Merafong*, the Constitutional Court in *Poverty Alleviation Network v President of the Republic of South Africa*⁷² appears to have continued in more recent times to exhibit a narrow conception of democracy. *Poverty Alleviation Network* is a fall out of the judgement of the Constitutional Court in *Matatiele II*⁷³ where the Court invalidated the Twelfth Amendment Act on the ground that it was passed by the KwaZulu-Natal provincial legislature in breach of the constitutional obligation of the legislature to facilitate public involvement and participation in the law-making process. The Court's order of invalidity was however suspended for a period of 18 months to allow parliament to remedy identified defect(s). It is in consequence of this order that the legislature introduced and passed again

⁷¹ Id at 369.

⁷² 2010 (6) BCLR 520 (CC).

⁷³ *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* 2007 1 BCLR 47 (CC).

the Constitution Thirteenth Amendment Act (Thirteenth Amendment Act),⁷⁴ the statute which is the subject-matter of the present challenge.

Applicants challenged the constitutionality of the Thirteenth Amendment Act on two main grounds. First, it was alleged that public involvement and participation was not in fact facilitated as the legislature failed to consult residents of Matatiele as a discrete and identified group. This, the applicants alleged, resulted in the dilution and diminution of the concerns of this discrete group in violation of the legislature's constitutional obligation to facilitate public participation. Applicants also alleged that whatever participation of the public was facilitated by the legislature was a farce as the ultimate decision was already a done deal. Second, the applicants also alleged that the amendment was irrational as it was not serving any legitimate governmental purpose.⁷⁵ In dismissing the applicants objections to the validity of the Act, the Court held that '[a]lthough due cognisance should be taken of the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself'.⁷⁶ In effect, the Court in this case restated its earlier position in *Merafong* that public participation is supposed to supplement majority rule and periodic elections and not to trump them. The Court also dismissed the rationality objection of the applicants on the ground that what community is to belong where is for the legislature to determine and the courts cannot second guess the legislature or inquire into the motives of individual legislator in this regard.

The latest decision of the Constitutional Court, at the time of writing, in the demarcation of boundary cases is *Moutse Demarcation Forum and Others v President of the Republic of South Africa*,⁷⁷ a case with similar facts and grounds, of objections/challenge as in *Merafong and Matatiele II*. A unanimous Court dismissed appellants' grounds of objections and challenge on the similar reasoning given in earlier cases.

⁷⁴ Act 23 of 2007.

⁷⁵ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 para 73 (CC).

⁷⁶ *Id* para 62.

⁷⁷ 2011 (11) BCLR 1158 (CC).

Lastly, mention must also be made of *Mazibuko v Sisulu and Another*⁷⁸ where the Constitutional Court, in 2013, stated that the South African Constitution envisages a deliberative, multiparty democracy.⁷⁹ And that as a result of this, the right of a member of parliament to present a motion of no confidence in the President of the Republic in parliament cannot be subject of a gift of the majority or that of the minority members⁸⁰ of parliament. According to the Court, the right to present a motion of no confidence in the President of the Republic flows directly from section 102 (2) of the South African Constitution, a provision that is central to the ‘...deliberative, multiparty democracy envisioned in the Constitution.’⁸¹

Granted, the Court is obviously correct from the standpoint of liberal/representative theories of democracy to hold in *Merafong* and similar cases that the opinion of the populace is not binding on the legislature in its decision-making processes if such opinion conflicts with government policy as conceived by appropriate governmental organs and authorities. This is because consent, the base upon which all democratic theories rest, is tied only to free elections and not to maximum participation, although some very few theories of democracy makes maximum participation a prerequisite of democracy.⁸² Ingels has rightly observed in this regard that: ‘Democrats may favour local participation on independent grounds, but are not obliged to accept it as part of the meaning of “democracy”.’⁸³ However, as already stated above, the statement is only correct in terms of liberal/representative theories of democracy. That statement and position is not correct in terms of African conceptions of politics where consultation, deliberation and consensus are essential features of public decision-making processes as I point out in Chapter Three. In terms of the African conception of politics and the WABIA understanding of democracy recommended in Chapter Three, public involvement and what it advocates would have to have had an impact and be reflected in the ultimate decision of the legislature in this case.

⁷⁸ (CCT 115/12) [2013] ZACC 28.

⁷⁹ Id at para 44.

⁸⁰ Phrases that the Court used in the judgment to refer to either the majority or the minority holding the motion of no confidence to ransom.

⁸¹ *Mazibuko v Sisulu and Another* (CCT 115/12) [2013] ZACC 28 at para 44 (CC).

⁸² S J Ingels ‘Education, community and democratic participation’ in P O Bodunrin (ed) *Philosophy in Africa* (1985) 229 at 233.

⁸³ Ibid.

Having thus identified and discussed South African courts' conception of democracy in borderline cases that touched upon the involvement and participation of the members of public in public decision-making processes above, I turn next to the examination of the courts' conception of democracy in cases dealing with the right of individuals to political participation.

4.1.2 Right to political participation

The right to political participations which includes the right to vote and be voted for has been referred to as one that is preservative of civil and political rights.⁸⁴ The reason for this is because it is the right that determines the exercise of political power in contemporary democratic society.⁸⁵ The importance of the right for democratic deliberation and political action cannot therefore be gainsaid. One of the earliest cases in this area of the law in South Africa is *New National Party v Government of the Republic of South Africa and Others*⁸⁶ where the issue of the political right to vote enshrined in section 19 (3) (a) of the South African Constitution took centre stage. The main issue in the case was whether the provisions of the South African Electoral Act of 1998⁸⁷ which prescribe certain kinds of identity documents vis: a Bar coded identity document and/or a temporary identity certificate (TIC) or a temporary registration certificate (TRC) as a prerequisite for registration and voting violates the right of every adult citizen to vote during elections as enshrined in section 19 (3) (a) of the South African Constitution.⁸⁸ The challenge against the constitutionality of the 1998 South African Electoral Act was against the background of the fact that 20 per cent of South Africans, about 5 million otherwise eligible voters will be disenfranchised by the impugned provisions of the Act.

⁸⁴ See for instance, *Harper v Virginia State Board of Elections* 383 US 663 at 667 (1966).

⁸⁵ *New National Party v Government of the Republic of South Africa and Others* 1999 (5) BCLR 489 at 122 (CC).

⁸⁶ 1999 (5) BCLR 489 (CC).

⁸⁷ Act 73 of 1998.

⁸⁸ Section 19 (3) (a) of the South African Constitution provides that: 'Every adult citizen has the right – to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret...'

In dismissing the challenge mounted by the applicant against the law, the majority of the Constitutional Court held that the main question to be asked is whether the impugned provisions are rationally connected to a legitimate governmental purpose. Once this is answered in the affirmative, the judiciary is precluded by the doctrine of separation of powers from inquiring into the reasonableness or otherwise of the impugned provisions as this is within the exclusive competence of the legislature.⁸⁹ The majority found that the impugned provisions are rationally connected to a legitimate governmental purpose because the form of identification documents required by the Act is the one that best guarantees clear and precise identification coupled with the fact that it is more convenient for the electoral officials to use. Thus, whether or not such requirement is reasonable having regard to the fact that other forms of identification are available and in possession of the 5 million voters that are going to be disenfranchised by the impugned provisions is not within the ambit of the court to determine as the judiciary is not competent to second guess the parliament who has the sole authority to determine which means of identification are appropriate. The Court in the instant case obviously failed to heed the admonition of Sachs J in *August and Another v Electoral Commission and Others* where the learned Justice counseled that legislation dealing with franchise should be interpreted to favour enfranchisement rather than disenfranchisement.⁹⁰

The error and fallacy in the reasoning and decision of the majority in *New National Party* is, however, brought to the fore by O' Regan J in her powerful dissent in the case. According to O' Regan J, the right to vote is the very foundation of democracy and is preservative of all other civil and political rights.⁹¹ She also stressed that in view of South Africa's long struggle for democracy, the country needs to build a resilient democracy; and in order to do this, the country needs to develop a culture of participation. According to her: 'To build the resilient democracy envisaged by the Constitution, we need to establish a culture of participation in the political process...'⁹² She is therefore of the opinion that having regard to the importance of the right to vote to democracy and to South African political process and contrary to the view of the majority, the courts are competent to inquire into the reasonableness or otherwise of the means chosen by parliament to actualise the right to vote. According to her:

⁸⁹ *New National Party v Government of the Republic of South Africa and Others* 1999 (5) BCLR 489 para 24 (CC).

⁹⁰ 1999 (4) BCLR 363 at para 17.

⁹¹ *New National Party v Government of the Republic of South Africa and Others* 1999 (5) BCLR 489 at para 122 (CC).

⁹² *Id* at 121.

Regulation, which falls short of prohibiting voting by a specified class of voters, but which nevertheless, has the effect of limiting the number of eligible voters needs to be in reasonable pursuance of an appropriate government purpose. For a court to require such a level of justification, is not to trample on the terrain of Parliament, but to provide protection for a right which is fundamental to democracy and which cannot be exercised at all unless Parliament enacts an appropriate legislative framework.⁹³

She consequently held that the impugned provisions are unreasonable and not rationally connected to any legitimate purpose of government.

A contrast of the majority opinion with the minority opinion of O'Regan J throws up the following: One, while the majority took a deferential posture to the legislature based on a liberal democratic understanding of democracy which follows a strict separation of powers of three arms of government and prescribes a very limited role to the judiciary on issues bordering on public policy and what may be called political decision making processes,⁹⁴ the minority opinion asserts the constitutional legitimacy and competence of the courts to police other organs of government in constitutional democracies and tried to balance both the constitutional and democratic elements of constitutional democratic systems.⁹⁵ Thus, while the majority opinion is consistent with the liberal philosophy of democracy evidenced by heavy reliance on liberal democratic doctrine of separation of powers and judicial deference, the minority opinion stresses more the constitutional conception of democracy.

Two, the majority opinion of the Court appears willing to sacrifice the interests of five million eligible voters just because about 20 million others are already in possession of the required identification documents. This evidences a majoritarian conception of politics which privileges and places premium on majority numbers of citizens in public decision-making processes. The minority opinion on the other hand emphasises inclusiveness and participation

⁹³ Id at 122

⁹⁴ See for instance, S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 63. See also generally, M H Marshall 'The separation of powers: An American perspective' (2006) 22 *South African Journal on Human Rights* 10.

⁹⁵ According to Tully, for a constitutional democratic system to be legitimate it must be both constitutional and democratic. J Tully 'The Unfreedom of the Moderns in comparison to their ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204 – 206. This view of Tully I have already discussed at length in Chapter Three.

by its insistence that efforts ought to have been made to capture every eligible voter in the political process.

From the foregoing, while the majority opinion is consistent with the liberal/majoritarian view of democracy, the minority opinion is more in line with an African conception of politics with its emphasis on inclusiveness and participation as discussed in Chapter Three.

An approach more in tune with inclusive politics is, however, apparent from the Constitutional Court decision in *August and Another v Electoral Commission and Others*.⁹⁶ In *August*, the applicants who were convicted and awaiting trial prisoners sued the respondents contending that contrary to the Interim Constitution and the earlier Electoral Act of 1993⁹⁷ that the 1996 Constitution of the Republic of South Africa and the extant electoral act: the 1998 Electoral Act,⁹⁸ do not provide for disqualification of prisoners from exercising their franchise. The applicants therefore contended that the first respondent is obliged to provide measures that will enable them exercise their voting rights. The respondents contended on the other hand that they were not obliged by law to put any special measures in place for the applicants because they have by their own conduct disabled themselves from exercising their franchise. Respondents also argued that to order them to put measures in place to facilitate the exercise of franchise by the applicants will put enormous logistical and financial challenges upon the state. The High Court bought these arguments of the respondents and dismissed applicants/appellants' action.

However, on appeal to the Constitutional Court, the Court held that '...legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement'⁹⁹ and thus that the provisions of the 1998 Electoral Act which provides that votes are to be cast in place of ordinary residence should be construed to make prisons the ordinary residence of prisoners for the purposes of casting their ballots. According to the Court:

⁹⁶ 1999 (4) BCLR 363.

⁹⁷ Act 202 of 1993.

⁹⁸ Act 73 of 1998.

⁹⁹ *August and Another v Electoral Commission and Others* 1999 (4) BCLR 363 para 17 (CC).

Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.¹⁰⁰

The Court therefore concludes that the relevant provisions of the Constitution and the laws mandate an inclusive reading and approach because it is every citizen's badge of dignity and personhood. This reading of the Court, however, despite its inclusive approach to franchise statutes, mirrors the classical liberal understanding of democracy. This is because elections and the concomitant right to vote lies at the very core of liberal-legal theory of democracy.¹⁰¹ As rightly pointed out by Ugochukwu, elections and the concomitant right to vote is liberal democracy's life-sustaining oxygen.¹⁰² It comes as no surprise therefore that the Court will place a very high value and premium on franchise issues in this case.

The inclusive approach to the interpretation of franchise legislation was again displayed by the Constitutional Court in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)*.¹⁰³ In *NICRO*, the South African parliament had by the provisions of the Electoral Laws Amendment Act, 2003,¹⁰⁴ in apparent response to the Court's pronouncement in *August*, excluded from voting all prisoners sentenced to imprisonment without the option of fine. Applicants who were prisoners sentenced to imprisonment without the option of fine challenged the constitutionality of the Act on the ground that it violated their constitutionally guaranteed rights. The main complaint of the applicants in this regard is that the Act violates their entrenched right to vote in section 19 (3) (a) of the South African Constitution.

¹⁰⁰ Ibid.

¹⁰¹ B Ugochukwu 'Ballot or bullet: Protecting the right to vote in Nigeria' (2012) 12 *African Human Rights Law Journal* 539 at 543 – 544.

¹⁰² Ibid. See also E Azinge 'The right to vote in Nigeria: A critical commentary on the open ballot system' (1994) 38 *Journal of African Law* 173 where he also makes the point that the right to vote is intertwined with the concept of representative democracy.

¹⁰³ 2004 (5) BCLR 445 (CC).

¹⁰⁴ Act 34 of 2003.

The applicants' application was opposed by the state on two main grounds. First on logistical and financial grounds; that scarce resources should be directed to meeting the needs of those who cannot otherwise come to the polls rather than sentenced prisoners who were the architects of their own woes. Second, on policy grounds; that a temporary deprivation of franchise during period of imprisonment will heighten and emphasise the government's uncompromising stance against crime. The majority of the Court held on the first ground that the government has not shown that it will be much more onerous to facilitate voting by sentenced prisoners than other groups for whom special arrangement will have to be made by the government as a result of their incapacity. On the second ground, the majority also held that the government had not placed sufficient materials or evidence before the Court to justify its policy thrust or position. The Court therefore held that the limitation of the voting rights of persons serving terms of imprisonment without the option of fine did not pass constitutional muster under the stringent conditions set for limitation of rights in section 36 of the South African Constitution. The Court therefore again in this case places a very high value on the right to vote, consistent with liberal democratic theory.

The inclusive and participatory approach to the interpretation of legislation dealing with franchise came to the fore again in *African Christian Democratic Party v Electoral Commission and Others*¹⁰⁵ where the Court held that the question whether applicant has complied with the provisions of the Local Government: Municipal Electoral Act of 2000 (the Municipal Electoral Act)¹⁰⁶ was to be determined substantively and not restrictively. In the case, the provisions of sections 14 and 17 of the Municipal Electoral Act required, among other things, that parties and candidates for municipal elections are to deposit an amount equal to the prescribed amount with the Electoral Commission before qualifying to take part in the elections. A prescribed amount of R 3000 was stipulated for the Cape Metropolitan Council, the election of the council area in dispute in this case.

It was however revealed during proceedings that the applicant had a credit balance of R10, 000 with the Commission from the bulk payment of R283, 000 the applicant earlier deposited with the Electoral Commission to cover the prescribed fees of all the area councils applicant

¹⁰⁵ 2006 (5) BCLR 579 (CC).

¹⁰⁶ Act 27 of 2000.

intended to contest elections in during the election period. The Cape Metropolitan Council was, however, not included in the councils covered by this earlier deposit. When it later became apparent that the applicant intended to contest election in the Cape Metropolitan Council after the expiration of the time stipulated for the lodging of application and payment of deposit to contest elections and that the applicant had not paid the requisite deposit to qualify to contest the election in the Cape Metropolitan Council, the applicant asked the Commission to off-set the deposit from its credit balance with the Commission. This the Commission refused to do on the ground that the time prescribed for the payment had elapsed and that by extant laws it has no jurisdiction to condone late payment.

The dispute was subsequently referred to the Electoral Court who found for the Commission. On appeal to the Constitutional Court, the Court held, following the ratio in *August*, that legislation dealing with franchise is to be interpreted in favour of inclusion and participation and not exclusion and disenfranchisement. The majority of the Court therefore found for the applicant.

The enfranchisement route was again followed by the Constitutional Court in *Richter v Minister of Home Affairs and Others*,¹⁰⁷ a case revolving around the issue of the right of expatriate South African citizens to vote. The South African Electoral Act, 1998¹⁰⁸ and regulations made thereunder regulating the exercise of the right to vote abroad restricted the classes of absent voters who can vote outside the shores of the country to what the Court called a privileged class of voters i.e. those on government service abroad and those who are temporarily absent from the country on holiday, sporting, educational or business purposes. The applicant, a teacher working in London and therefore not coming within the exception created under the electoral laws, contended that this restriction to a narrow category of people is a violation of his right to vote under section 19 (3) of the South African of the Constitution. The High Court found in favour of the applicant and declared the offending provisions of the laws unconstitutional. In a confirmation proceeding at the Constitutional Court, the Court noted that the right to vote has both a symbolic and constitutional importance. The symbolic importance of the right according to the Court lies in what Sachs J in *August and Another v*

¹⁰⁷2009 (5) BCLR 448 (CC).

¹⁰⁸ Act 73 of 1998.

*Electoral Commission and Others*¹⁰⁹ referred to as a badge of personhood and dignity and signified that everybody counts in a democracy.¹¹⁰

The Court explained the constitutional importance of the right to vote thus:

The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, as millions patiently and unforgettably did in April 1994, democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values.¹¹¹

The Court then noted that in contradistinction to other civil and political rights, the right to vote imposes both the negative obligation to refrain from impairing the exercise of the right and the positive obligation to take proactive steps to ensure that citizens are able to exercise the right on the state.¹¹² The Court also notes that while the state may impose conditions of reasonable compliance on voters, requiring them to travel thousands of kilometres across the globe to cast their ballot is not one of those reasonable conditions. This is more so since similar conditions are not imposed on those on government service abroad.¹¹³ The Court therefore held that the restriction of the right of absentee citizens who are registered voters to vote to only a narrow class of people is an infringement of section 19 of the South African Constitution. The restriction is also held by the Court not to be reasonable or justifiable in a democratic society as the state has not shown that the restriction served any legitimate governmental purpose. As rightly noted by Le Roux,¹¹⁴ the effect of this decision of the Constitutional Court is not only to allow all category of citizens who are temporarily out of jurisdiction to vote, but also those citizens who are permanently out of jurisdiction. Provided they are enrolled to vote.

¹⁰⁹ 1999 (4) BCLR 363 (CC).

¹¹⁰ *Richter v Minister of Home Affairs and Others* 2009 (5) BCLR 448 (CC) para 52.

¹¹¹ *Id* at para 53.

¹¹² *Id* at para 54.

¹¹³ *Id* at para 68.

¹¹⁴ W Le Roux 'Migration, street democracy and expatriate voting rights' (2009) 24 *Southern African Public Law* 370 at 378 – 379.

Thus, in *AParty and Another v Minister of Home Affairs and Others*,¹¹⁵ the applicants, absentee citizens, had challenged the constitutionality of the residence requirement of the South African Electoral Act, 1998¹¹⁶ on the ground that it is a violation of their section 19 constitutional right. The Constitutional Court confirmed its holding in *Richter v Minister of Home Affairs* to the effect that expatriate citizens who are registered voters cannot be lawfully denied the right to vote abroad. The Court however refused *AParty* applicants' applications for direct access to the Constitutional Court because they were not already registered to vote. The Court held that the Electoral Act in question was enacted by parliament to give effect to the right to vote. And that intrinsic to the scheme created by the Act is the residence requirement that a person only qualifies to be registered to vote if such a person is ordinarily resident in South Africa. The Court noted that the challenged residence requirement of the Act is the backbone of the electoral scheme created by parliament whose duty it is to design the scheme. The Court therefore declined to grant direct access to the applicants on the ground that the issue raised by the applicants required a full consideration of relevant sections of the Electoral Act. And since the issues in the case were being raised for the first time, the Court held that it is not ideal that it be constituted the court of first and last instance.

Le Roux has criticised the Constitutional Court decisions in both *Richter* and *AParty*.¹¹⁷ While he agreed with the Constitutional Court that resident citizens retain their constitutional right to vote he disagreed that expatriate/absentee citizens who are permanently outside jurisdiction also have a right to vote in South African elections as held by the Court in *Richter*.¹¹⁸ Le Roux argued further that having blurred the distinction between citizens who are temporarily out of jurisdiction and those who are permanently absent, there was no principled basis for the Court to have declined to void the residence requirement electoral scheme of the Electoral Act in both *Richter* and *AParty*. He argued further still that the Court was even wrong to have held that citizens who are permanently out of jurisdiction have a right to vote. This is because it is a fundamental principle of democracy that only those

¹¹⁵ 2009 (6) BCLR 611 (CC).

¹¹⁶ Act 73 of 1998.

¹¹⁷ W Le Roux 'Migration, street democracy and expatriate voting rights' (2009) 24 *Southern African Public Law* 370.

¹¹⁸ *Id* at 373.

subject to the jurisdiction of a law should have a say in its making or administration.¹¹⁹ He therefore argued that the best way consistent with street/local democratic principles would have been to give non-citizen residents the right to vote while denying it to non-resident citizens.

In her response to Le Roux, Van Marle agreed with Le Roux's argument regarding the need to disaggregate citizenship in the way and manner suggested by the latter.¹²⁰ Van Marle is however unsure about the residence based requirement for participation in politics and is also sceptical of the central and pre-eminent role that law and constitution occupy in Le Roux's thesis.¹²¹ According to Van Marle, over-reliance on law and constitution as vehicles for politics will only inhibit the kind of politics and political community that Le Roux himself is arguing for.¹²²

On my part, I find Le Roux criticism of the Constitutional Court decisions in *Richter* and *AParty* persuasive. I agree with him that only those subject to a law should have a say in its making or administration. This is because the street/local democracy argument of Le Roux will appear to be consistent with my own notion and conception of democracy which is also in line with the argument that those directly affected by a law are to be given pre-eminent consideration during deliberations about such law(s) consistent with African political theories and systems as I point out in Chapter Three.

The right to participate in the political process was more recently vindicated by the Constitutional Court in *Ramakatsa and Others v Magashule and Others*¹²³ where Court held that irregularities occurring during a provincial election violate appellants' right to participate in the affairs of their political parties as guaranteed by section 19 (1) of the South African Constitution. According to the Court, although political parties have the right to regulate their affairs according to the provisions of their constitutions, this must not however be contrary to

¹¹⁹ Id at 393.

¹²⁰ K Van Marle 'Constitutional patriotism or constitutional nationalism? A response to Wessel le Roux's paper' (2009) 24 *Southern African Public Law* 402.

¹²¹ Id at 402.

¹²² Id at 404.

¹²³ 2013 (2) BCLR 202 (CC).

the provisions of the Constitution. Political parties in conducting their affairs cannot act unlawfully.¹²⁴ This decision bears a striking resemblance to the current stance of the Supreme Court of Nigeria on similar issues as evidenced by cases decided earlier in time by the Supreme Court in *Ugwu and Another v Ararume and Another*¹²⁵ and *Amechi v I.N.E.C. and Others*.¹²⁶ More will be said on these cases in the appropriate section below.

The likely positive impact of this inclusive and participatory approach to franchise legislation on public decision-making and the political process, however, appeared to have already been watered down by the same Constitutional Court in *United Democratic Movement v President of the Republic of South Africa & Others II*¹²⁷ where the Court held that the frustration of political rights of the electorates through floor crossing by elected officials does not undermine multi-party democracy because electorates have no control over elected representatives in between elections. According to the Court: ‘There is a tension between the expectation of voters and the conduct of members elected to represent them. Once elected, members of the legislature are free to take decisions, and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign.’¹²⁸ This decision is premised on the idea that the principles of separation of powers precludes the courts from questioning the way parliament have through laws decided that the political process be carried on. In essence, save during periods of elections when electorates may vote to change erring representatives, electorates have no control whatsoever over erring and non-performing representatives and therefore cannot hold them to account. The implication of this kind of holding on good governance and the human rights commitments of the state is better imagined.

Furthermore, the decision of the Court in *United Democratic Movement II* above is even rather surprising having regard to the earlier position of the same Court on the issue of floor crossing by elected representatives in the *First Certification Judgment* where the Court held that the anti-defection clause which prohibited floor crossing in Schedule 6 of the Interim

¹²⁴ See for instance, *id* at paras 73 – 74.

¹²⁵ [2007] 12 NWLR (Pt. 1047) 365.

¹²⁶ [2008] 5 NWLR (Pt. 1080) 227.

¹²⁷ 2002 11 BCLR 1179 (CC).

¹²⁸ *Id* at para 31.

Constitution is not a contravention of the democratic ideals of the Constitution.¹²⁹ The Court therefore appears to me to be speaking from both sides of the mouth in the instant case and the distinction that the Court sought to draw between proportional representation system and constituency based system is at best not persuasive.

Roux has opined that the expansive principles of democracy mandated by the plain reading of section 1 (d) of the South African Constitution¹³⁰ survives *United Democratic Movement II*.¹³¹ This is because, according to him, the Court did not base its refusal to apply the values of accountability, responsiveness and openness, which universal adult suffrage is supposed to promote in the section on anything inherent in section 1 (d) of the Constitution but on extrinsic values viz: the hallowed principle of separation of powers, which makes him to conclude that the plain reading of section 1 (d) of the South African Constitution survives the decision. This may be so on paper. It is quite correct to suppose that another court who is so minded might adopt Roux's alternative reading of the section. The fact is, however, that based on the current deferential posture of the Court coupled with doctrine of precedent which is another hallowed principle of law in all common law jurisdictions, South Africa inclusive, that possibility of an alternative reading of the Constitution by a differently minded court may actually be narrower than is supposed.

As I already point out above, elections and the concomitant right to vote occupies a central place in liberal democratic theory. And true to the South African courts' liberal/representative bent, the right to vote as means of political participation occupies a central place and enjoys robust recognition in the courts' jurisprudence. Consequently, majority of the cases decided in this area of the law, as is evidence from the foregoing discussion, vindicated that right. What is worthy of note, in my opinion, however, is that when the right concerns the periphery of citizens participation and involvement in the political process like voting, periodic elections and membership of a political party, the courts have no problem in vindicating

¹²⁹ *Ex Parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa, 1996*; 1996 (10) BCLR 1253 paras 184 – 187 (CC).

¹³⁰ Section 1 (d) of the South African Constitution provides that: 'Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

¹³¹ T Roux 'The principle of democracy in South African constitutional law' In S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) 79 at 80 – 82.

section 19 rights. However, the moment that right impinges on policy or touches upon the involvement/participation of citizens regarding how the political processes are to be organised, available evidence shows that the courts are not that forthcoming. This is clearly deducible from cases like *New National Party* and *United Democratic Movement II* above.

4.1.3 Freedom of expression

One of the distinguishing features of liberal democratic theory is the centrality of individual rights where rights are viewed as trumps against the majority and governmental exercise of powers.¹³² Human rights are also regarded as one of the few ways through which the citizens of bourgeois liberal democratic societies participate in public life.¹³³ The right to freedom of expression is one of the rights recognised as one of the pillars of a functioning liberal democratic society in this regard. It is one of the rights recognised as essential for democratic deliberations and political participation. This is because without the right to freedom of expression ‘... the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.’¹³⁴ The right is also one of the basic conditions for social progress and development.¹³⁵ Expressions protected by the right therefore go beyond dissemination and reception of information and ideas, but also includes the protection of artistic and aesthetic expressions, and expressions that are acceptable and those that are found unacceptable and unsavoury by some section of the society, among others.¹³⁶ The right is

¹³² See for instance, J Donnelly ‘Human rights, democracy and development’ (1999) 29 *Human Rights Quarterly* 608 at 620 – 622; C Heyns ‘A “struggle approach” to human rights’ in A Soeteman (ed) *Pluralism and law* (2001) 171 at 186; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 63 – 66.

¹³³ F Michelman, ‘Welfare rights in a constitutional democracy’ (1979) *Washington University Law Quarterly* 659 at 677; J Raz ‘Rights and politics’ (1995) 71 *Indiana Law Journal* 27 at 42 – 43; C Heyns ‘A “struggle approach” to human rights’ in A Soeteman (ed) *Pluralism and law* (2001) 171 at 186.

¹³⁴ *Khumalo and Other v Holomisa* 2002 (8) BCLR 771 at para 21.

¹³⁵ See for instance, the dictum of Madala J in *Phillips v DPP* 2003 (4) BCLR 357 at para 39 (CC) where the learned Justice states that: ‘Freedom of expression constitutes one of the essential foundations of a democratic society, and is one of the basic conditions for its progress and for the development of every woman and man.’

¹³⁶ The right has been held to protect prostitution and possession of pornographic materials: *Case and Another v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC); strip tease dancing: *Phillips and Another v DPP and Others* 2003 (4) BCLR 357 (CC). See also the recent Constitutional Court decision in *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (12) BCLR 1346 (CC) where the Court declared invalid certain provisions of the Films and Publications Act as amended by the Films and Publications Amendment Act because it placed prior restraint on the publication of sexual conduct in violation of section 16 of the South African Constitution.

however not absolute but can be restricted if reasonable and justifiable in a democratic society.¹³⁷

The essential importance of freedom of expression to democratic deliberations, social progress and development explains the pride of place courts allotted the right in South Africa.¹³⁸ In *Islamic Unity Convention v Independent Broadcasting Authority and Others*,¹³⁹ for instance, the appellant, an Islamic community radio station, had aired an interview about Zionism and the nation of Israel which the first respondent alleged is likely to offend/alienate the Jewish community in South Africa. This the first respondent contended violated clause 2 (a) of the Code of Conduct for Broadcasting Services (the Code) which prohibits broadcasts that are likely to prejudice relations between sections of the South African population. However, expressions that are likely to prohibit relations between sections of South African population is not one of the expressions prohibited under section 16 (2) of the South African Constitution.¹⁴⁰ Consequently, when the first respondent began proceedings against the appellant under section 2 (a) of the Code, the appellant approached the courts contending that clause 2 (a) of the Code violated section 16 of the Constitution, that is, its freedom of expression provision. The Constitutional Court held that broadmindedness and pluralism is central to an open and democratic society,¹⁴¹ and that where the state extends the ambit of regulation of speech beyond the ambit of section 16 (2) of the South African Constitution as in this case, such regulation must pass constitutional muster under section 36 (1) of the Constitution to be valid. Section 2 (a) of the Code was thus held to be overbroad and unconstitutional.

¹³⁷ See for instance, section 36 of the South African Constitution. See also *De Reuck v DPP and Others* 2003 (12) BCLR 1333 (CC) where the prohibition of possession of child pornography was held by the Constitutional Court to be justifiable and necessary under section 36 of the South African Constitution.

¹³⁸ See for instance, the decision of the Constitutional Court in *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) where the Court invalidated section 126B (1) – (4) of the South African Defence Act which prohibited members of the South African defence forces from joining trade unions or participating in public protest as a violation of section 16 freedom of expression provision of the South African Constitution.

¹³⁹ 2002 (5) BCLR 433 (CC).

¹⁴⁰ Section 16 (2) of the South African Constitution prohibits expression constituting propaganda for war; incitement to imminent violence or advocacy of hatred that is based on race gender, religion or ethnicity and which constitutes incitement to cause harm.

¹⁴¹ *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (5) BCLR 433 at para 28 (CC).

The values of broadmindedness and pluralism of ideas and voice was again vindicated by the Constitutional Court in *Laugh It Off Promotions CC v South African Breweries International*.¹⁴² In the case, the appellant had through a parody of the respondent's brand label printed on T-shirts criticised the racial labour practices of the respondent, a multi-national company in South Africa. The respondent sued appellant for infringing its trademark. Although both the trial High Court and the Supreme Court of Appeal found for the respondent, the Constitutional Court took the view that big businesses and the well-resourced should not be allowed to stifle alternative and critical voices. According to the Court, the threat of litigation, especially by big businesses, and overzealously applied trademark law against not so well resourced social critique(s) may stifle legitimate public debate. The Court pronounced thus: 'To limit valuable communication to non-commercial enterprises would further marginalise alternative and competing voices in society. In this way voices of the best resourced would tend to prevail.'¹⁴³ The Court therefore appears in the case to support a more participatory approach that will further diversity of views and ideas.

In addition to the foregoing cases, the Constitutional Court also evinced a participatory and inclusive approach to interpretation of the freedom of expression right in the very recent case of *Mail and Guardian Ltd and Others v M J Chipu N.O. (Chairperson of the Refugee Appeal Board) and Others*¹⁴⁴ where the Court declared invalid section 21(5) of the South African Refugees Act,¹⁴⁵ which did not give any discretion to the Refugee Appeal Board to admit members of the public and/or interested parties to its proceedings or disclose matters relating to its proceedings in appropriate cases as an unjustifiable limitation on the right to freedom of expression.

However, if *Islamic Unity Convention* and *Laugh It Off Promotions CC* are contrasted with the decisions of the majority of the Constitutional Court in *S v Mamabolo and Others*¹⁴⁶ and *Khumalo and Others v Holomisa*,¹⁴⁷ the exclusionary and narrow scope envisaged for

¹⁴² 2005 (8) BCLR 743 (CC).

¹⁴³ Id at para 62.

¹⁴⁴ [2013] ZACC 32.

¹⁴⁵ Act 130 of 1998.

¹⁴⁶ 2001 (5) BCLR 449 (CC).

¹⁴⁷ 2002 (8) BCLR 771.

involvement and participation of the citizenry in policy related issues and public decision-making processes via the prisms of rights becomes more apparent, yet again.

In *S v Mamabolo and Others*, the appellant was convicted of the offence of scandalising the court because he had granted an interview where he opined that the orders of a court are mistaken on points of law. He appealed his conviction and sentence on two grounds. The first is that the offence of scandalising the court is not constitutionally permissible having regard to the constitutionally guaranteed right of expression. The second ground is that the summary procedure for the prosecution of the offence cannot pass constitutional muster. The Constitutional Court held that the summary procedure for the trial of contempt of court violated the constitutionally guaranteed right to a fair trial; and that in relation to the appellant the substance of the offence of scandalising the court was not made out. The majority of the Court however held that the offence of scandalising courts is constitutional and needed to be retained in the law because while public scrutiny of the judiciary constitutes democratic check, this is outweighed by the need to protect the integrity of the judiciary in a young democracy.¹⁴⁸

However, as rightly pointed out by Sachs J in his powerful dissenting opinion, the majority holding will put a damper on public scrutiny, criticism and engagement of the general public with the courts and will thus limit democratic deliberation. According to the learned Justice: ‘In an open and democratic society, freedom of speech and the right to expose all public institutions to criticism of the most robust and inconvenient kind, are vital.’¹⁴⁹ Justice Sachs is therefore of the view that the offence of scandalising courts which contemplates statements made outside courts and which do not relate to on-going proceedings should have no place under an open and democratic society which values freedom of speech.¹⁵⁰ The learned Justice thus went further to say as follows:

The primary function of the judiciary today is happily to protect a just rather than an unjust legal order. Yet criticism, however robust and painful, is as necessary as ever. It is not just the public that has the right to scrutinize the judiciary, but the judiciary that has the right to have its activities subjected to the

¹⁴⁸ Id at paras 30 – 33.

¹⁴⁹ Id at para 71.

¹⁵⁰ Id at para 72.

most rigorous critique. The health and strength of the judiciary, and its capacity to fulfil time-honoured functions in new and rapidly changing circumstances, demand no less. *There are no intrinsically closed areas in an open and democratic society.*¹⁵¹

The above view of Justice Sachs I think is better for the democratic deliberation objectives that freedom of speech is intended to serve in an open and democratic society than the view and position of the majority.

That restricted involvement and participation in critical areas of public life via constitutionally entrenched rights is envisaged for the citizens by the courts was confirmed again by the Constitutional Court in *Khumalo and Others v Holomisa*.¹⁵² In *Khumalo and Others*, the applicants, members of a print media house, had been sued by the respondent, a politician, for defamation consequent upon an article they published about him which touched upon his fitness to hold public office. Appellants had contended before the trial High Court that South African law of defamation, which did not require the plaintiff to prove the falsity of an alleged defamatory statement against him is contrary to the provision of section 16 of the South African Constitution. This claim was rejected by the trial Court. On a direct appeal to the Constitutional Court, it was held by a unanimous bench that this rule of South African common law does not violate section 16 of the South African Constitution. The Court recognised the fundamental importance of the media in actualising the right to freedom of expression in any democratic society.¹⁵³ The Court also acknowledged that the South African common law rule of defamation as presently constituted will have a chilling effect on free flow of information and ideas. Even so, the Court still declined to follow the more progressive decision of the United States Supreme Court cited to it where it had been held that where official conduct is in issue the official in question must prove falsity of alleged defamatory statements and actual malice on the part of defendant(s) in publishing same to succeed in his/her action.¹⁵⁴ This is because the Constitutional Court was of the view that the South African Supreme Court of Appeal's earlier development of the common law rule of defamation by the addition of a test of reasonableness in addition to other defences available to a defendant in any case of defamation¹⁵⁵ would ameliorate the chilling effect of the extant

¹⁵¹ Id at para 77 (Emphasis supplied).

¹⁵² 2002 (8) BCLR 771.

¹⁵³ See for instance, paras 23 – 24 of the judgment.

¹⁵⁴ *New York Times Co. v Sullivan* 376 US 254 (1964).

¹⁵⁵ This is in *National Media Ltd and Others v Bogoshi* 1999 (1) BCLR 1 (SCA).

rule on information dissemination and reception. I am, however, of the view that following the more progressive United States Supreme Court decision in the instant case and allowing the exception claimed by the appellants would have much better served the democratic objectives of freedom of expression than the reasonableness test put forward by the Court. This is because the test appears to me to be very problematic and difficult to prove so that it would in no way remove the chilling effect of the extant common law rule of defamation as rightly argued by the appellants.

My claim of the narrow and exclusionary conception of democracy employed by the courts in issues that border on policy and public decision-making processes in the interpretation of fundamental human rights appears to have now been put beyond doubt in the recent case of the *President of the Republic of South Africa and Others v M & G Media Ltd.*¹⁵⁶ Brief facts of the case are as follows: Just before the 2002 presidential election in Zimbabwe, Former President Mbeki commissioned two senior South African judges to visit Zimbabwe to assess the constitutional and legal issues appertaining to the election. Upon their return to South Africa, the two judges prepared a report which was submitted to the President. The President, however, never released the report to the public. Consequent upon this, the respondent, a member of the South African print media, requested access to the report under section 11 of the South African Promotion of Access to Information Act (PAIA),¹⁵⁷ an Act enacted to give effect to the constitutional right to have access to information held by the state guaranteed under section 32 (1) (a) of the South African Constitution.¹⁵⁸ The appellants' refused to grant access. Upon appellants' refusal, the respondent approached the court to compel the release of the document on the strength of its constitutional right to have access to information held by the state. The appellants opposed the release of the report on the grounds that it contained confidential information that relates to the policy of government in its international intercourse and relied upon exemptions granted it under PAIA. Both the High Court and the Supreme Court of Appeal held that the non-disclosure of the report is unconstitutional and ordered the release of the report. The state/appellants appealed to the Constitutional Court.

¹⁵⁶ 2012 (2) BCLR 181 (CC).

¹⁵⁷ Act 2 of 2000.

¹⁵⁸ Section 32 (1) (a) of the South African Constitution provides thus: Everyone has the right of access to – any information held by the state'.

The Constitutional Court, with a bare majority of five to four, after a robust review of comparative international jurisprudence on the issues held that having regard to the contested nature of the dispute, the trial Court ought to have invoked its powers under section 80 of PAIA to have a peek at the report in order to determine whether the grounds of refusal of the state are made out. The Court thus ordered that the case be remitted back to the High Court. The remission was however in the face of serious protests of wasted cost and the likelihood of the case ending up before the Constitutional Court again. These protests the majority dismissed as mere speculation.

In the minority's view however, the state had failed to justify its refusal to release the report. They therefore held that both the High Court and the Supreme Court of Appeal were clearly right to have ordered the release of the report. In the opinion of the minority: 'To give secret judicial examination of disputed records a central place in deciding claims to exemption, instead of enforcing the burden government rightly bears to justify withholding information, is in my view a grave error.'¹⁵⁹

Thus, even here, where the issues concern the vindication of rights which normally are regarded as central to liberal democratic theories, the foregoing analysis shows that courts' performance in vindicating participation and action have been below par. This is much more so the moment rights claims are likely to impinge politics or policy. The Courts' position here becomes understandable and explainable once it is remembered that liberal democratic theories conceived politics and policies as within the exclusive preserve of elected representatives and therefore frowned upon what they call the politicisation of rights or the judicialisation of politics.¹⁶⁰ And this is despite the pride of place that the notion of individual rights occupies in liberal democratic theories. The above position of the Constitutional Court in the cases examined above can therefore be seen to be consistent with a liberal democratic understanding of democracy.

¹⁵⁹ *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) BCLR 181 at para 130 (CC).

¹⁶⁰ H Corder 'Lessons from (North) America: (Beware the 'legalization of politics' and the 'political seduction of the law')' (1992) 109 *South African Law Journal* 198; J Waldron 'A right based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18; D M Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

From the foregoing, South African courts showcase their conception of South African democracy by variously referring to the nature of South African democracy as a representative democracy, a representative democracy with participatory elements, a constitutional democracy, a deliberative and multi-party democracy, among others. These different nomenclatures notwithstanding, what is clear from foregoing discussion is that South African courts are more than willing to praise the virtues of participation and inclusiveness when issues before them concern the periphery areas of life. They thus have no problem vindicating democratic and participatory rights of citizens where to do so does not impinge on or concern political or policy issues. Where the matter before them concerns issues they regard as concerning the politics and/or policies of the republic, the courts are not as forthcoming in vindicating the claims of litigants as evidence in the foregoing sections has shown. In the few cases where the courts' approach appears to have been participatory like in the case of *Laugh It Off Promotions* discussed above, the issue(s) before the courts had nothing to do with government at all. And when it does, it does not impinge upon policy. Thus, although the courts have denoted their understanding of democracy through different nomenclatures, their rulings and judgments in their narrow and exclusionary effects appear to me to be consistent only with liberal/representative democracy.

4.2 NIGERIAN COURTS' CONCEPTIONS OF DEMOCRACY

In a bid to deduce Nigerian courts' conception of democracy, six groups of cases are examined in this section. The first group consists of those directly concerned with the competence of citizens to question or participate in public decision-making processes. This area of the law is adjudicated through the prism of the law of *locus standi* in Nigeria. The second group of cases are those concerned with the right of political participation. The third group are those dealing with the rights to freedom of association and assembly in Nigeria. The fourth group concerns those dealing with the right to freedom of expression in Nigeria. The fifth group concerns cases dealing with the impeachment/removal of certain political office holders in Nigeria. The last group deals with cases having to do with the interpretation of socio-economic rights in Chapter II of the Nigerian Constitution. It is necessary to widen

the scope of the inquiry in relation to Nigeria because of the relative paucity of direct constitutional provisions and jurisprudence dealing with democracy in Nigeria. Cases from more diverse areas of the law are therefore interrogated to ensure that the courts' conception of democracy is made as clear as possible. Having dispensed with that explanation, I now turn to the examination and discussion of the selected areas and cases.

4.2.1 *Locus standi* cases

The first group of Nigerian cases analysed in this regard are those dealing with the issue of participation of citizens in public decision-making processes. This issue is engaged by Nigerian courts through the prism of *locus standi* based on the civil rights and obligations provisions of section 6 (6) (b) of the Nigerian Constitution.¹⁶¹ At first glance, the link between the law of *locus standi* and democracy may appear tenuous. A closer look will however reveal that there is a clear linkage between the two, especially in jurisdictions like Nigeria's which lacks direct constitutional provisions similar to sections sections 72 (1) (a) and 118 (1) (a) of the South African Constitution, which mandates public involvement and participation in public decision-making processes. Experience in Nigeria tends to show that coupled with the lack of direct provisions mandating popular participation, attempts at participation in the public realm by citizens in places like Nigeria are also most likely to be met by the private/public divide of bourgeois liberal democratic theory and practice ably reflected in the twin common law doctrines of *relator action* and *locus standi*. The former stating that only a public officer, the Attorney General, is entitled to sue for remedy of public wrongs and a private party who desires to sue to remedy such wrongs must show an interest above that of the general public. In other words, the private party/person must be able to show that the public wrong has become a private wrong in relation to him/her. The former's operation calls/brings the latter doctrine into life.

Where a private person is able to show that a public wrong has become a private wrong in relation to him/her s/he is said to have *locus standi*, if s/he is not able to so prove s/he is said to lack *locus standi* and his/her action is terminated forthwith. Therefore *locus standi* operates

¹⁶¹ Section 6 (6) (b) of the Nigerian Constitution provides thus: 'The judicial powers vested in accordance with the foregoing provisions of this section – (b) shall extend, to all matters between persons, or between government or authority and to any persons 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 jurisdictions like Nigeria to deny political participation and involvement in public decision making processes to citizens who are not able to show interests beyond that of the general public. The law of *locus standi* is therefore disempowering and a violation of the norms of liberal democracy itself in as much as democracy is intended to empower the people through participation.¹⁶² Therein lies the link between democracy and the law of *locus standi*.

According to the Supreme Court of Nigeria, '[t]he term *locus standi* (or standing) denotes the legal capacity to institute proceedings in a Court of law.'¹⁶³ It, therefore, denotes the legal competence of a party to approach the courts for relief. The law of *locus standi* is very problematic in Nigeria.¹⁶⁴ For one thing, *locus standi* is, like jurisdiction, a threshold issue in litigation. It can be raised at any stage of the proceedings, even for the first time in the Supreme Court and any adjudication in breach thereof is a nullity.¹⁶⁵ A cursory glance at the courts' decisions, however, reveals that it is not a concept that the courts always consider if it is not raised by one of the parties. The implication of this is that a case may proceed for many years even up to the Supreme Court only to be thrown out for lack of standing of a party. For another thing, the plaintiff has standing and can invoke the jurisdiction of the court only if his legal rights or interests are in issue and only the courts are competent to determine whether or not a party's legal rights or interest is/are in issue and this determination can only be made if the jurisdiction of the court is invoked. There is thus much circularity in the operation of the rule of standing and a party is not able to determine conclusively before incurring litigation expenses whether or not he has the requisite standing to maintain a case in court. Also, the merits or otherwise of a case do not matter at all once a court determines that a party lacks the requisite standing. Regardless of these and other problems associated with the rule, however, it continues to operate unhindered; supposedly to prevent busy bodies and meddlesome interlopers from taking over the judicial process. Closer scrutiny of these decisions, however, reveals that they betray a particular understanding of democracy by the Nigerian judiciary.

¹⁶² Donnelly has rightly opined in this regard that the aim of democracy is to empower the people while that of human rights is to empower individuals. J Donnelly 'Human rights, democracy and development' (1999) 29 *Human Rights Quarterly* 608 at 619.

¹⁶³ *Owodunni v Reg. Trustees of CCC* (2000) 10 NWLR (Pt. 675) 315 at 338.

¹⁶⁴ See for instance, J O Akande 'The problem of *locus standi* in judicial review' (1982) 3 *Nigerian Current Law Review* 42 for a discussion of some of the problems associated with the rule in Nigeria

¹⁶⁵ See the pronouncement of the Supreme Court in *Owodunni v Reg. Trustees of CCC* (2000) 10 NWLR (Pt. 675) 315 at 338.

The first in the *locus standi* line of cases is the Supreme Court of Nigeria decision in *Senator Adesanya v President of Nigeria*,¹⁶⁶ a case generally regarded as *locus-classicus* in this area of the law. Although *Adesanya* was by no means the first Nigerian case on *locus standi*,¹⁶⁷ it was in this case that the Supreme Court of Nigeria, for the first time, imported section 6 (6) (b) of the then 1979 Constitution of Nigeria into the Nigerian law of standing.¹⁶⁸ In *Adesanya*, the plaintiff had complained that the appointment of the second respondent as the Chairman of the then Federal Electoral Commission was in breach of the provisions of the 1979 Constitution of Nigeria. After initial pronouncements which betrayed a republican understanding of democracy through the affirmation of popular participation by citizens,¹⁶⁹ the Court ultimately held that unless the civil rights and obligations of the plaintiff is directly in issue he is not entitled to approach the court for relief.

As I point out earlier, human rights occupies a central place of importance in liberal democratic theories and is one of the means (in addition to periodic elections) by and through which citizens are allowed to participate in politics or public decision making processes. The Supreme Court of Nigeria's insistence in the above case that the civil rights and obligations of the applicant must be in issue before he can question the appointment of the second

¹⁶⁶ [1981] 2 NCLR 358

¹⁶⁷ Several cases were in fact decided under the common law before *Adesanya*. The position of the law regarding *locus-standi* in Nigeria in the pre-*Adesanya* period was that in private law suits *locus-standi* is subsumed in the cause of action of the plaintiff. Thus whether or not a party has *locus-standi* to invoke the jurisdiction of the court is determinable from his cause of action. See for instance, the cases of *Adanji v Hunvoo* I NLR 75 and *Will v Will* 5 NLR 74. In public law matters on the other hand, the type of remedies sought by applicant(s) determines the applicable rule of *locus-standi*. If the remedy sought is the private law remedies of declaration, mandamus or injunction, then applicant(s) must show violation of a legal right: *Olawoyin v AG Northern Region* (1961) 1 ANLR 269; where remedies sought are prerogative remedies of either certiorari or prohibition a real interest will suffice: *Queen v Administrator Western Region* (1962) 3 WNLR 344.

¹⁶⁸ Section 6 (6) (b) of the 1979 Constitution of the Federal Republic of Nigeria is in *pari-materia* with the provisions of section 6 (6) (b) of the current Nigerian Constitution. Section 6 (6) (b) of the 1979 Constitution provides thus: 'The judicial powers vested in accordance with the foregoing provisions of this section – Shall extend to all matters between persons, or between governments 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'.

¹⁶⁹ The Supreme Court, per Fatai-Williams CJN, as he then was, had earlier in the lead judgment pronounced thus: 'To my mind, it should be possible for any person who is convinced that there is an infraction of the provisions of Sections 1 and 4 of the Constitution which I have enumerated above to be able to go to court and ask for appropriate declaration and consequential relief if relief is required. In my view, any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an *obligation* to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his *civil right* to see this is so' *Senator Adesanya v President of Nigeria* [1981] 2 NCLR 358 at 376.

respondent betrayed a classical liberal conception of democracy ‘which views rights as enclaves of freedom, protected and separated from democratic politics’.¹⁷⁰

Also in *Fawehinmi v I.G.P & Others*,¹⁷¹ the applicant had approached the court for an order of mandamus to compel the Nigerian Police Force to investigate his allegations of forgery of certificates and perjury, among others, against the then Governor of Lagos State which if proven would have rendered the Governor unfit to continue in office as Governor. The objections of the respondent on the ground that the applicant lacked *locus standi*, among other objections raised by the respondent, were sustained by the trial High Court. On appeal to the Court of Appeal, the Court of Appeal allowed the applicant’s appeal. On further appeal to the Supreme Court, the Supreme Court allowed the appeal of the respondent and held *inter alia* that the applicant had no *locus standi* to bring the action because he had not shown that his right or interest was implicated in the facts in issue pursuant to section 6 (6) (b) of the Nigerian Constitution. According to the Court:

...section 6(6) (b) of the 1999 Constitution does not confer *locus standi* on any litigant but merely allows the court to determine any question as to his civil rights and obligations. But he must show that his civil rights and obligations have been infringed before section 6(6) (b), which vests judicial powers in the court and provides forum for litigation, will enable the court to look into a person’s grievance.¹⁷²

The Supreme Court of Nigeria, however, appears to have adopted a more expansive approach to the operation of the rule of *locus standi* in *Fawehinmi v Akilu*¹⁷³ and *Adediran v Interland Transport Ltd.*¹⁷⁴ In *Fawehinmi v Akilu*, the plaintiff had approached the court for an order of mandamus to compel the Lagos State Director of Public Prosecution to exercise his discretion whether or not he would prosecute the respondents whom the plaintiff accused of the murder of his (plaintiff’s) client and friend. One of the objections raised by the respondents in the case was that the plaintiff lacked the standing to maintain the action. The Supreme Court held in that case that the plaintiff has *locus standi* under section 342 of the Criminal Procedure Law of Lagos State which grants every citizen the right of private criminal prosecution

¹⁷⁰ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 64.

¹⁷¹ (2002) 7 NWLR 607 (SC).

¹⁷² *Id* at 689.

¹⁷³ [1987] 4 NWLR (Pt. 67) 79.

¹⁷⁴ [1991] 9 NWLR (Pt. 214) 155.

subject to the conditions stipulated under the section. The Court also held that it is the duty of every citizen to see to it that crimes are duly prosecuted.

Adediran v Interland Transport Ltd on the other hand concerned the question whether the common law rule of relator action in public nuisance has been super-ceded by the provisions of section 6 (6) (b) of the Nigerian Constitution. In answer, the Supreme Court held that the relator action requirement of public nuisance is inconsistent with the provisions of section 6 (6) (b) of the Constitution. According to the Court:

...except provided by rules of court, where a party can show that his Civil (sic) and obligations are in issue the judicial powers of the Constitution for the determination of such civil rights and obligations have been vested in our courts. To observe the common law distinction in instituting actions in tort of nuisance is to invoke and impose a common law provision inconsistent with the Constitution. It is to deprive the citizen of the right of action conferred on him by the Constitution.¹⁷⁵

However, a closer look at these two cases reveals that in spite of the apparent expansive approach of the Court, the cases are not real exceptions to *Senator Adesanya v President of Nigeria*.¹⁷⁶ With regard to *Fawehinmi v Akilu*, the *locus standi* of the applicant there was founded on statutory right of private criminal prosecution; while *Adediran v Interland Transport Ltd*. actually followed the civil rights and obligations approach of *Adesanya* as can be gathered from the pronouncement of the Court quoted above.

Thus, in essence, the classical liberal-legal and rights-centred approach of the Supreme Court in *Adesanya* to the issue of *locus standi* was believed to be the law until the more recent decision of the Court of Appeal in *Fawehinmi v The President*¹⁷⁷ In *Fawehinmi v The President*, the appellant approached the court for a declaration that the remuneration of the 3rd and 4th respondent, Ministers of the Government of the Federation, that was being paid in US Dollars and far in excess of the amount stipulated by a statute¹⁷⁸ are in violation of the relevant statute and a gross breach of the Nigerian Constitution. The respondents objected to the *locus standi* of the appellant on the ground that it has not been shown that the appellant's civil rights and obligations are in issue pursuant to section 6 (6) (b) of the Constitution, among other arguments. The trial High Court agreed with the respondents and held that the appellant had no *locus standi* to institute the action. On appeal to the Court of Appeal, the

¹⁷⁵ *Adediran v Interland Transport Ltd*. [1991] 9 NWLR (Pt. 214) 155 at 181.

¹⁷⁶ [1981] 2 NCLR 358.

¹⁷⁷ (2008) 23 WRN 65.

¹⁷⁸ Certain Political, Public and Judicial Office Holders (Salaries and Allowances, etc) Act 6 of 2002.

latter reversed the High Court and held that the appellant, being a citizen of Nigeria and a tax payer had the *locus standi* to institute the action. According to the Court:

In this country, where we have a written Constitution which establishes a constitutional structure involving tripartite allocation of power to the judiciary, executive and legislature as the co-ordinate organs of government, judicial function must primarily aim at preserving legal order by confining the legislative and executive within their powers in the interest of the public and since the dominant objective of the rule of law is to ensure the observance of the law, it can best be achieved by permitting any person to put the judiciary machinery in motion in Nigeria whereby any citizen could bring an action in respect of a public derelict. Thus, the requirement of *locus-standi* becomes unnecessary in constitutional issues as it will merely impede judicial functions.¹⁷⁹

Thus, relying on the same *Adesanya's* case, the Court adopted a more participatory approach to issues that border on public decision-making in contradistinction to the position of the Supreme Court in the case.

I do not, however, think that *Fawehinmi v Akilu* has in fact wrought any change in the law of *locus standi* in Nigeria. First, one of the landmark decisions of the Supreme Court of Nigeria on the issue is *Owodunni v Reg. Trustees of CCC*,¹⁸⁰ where the Court clarified the position of the law with regard to *locus standi* merely states that section 6 (6) (b) of the Nigerian Constitution does not in fact apply to all proceedings generally. The provision only becomes relevant when the interpretation/application of the Constitution or a statute is in issue and where proceedings relate to the issue of private law, *locus-standi* becomes subsumed in the cause of action as obtainable under the common-law before the case of *Adesanya*.¹⁸¹ In other words, the rule of standing applies in public law litigation while the law in relation to private law reverts back to pre-*Adesanya* position. This means in essence that the civil rights and obligations hurdle remains to be surmounted for litigants in public law litigations.

Second, based on the doctrine of judicial precedent, the Court of Appeal cannot purport to overrule the Supreme Court on this issue being a court lower in hierarchy to the Supreme Court; more so, since the Court of Appeal did not purport to distinguish *Adesanya* from the case before it. The fact that *Fawehinmi v The President* may not have wrought any change in the law is actually confirmed by the fact that some High Courts have in fact refused to follow the Court of Appeal on this point, preferring instead to still base their decisions on the *ratio* in

¹⁷⁹ *Fawehinmi v The President* (2008) 23 WRN 65 at 114.

¹⁸⁰ (2000) 10 NWLR (Pt. 675) 315.

¹⁸¹ *Id* at 338 – 347.

Adesanya.¹⁸² Having regard to the foregoing, the position of the law of *locus-standi* in Nigeria, I contend, remains as clarified by the Supreme Court in *Owodunni's* case. That is that section 6 (6) (b) of the Nigeria Constitution does not apply to all proceedings generally. It only becomes relevant in public law matters. Which means in effect that a litigant will have to show the violation of his/her civil rights or obligations when intending to invoke the jurisdictions of the court in public law matters pursuant to the provisions of 6 (6) (b) of the Constitution.

There are two points to make here before I conclude this section. The first is that the decisions of the courts on *locus standi* examined here place a very high premium on rights as the requisite window of citizens' involvement and participation in public decision making processes. The second is the private/public law distinctions made by the Supreme Court in this area of the law in *Owodunni's* case. As I have already pointed out, this rights-centred approach and the public/private divide of the Nigerian courts in these cases are characteristics that are peculiar/specific to liberal constitutionalism.¹⁸³ It is therefore safe to conclude that the courts here are exhibiting classical liberal constitutionalism/democratic traits.

One other point that merits discussion before concluding this section concerns the new Fundamental Rights Enforcement Procedure Rules (2009 FREP Rules) promulgated in 2009 by the Chief Justice of Nigeria pursuant to section 46 (3) of the Nigerian Constitution. These rules clearly envisage a broadening of *locus standi*. However, the broadening is only with respect to fundamental rights litigation and not with respect to litigation in general, as can be gathered from paragraph 3 (e) of the Preamble to the 2009 FREP Rules.¹⁸⁴ As a matter of fact, aspects of the provisions of this 2009 FREP Rules have recently been declared

¹⁸² See for instance, *Femi Falana v The Senate and 4 Others* Suit No: FHC/ABJ/CS/603/10 (Delivered on the 22nd day of May, 2012). The Court in this case ruled that a human rights activist who has challenged in court the jumbo pay of Nigerian Federal legislators has no *locus standi* to pursue the case. The Court refused to follow the Court of Appeal in *Fawehinmi v The President* preferring instead to base its decision on the *Adesanya's* case. See also *Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* Suit No: FHC/ABJ/CS/640/2010 (Delivered on the 29th day of November, 2012) where the court also threw out the suit of a civil society organisation questioning how Nigerian oil windfall during the regime of former military head of state Ibrahim Babangida was expended on the ground of lack of *locus standi*. The court in this instance also declined to follow *Fawehinmi v The President*.

¹⁸³ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 59.

¹⁸⁴ Para 3 (e) of the Preamble to the 2009 FREP Rules expressly provides that: 'The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*.'

unconstitutional by a Nigerian High Court on the ground that it includes the African Charter and other international human rights instruments subscribed to by Nigeria as part of the rights enforceable via the Rules.¹⁸⁵

Additionally, as Sanni has rightly in my view argues that the 2009 FREP Rules are subsidiary legislation which cannot amend or repeal the Nigerian Constitution.¹⁸⁶ This view was recently confirmed by the decision referred to above. The 2009 FREP Rules cannot, therefore, purport to legitimate what the Constitution prohibits. This in effect means the perpetuation of the rights-centred approach of the classical liberal conception of democracy in the Nigerian law of *locus standi*.

4.2.2 Right to political participation

The right of citizens to participate in the government of Nigeria is provided for by section 14 (3)¹⁸⁷ of the Nigerian Constitution. However, probably because the right in section 14 (3) of the Constitution is not justiciable, being contained in Chapter II of the Constitution, Nigerian courts often-times read the section together with section 40 of the Constitution, the right to freedom of assembly and association to give effect to the right to political participation in the Nigerian Constitution.

Sections 14 (3) and 40 of the Nigerian Constitution came up for consideration in *INEC v Musa*,¹⁸⁸ considered the *locus-classicus* in this area of the law in Nigeria. In this case, a number of political parties questioned the constitutionality of the Nigerian Electoral Act 2001 and the regulation made thereunder by the Independent National Electoral Commission

¹⁸⁵ *The Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* Suit No: FHC/ABJ/CS/640/2010 (Decision of the Federal High Court Abuja, delivered on the 29th of November, 2012).

¹⁸⁶ A Sanni “Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The need for far-reaching reform” (2011) 11 *African Human Rights Law Journal* 511.

¹⁸⁷ Section 14 (3) provides that ‘the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution’.

¹⁸⁸ (2003) 3 NWLR (Pt. 806) 72.

(INEC). The main contention in *INEC v Musa* was whether section 222 of the Nigerian Constitution, which deals with the criteria for associations to become political parties in Nigeria is exhaustive of requisite criteria so as to preclude the legislature and INEC from adding to the list. In holding that section 222 of the Constitution is exhaustive of the matter, the Supreme Court of Nigeria pronounced as follows:

To put the issues in the appeal in proper perspective it is expedient to pause to emphasise that by section 14 (1) of the Constitution of the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice. Political parties are essential organs of the democratic system. They are organs of political discussion and of formulation of ideas, policies and programmes. Plurality of parties widens the channel of political discussion and discourse, engenders plurality of political issues, promotes the formulation of competing ideas, policies and programmes and generally provides the citizen with a choice of forum for participation in governance, whether as a member of the party in government or of a party in opposition, thereby ensuring the reality of government by discussion which democracy is all about in the final analysis.¹⁸⁹

The Court therefore struck down those aspects of the Electoral Act and INEC regulation it considered too restrictive to political parties' formation. That aspect of the regulation that totally prohibited civil servants from political party membership was also annulled by the Court. While the Court in *INEC v Musa* recognised that participation and discussion is the whole essence of democracy, it does appear that the Court thinks it is through the instrumentality of political parties that these can become a reality. This view that political parties, and inevitably periodic elections, are the only legitimate means of participation and discussion is a classically liberal/representative democratic viewpoint.

As I earlier point out in Chapter Three when I examine the evolution and development of representative/liberal democracy, multi-party elections where political parties play the prominent role of representor of different kinds of interests and policies among which electorates choose in periodic elections is the hallmark of liberal democracy of contemporary times.¹⁹⁰ Policy and interest shopping of electorates among different political parties is one of the very few ways through which citizens participate in the liberal democracy of today. Therefore, the Supreme Court of Nigeria's position about the essential importance of plurality of parties (and the plurality of interests and policies that this will foster) to democratic participation as expressed in the quotation above is a classically liberal/representative democratic viewpoint.

¹⁸⁹ Id at 150.

¹⁹⁰ See for instance, J Schumpeter *Capitalism, socialism and democracy* (1943) 269. See also C Ake *The feasibility of democracy in Africa* (2000) 17 – 26.

Before *INEC v Musa*, however, there were cases that have sought to define the nature of the relationship between individuals and political parties to which individuals belong and the scope of the exercise of individuals' right to political participation within the ambit of party politics in Nigeria. One of the earlier cases in this area of the law is *Alhaji Balarabe Musa v Peoples Redemption Party*.¹⁹¹ The applicant, a state Governor, was a member of the respondent, a registered political party in Nigeria. The applicant had been attending meetings with other Governors who were from other political parties. The applicant's party, the respondent, frowned upon the applicant's attendance of the meetings. The respondent's members, by a resolution of the party, forbade him from attending further meetings. He brought an application before the High Court of Lagos State for an order of *certiorari* to quash the resolution of his party as being a violation of his fundamental right to assembly and association, among others. The Court rejected the applicant's contention and held that although a political party is not entitled to restrict the fundamental rights of its members, still a political party being a voluntary association is supreme over its internal affairs and not subject to the jurisdiction of the court. The Court also held that the decision of the majority members of a party is binding on all members and the court is not entitled to interfere.¹⁹²

A similar decision that a political party has supreme and exclusive authority over its internal affairs was reached by the Supreme Court of Nigeria in *Onuoha v Okafor and Others*.¹⁹³ *Onuoha v Okafor and Others* relates to the competence of political parties to nominate/select candidates for elections and the incompetence of the courts to interfere in the process. In the case, the plaintiff/appellant was first nominated as the flag bearer of the second respondent, a registered political party in Nigeria, for a seat in the Senate of the Nigerian National Assembly. A subsequent primary election was, however, conducted by members of the second respondent where the first respondent emerged as winner without cancellation of the earlier one where the plaintiff/appellant emerged the flag bearer. The plaintiff/appellant's name was therefore substituted with that of the first respondent. The plaintiff/appellant approached the court for relief. The trial Court in granting the prayers of the plaintiff/appellant held that second respondent's officers conducted the first primary election which was authenticated also by an officer of the second respondent. They were therefore

¹⁹¹ [1981] 2 NCLR 763.

¹⁹² *Id* at 678 – 679.

¹⁹³ (1983) 2 SCNLR 244.

precluded from conducting a second primary and substituting the candidacy of the plaintiff. The trial Court's decision was overturned by the Court of Appeal who held that the nomination and selection of candidates for election is an internal matter of parties upon which the court has no jurisdiction. This decision of the Court of Appeal was confirmed by the Supreme Court on appeal to it.

The incompetence of the courts to interfere in the choice of parties' choice of candidates for election was again confirmed by the Supreme Court in *Dalhatu v Turaki and Other*.¹⁹⁴ in *Dalhatu v Turaki and Other*, appellant had emerged as the governorship candidate of respondents' political party, the All Nigeria People's Party, for the Jigawa State in the primary elections held for that purpose in Kano State. The first respondent who did not participate in the party's earlier primaries was subsequently elected in another primary election held in Dutse, the capital of Jigawa State. The appellant approached the High Court of the Capital Territory, Abuja for a declaration that the purported subsequent election of the first respondent was unconstitutional and breached appellant's right to a fair hearing and his right to be elected to an elective office. The High Court held in the appellant's favour. The trial High Court held that although a court cannot nominate or elect a candidate for a political party, where a political party had permitted and encouraged an individual to strive towards the realisation of his constitutional rights to vote and be voted for by accepting relevant fees from him, processing his nomination form and screening him for an election which he duly won, the political party is not to be allowed to rescind its decision to sponsor the individual as such acts are fraudulent and dishonest and violated item 15 (5) of the Nigerian Constitution.

The above decision of the High Court was overturned by the Court of Appeal on appeal. The Court of Appeal held that the trial Court decision ignored the earlier decision of the Supreme Court in *Onuoha v Okafor* discussed above. On a further appeal to the Supreme Court by the appellant, the Court affirmed the decision of the Court of Appeal and held, *inter-alia*, that the right to be nominated or elected by a political party is not a legal right of any individual but a domestic right of political parties to be exercised in accordance with the party's constitution. The issue raises a political question into which the courts are not entitled to dabble. The understanding of democracy displayed by the courts in holding that decisions of political parties regarding the selection and nomination of candidates are not to be

¹⁹⁴ (2003) 15 NWLR (Pt. 843) 310.

questioned in court by any individual adversely affected by such decisions is that the majority of members of the parties have the final say in such matters. This is a majoritarian understanding of democracy.

Alhaji Balarabe Musa v Peoples Redemption Party and other cases examined above can however be contrasted with the more recent decision of the courts regarding the relation of political parties and their members in *Ugwu and Another v Ararume and Another*,¹⁹⁵ *Amechi v I.N.E.C. and Others*¹⁹⁶ and *Abubakar v Attorney General of the Federation*¹⁹⁷ where the courts appeared to have taken a more involved approach. These cases are now discussed in turn below.

In *Ugwu and Another v Ararume and Another*, the first respondent contested and won the governorship primaries of the second appellant, a registered political party in Nigeria. First respondent's name was consequently forwarded to the second respondent as the governorship candidate of the second appellant as required by law. Subsequently, however, first respondent name was substituted with first appellant's name by the second appellant on the ground that the first respondent's name was submitted to the second respondent in error. The first respondent thereupon brought application before the Federal High Court Abuja for a declaration that it was unconstitutional and illegal for the second appellant to substitute his name after same had been sent to, accepted and published by the second respondent as the governorship candidate of the second appellant as required by law. Also, that there was no cogent and verifiable reason for the change as required by the applicable electoral act. The High Court in finding against the first respondent held that it has not the requisite knowledge of the nomination and sponsorship of the second appellant party and that section 34 of the Nigerian Electoral Act, 2006 (the applicable Electoral Act) entitled the second appellant party to change its nominees for another anytime within 60 days before election takes place.

On appeal to the Court of Appeal, the Court allowed the first respondent's appeal holding that the trial Court's decision did not meet the justice of the case. On a further appeal to the Supreme Court, the Court dismissed the appeal of the appellants and affirmed the decision of the Court of Appeal. The Court held, among other things, that the second appellant had not

¹⁹⁵ [2007] 12 NWLR (Pt. 1047) 365.

¹⁹⁶ [2008] 5 NWLR (Pt. 1080) 227.

¹⁹⁷ [2007] 3 NWLR (Pt. 1022) 601.

furnished cogent and verifiable reasons for the substitution of the first respondent's name as required by law.

The facts of *Amechi v I.N.E.C. and Others*¹⁹⁸ are similar to that of *Ugwu and Another v Ararume and Another*, save that in *Amechi*, the second respondent who was substituted with the appellant did not even contest the governorship primary in issue. While the appellant's suits were pending, the governorship election subject-matter of the dispute took place and the second respondent who did not participate in the governorship primaries won the election. In allowing the appeal of the appellant and declaring him the winner of the governorship election in place of the second respondent, the Supreme Court held that political parties in selecting or nominating their candidates must ensure intra-party democracy and abide by constitutional provisions. The Court opines thus:

Democracy's world is rich and multifaceted. Democracy should not be viewed from a one dimensional vantage point. Democracy is multidimensional. It is based on the centrality of laws and democratic values, and, at their center, human rights. Indeed, democracy is based on every individual's enjoyment of rights of which even the majority cannot deny him simply because the power of the majority is in it (sic) hands.¹⁹⁹

In spite of the differences in results between *Balarabe Musa, Onuoha v Okafor* and *Dalhatu v Turaki* on the one hand and *Amechi v I.N.E.C.* and *Ugwu v Ararume* on the other hand, I think both cases are premised still on a liberal-legal understanding of democracy. As regards the former group of cases, it can be seen that the courts declined to interfere in matters they regarded as internal to political parties on grounds of the courts' institutional incompetence. This deference is obviously based on the liberal-legal doctrine of political question made popular by the United States Supreme Court.²⁰⁰ By this doctrine courts of law decline to adjudicate cases they consider are best resolved through political processes.

As regards the latter group of cases, the courts appeared to have been of the view that applicants in both cases have somehow acquired a vested right to contest the respective governorship elections by virtue of having won their respective political parties' governorship primaries. A high premium appeared therefore to have been placed on the

¹⁹⁸ [2008] 5 NWLR (Pt. 1080) 227.

¹⁹⁹ Id at 339.

²⁰⁰ See for instance, E Nwauche 'Is the end near for the political question doctrine in Nigeria' C Fombad and C Murray (eds) *Fostering constitutionalism in Africa* (2010) 31.

respective rights of the applicants as trumps against the majoritarian power of the parties' membership to change candidate midstream. This view of rights as enclaves of freedom beyond the vicissitudes of majoritarian rule reflects a classically liberal legal view of democracy as I have earlier discussed in this Chapter. Thus, despite the differences in the approach of the courts and the results achieved in these two classes of cases, both are still premised on a liberal-legal conception of democracy as foregoing analysis shows.

The last but not the least of the cases discussed here is *Abubakar v Attorney General of the Federation and Others*.²⁰¹ Here, the plaintiff, Atiku Abubakar, was elected as the Vice-President of Nigeria in the 2003 general election alongside Olusegun Obasanjo as the President of Nigeria. Somewhere along the line during the duo's tenure, they fell out with each other and the plaintiff during his tenure as a sitting Vice-President resigned from the party that got him to office and joined another political party. The President of Nigeria thereupon declared the office of the plaintiff as Vice-President of Nigeria vacant. The plaintiff thereafter brought a suit to the Nigerian Court of Appeal under the latter's original jurisdiction²⁰² to determine whether his office has become vacant as declared by the President. In finding in favour of the plaintiff, the Court held, among other things, that the plaintiff's right to peaceful assembly and association is unimpeachable and that if he loses his office in the circumstances of the case, it will have the effect of penalising him for exercising his right to peaceful assembly and association.²⁰³ The Supreme Court here also places a very high premium on fundamental human rights as means of political participation. And as already discussed above, this mirrors a liberal-legal conception of democracy.

4.2.3 Cases on the rights to freedom of association and assembly

The rights to freedom of association and assembly have been referred to as 'bulwarks of a democratic form of government.'²⁰⁴ Their importance for furthering democracy cannot be overstated. Individuals and groups must be able to assemble and associate together for any politics and even social interaction to be possible. This explains the pride of place that the

²⁰¹ [2007] 3 NWLR (Pt. 1022) 601.

²⁰² By the provisions of section 239 of the Constitution of Nigeria, 1999 as amended, the Court of Appeal has the original jurisdiction to hear and determine the question of whether any person has been validly elected as President or Vice-President of Nigeria; whether the term of office of the President or Vice-President has ceased; or whether the office of the President or Vice-President has become vacant.

²⁰³ *Abubakar v Attorney General of the Federation and Others* [2007] 3 NWLR (Pt. 1022) 601 at 638.

²⁰⁴ *I.G.P. v A.N.P.P and Others* (2007) 18 NWLR (Pt. 1066) 457 at 484.

rights enjoy in international instruments, domestic constitutions and jurisprudence of courts across different jurisdictions the world over.

The rights of the citizens to freely associate and assemble for the protection of their interests, *simpliciter*, are provided for by section 40 the Nigerian Constitution.²⁰⁵ These rights have been defined not to be limited to matters regulating the terms and conditions of employment or restricted to matters of membership of political parties but to include all matters upon which the citizens might have common interests. The right to assemble and associate has thus been held to include the right of Nigerian citizens to mass protests and demonstration against unpopular policies of government. In *FGN v Oshiomole*,²⁰⁶ the Federal Government of Nigeria sought an order of court to restrain the Nigerian Labour Congress led by the first respondent from embarking on strike or leading a mass protest against the removal of fuel subsidy undertaken by the government in 2004. In rejecting the application, the High Court of the Federal Capital Territory Abuja held that the provisions of the section 40 right of persons to freely associate and assemble for the protection of their interests in the Constitution confers a right on all Nigerians to meet and discuss all matters of common interest.²⁰⁷ Accordingly, '[i]f the Nigerian workers through the Nigerian Labour Congress consider the imposition of the N1.50k fuel sales tax inimical to their interest, they have a fundamental right to assemble or mass protest in opposition to such imposition.'²⁰⁸

This right of assembly and association in section 40 of the Constitution was, however, initially subjected to the overriding requirement of a police permit for public meetings and processions. In *Chukwuma v C.O.P.*,²⁰⁹ appellants had sued the respondent for the disruption of their meetings and violation of their section 40 rights on the grounds that they did not obtain police permit to hold their meetings. In rejecting appellants' claims against the respondent, the Nigerian Court of Appeal, Ilorin Division, held that although no police permit is required for any citizens to hold a private meeting, by virtue of the relevant provisions of the Nigerian Public Order Act a police permit is required before anybody can hold a public meeting or procession. And in the absence of such permit or licence any police officer of the

²⁰⁵ Section 40 provides that: 'Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests'.

²⁰⁶ (2004) 9 WRN 129.

²⁰⁷ *Id* at 137.

²⁰⁸ *Ibid*.

²⁰⁹ (2005) 8 NWLR (Pt. 927) 278.

rank of Inspector or above is authorised by law to stop such procession or meeting. Chinyere has rightly in my view criticised the decision of the Court of Appeal in *Chukwuma v C.O.P.* on the ground that the decision did not address the constitutionality/human rights compliance of the Nigerian Public Order Act which requires a permit to hold a public meeting or procession in Nigeria.²¹⁰

The constitutionality of the provisions of the Public Order Act requiring a permit to hold public processions or meetings was, however, directly in issue in *I.G.P. v A.N.P.P and Others*.²¹¹ In this case, political parties registered in Nigeria had sued the appellant for refusing to issue a permit to them to hold unity rallies throughout the country to protest the rigging of the 2003 general elections and for the violent disruption of the rallies by members of the Nigerian Police Force in Kano State on the ground that no permit was obtained. The Nigerian Court of Appeal, Abuja Division, found for the appellants and declared the provisions of the Public Order Act requiring a permit to hold a public meeting and processions a violation of section 40 of the 1999 Constitution. In doing so, the Court held that the rights to freedom of assembly and expression are the bulwarks of a democratic form of governments.²¹² They are rights which individuals should possess and exercise without any impediments provided they are exercised within the ambits of the law.²¹³ According to the Court:

A rally or placard carrying demonstration has become a form of expression of views on current issues affecting government and the governed in a sovereign state. It is a trend recognised and deeply entrenched in the system of governance in civilised countries – it will not only be primitive but also retrogressive if Nigeria continues to require a pass to hold a rally.²¹⁴

It should however be noted that *Chukwuma v C.O.P. and I.G.P. v A.N.P.P and Others* emanated from the same Court of Appeal, although from different judicial divisions of the Court. The state of the law in regard to this issue is therefore still in a flux since it has not yet been pronounced upon by the Supreme Court of Nigeria, the highest court in the country.

4.2.4 Cases on the right to freedom of expression

²¹⁰ A C Chinyere 'Public order versus the right to peaceful assembly in Nigeria' (1998 – 2006) *Nigerian Current Law Review* 166 at 173.

²¹¹ (2007) 18 NWLR (Pt. 1066) 457.

²¹² Id at 494.

²¹³ Id at 499.

²¹⁴ Id at 500.

The application of this right presents particular contrasts in Nigeria. Like most other fundamental rights in Nigeria, it was not recognised either during the colonial era or in the early days of the country's independence but became prominent during the country's military rule epoch. One of the biggest challenges to the application/operation of freedom of expression during Nigeria's colonial era in the public law realm is the colonial law of sedition. Britain's law of sedition which was based on the inviolability and protection of the person of the sovereign was rigorously applied by the courts of that era to stifle dissent and agitation for independence. According to the Nigerian Court of Appeal in *Nwakwo v State*:

The whole idea of sedition is the protection of person of the sovereign. It was based on the notion that the King or the Queen does no wrong and his or her person and those of the heirs and successors must be protected from acts of mischief or truth which would bring them to contempt, hatred, excite disaffection against them. The more true the facts the more severe the sedition.²¹⁵

In keeping with the avowed aim of the colonial law of sedition, the courts, at the time, interpreted sedition law to strengthen the hands of the colonial administration against 'educated natives' who might want to incite uneducated natives to hatred, political action or violence aimed at the changing the *status quo*. Earlier cases on freedom of expression in this area of the law thus displayed the understanding that colonial domination and oppression of Nigerians was a legitimate endeavour. Any utterances tending to rouse people to throw off the colonial yoke was regarded as criminal and punished by the courts. The cases decided during this period of time bear out this assertion as the following examples show.

In *R v Osita Agwuna*,²¹⁶ appellants delivered speeches at a public lecture where they exhorted Nigerians to throw off the colonial yoke and domination of the British government. They were convicted for sedition and sentenced to various terms of imprisonment. No mention was even made of their right to freedom of expression in the circumstances. Also in *African Press Ltd. v Queen*,²¹⁷ an article published by the first defendant which referred to the Macpherson Constitution, one of Nigeria's colonial constitutions, as an 'obnoxious constitution' and called colonial administrative officers enemies of the struggle for freedom was regarded as seditious and persons accused in connection therewith were convicted by the trial Court. Although the conviction regarding reference to the Macpherson Constitution as an 'obnoxious constitution' was set aside on appeal by the West African Court of Appeal, the

²¹⁵ (1985) 6 NCLR 228.

²¹⁶ (1944) 12 WACA 456.

²¹⁷ (1952) 14 WACA 57.

Court affirmed the appellant's conviction on the second count of causing disaffection to colonial administrative officers by calling them enemies of the struggle for freedom.

During the early days of Nigerian independence on the other hand, sedition laws became a tool of Nigeria's new political office holders to suppress political opponents and dissenting and critical voices in gross breach of the right to freedom of expression then guaranteed in the country's independence constitutions.²¹⁸ In *Ogidi v Police*²¹⁹ for instance, appellant had caused a piece to be published where he denounced the customary courts of the then Midwestern region of Nigeria as the tools of the political party in power in the region and called for its abolition. He was convicted of sedition by the trial Court for seeking to bring into hatred or contempt the administration of justice in Nigeria. On appeal to the Federal Supreme Court, Nigeria's highest court prior to the 1963 Republican Constitution of Nigeria,²²⁰ the Court while recognising the duty of courts to '...safeguard the right of freedom of expression, which is now embodied in the Constitution of Nigeria'²²¹ held that the publication was seditious and affirmed the conviction and sentence of the appellant.

Also, in *African Press Ltd. and Another v Attorney-General, Western Nigeria*,²²² accused persons had in a publication accused the government of the day of misuse of public funds and diversion of same into private pockets. They were convicted of sedition and their conviction and sentence were affirmed by the Supreme Court of Nigeria which had by then come into being under the 1963 Republican Constitution. According to the Supreme Court, the language of the article was abusive throughout and if the right to freedom of expression is to be given full effect the court must be satisfied that the article went beyond what was permissible in political controversy.²²³ The Court found this to be the case.

Thus, during the colonial period and in the early days of Nigerian independence not much was done by the courts to safeguard the right to freedom of expression of Nigerians. The

²¹⁸ Section 24 (1) of the 1960 Independence Constitution of Nigeria guaranteed the right to freedom of expression the following terms: 'Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.' Section 25 (1) of the Nigeria's 1963 Republican Constitution also guaranteed the right to freedom of expression in identical terms as that of the 1960 Independence Constitution.

²¹⁹ (1960) FSC 251.

²²⁰ Before the 1963 Republican Constitution which abolished appeals from Nigerian courts to the Privy Council, final appeals in civil and criminal cases lied to the Privy Council.

²²¹ Id at 253.

²²² (1965) 1 ANLR 12.

²²³ Id at 14.

understanding of the courts during those periods appeared to be that of the absolute and overwhelming power of state against which no one is permitted to stand. Things however started to change for better for judicial activism and judicial enforcement of human rights in Nigeria when the military took over the reins of power in 1966, and again during the second republic when the 1979 Constitution came into being. Activism of Nigerian courts during these two periods underscored the centrality of human rights in governance.

With specific reference to enforcement of the right to freedom of expression, Nigerian courts showed robust activism like in other areas of the law during Nigeria's military interregnum. In *Peoples Star Press Ltd v Brigadier R. A. Adebayo and Another*,²²⁴ military Edicts of the Western State of Nigeria, the "Sunday Star" and *Imole Owuro* (Prohibition) Edict 17 of 1968 and the Printers and Publishers of the "Sunday Star" and *Imole Owuro* (Declaration of Unlawful Society) Edict 19 of 1968 banned the publication and circulation of plaintiff's newspapers. The plaintiff contested the ban in court on the ground that it contravened section 25 (1) of the 1963 Republican Constitution's right to freedom of expression, among others. It was held by the High Court of Western State of Nigeria that liberty of circulation is essential to the freedom to publish as there will be no publication without a corresponding right to circulate. The Court was also of the view that the state did not show that the ban was warranted by any law that is reasonably justifiable in a democratic society. The Edicts were therefore declared unconstitutional, null and void. It is noteworthy that this decision was rendered in an epoch when Decrees and Edicts of the military ousted the jurisdiction of court in relation to all things done or purported to be done by the military under authorities of their edicts and decrees.

With regard to the second epoch of the 1979 Constitution, the records of the courts in relation to the enforcement of the right to freedom of expression showed much more robust judicial action than earlier times. One of the first cases that got to the courts during this period of time is *Tony Momoh v Senate of the National Assembly*.²²⁵ In this case; the plaintiff had published a story indicting some members of the second republic senate for corruption and conduct unbecoming of holders of such office. He was subsequently invited by the Senate who were miffed by his allegations to furnish particulars of the allegations through a resolution of the House. The plaintiff approached the High Court of Lagos State for an

²²⁴ (1971) UILR 269

²²⁵ (1981) 1 NCLR 105.

injunction and an order of *certiorari* to quash the resolution and invitation of the Senate on the ground that same violated his right to freedom of expression guaranteed under section 36 of the 1979 Constitution. It was held by the High Court that the resolution/invitation of the Senate violated applicant's constitutionally guaranteed rights to freedom of expression because to compel a newsman to disclose the source(s) of his/her information will lead to the dwindling and eventual evaporation of sources of information which will in turn negatively affect information gathering, dissemination and free flow of information.

Although, the Nigerian Court of Appeal held on appeal that newsmen have no greater right to protect the sources of their information than other ordinary Nigerians, that aspect of the trial Court's decision which held that the Senate is not legally competent to invite the applicant was not disturbed by the appellate court.²²⁶ According to the Court of Appeal:

There is no doubt that the judicial powers vested in the Courts under the Constitution do not entitle them to interfere in the internal affairs of the legislative houses including the conduct of their business. ...But when in the exercise of its constitutional powers the House involves a private citizen who is not a member of the House the matter ceases to be an internal affair of the House. The Courts can interfere if the matter involved is justiciable and the House has acted improperly.²²⁷

This will be the case especially where the matter involved implicated the fundamental right(s) of the private citizen as was the case under consideration.

The law that a person cannot be prevented or compelled to refrain from exposing corruption and waste in government and disseminating same to the public implicit in *Tony Momoh v Senate of the National Assembly* was again confirmed in *Innocent Adikwu and Others v Federal House of Representatives and Others*.²²⁸ In the latter case, applicants who were journalists had published a report in a national daily about some members of the Nigerian lower House, the House of Representatives, who were alleged to be involved in fraudulent claims of salaries and allowances for non-existent staff. The applicants/journalists concerned were again invited by the House to furnish particulars of their allegation and report. The applicants again applied to the High Court of Lagos State to enforce their fundamental right to freedom of expression on the ground that the invitation is a violation of their constitutional rights to freely gather and disseminate information and thus *ultra vires* the House. It was held by the Court that applicants cannot be compelled to disclose the source(s) of their information

²²⁶ *Senate of the National Assembly and Others v Tony Momoh* (1983) 4 NCLR 269.

²²⁷ *Id* at 294.

²²⁸ (1982) 3 NCLR 394.

either by discovery before trial or by cross-examination during trial, or by subpoena from courts or by summons from legislative investigating body except in grave or exceptional circumstances. According to the Court, a free press is one of the pillars of freedom in any democratic society and the constitutional protection of free flow of information implicit in the freedom of expression right is to ensure that sources of information do not dry up which may result in the public being deprived of information on matters of great public importance.²²⁹

The particular focus and ambit of the right to freedom of expression in a democratic society and the extent of the involvement of citizens in governance enabled by the right is adequately explained in the much later case of *Nwakwo v State*²³⁰ where the Nigerian Court of Appeal declared the Nigerian sedition laws unconstitutional as being a violation of section 36 of the 1979 Constitution's right to freedom of expression provisions. In the case, the appellant who was the governorship candidate of the opposition party was tried and convicted of publishing and distributing seditious publications by the trial High Court. The appellant was alleged to have published a book titled 'How Jim Nwobodo rules Anambra State' wherein the appellant indicted the then sitting Governor for misrule and mismanagement. He was proceeded against by the Attorney-General, tried and convicted by the High Court of the State for sedition for bringing the person of the Governor into disrepute. On appellant's appeal to the Court of Appeal, it was held that the law of sedition as it exists under the Nigerian criminal code law is inconsistent with the constitutionally guaranteed right to free speech. According to the Court:

The decision of the founding fathers of this present constitution [the 1979 Constitution] which guarantees freedom of speech which must include the freedom to criticise should be praised and any attempt to derogate from it except as provided by the constitution must be resisted. Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds there should be a resort to the law of libel where the plaintiff must of necessity put his character and reputation in issue. Criticism is indispensable in a free society.²³¹

Appellant's appeal was allowed by the Court and his conviction and sentence set aside.

As can be gathered from the Court of Appeal in *Nwakwo v State* and other cases on rights essential to democratic deliberations and participation examined in this Chapter in relation to Nigeria, Nigerian courts appear willing to vindicate rights to further democratic participation

²²⁹ Id at 417.

²³⁰ (1985) 6 NCLR 228.

²³¹ Id at 253.

and deliberation consistent with the liberal-legal conception of democracy just like its South African counterpart as discussed earlier in this Chapter. Also just like its South African counterpart, *Nwakwo* and other cases discussed in this section show that the ambit of the right to freedom of expression and the extent of citizens' involvement is limited to only informing the public, exposure of perceived ills in governance and criticisms of government and its policies. The right as presently fashioned and interpreted by Nigerian courts does not appear to envisage any substantial involvement of the citizens in politics or policies or to be geared towards getting the government to express the will of the governed which is the whole essence of democracy in its popular sense.

The above conclusion in relation to freedom of expression goes for the other fundamental rights cases examined here as well, as the foregoing analysis shows. Except for *FGN v Oshiomole* discussed above, all of the cases where the courts vindicated rights have nothing substantial to do with policies or getting the government to express the will of the governed as true democracy in terms of popular government requires. And as I show in the next Chapter, *FGN v Oshiomole* has also been superseded by a contrary decision of the Nigerian Court of Appeal in *Oshiomole and Another v FGN and Another*.²³² More will be said on this case in the next Chapter.

4.2.5 Cases on impeachment/removal of political office holders

Another area of Nigerian courts' jurisprudence where Nigerian courts' conception of democracy plays a role and can be deduced are cases dealing with impeachment/removal of political office holders. One of the very first (if not actually the first) and one of the clearest cases yet in this area of the law in Nigeria is *Akintola v Aderemi and Adegbenro*²³³ where the then Federal Supreme Court clearly expressed the kind of democracy underpinning Nigeria's independence constitutional regime as that of a constitutional democracy. In the case, the Federal Supreme Court was called upon to interpret section 33 (10) (a) of the Western Nigeria Constitution which provides that: 'the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority

²³² [2007] 8 NWLR (Pt. 1035) 58.

²³³ (1962) 1 ANLR 440.

of the members of the House of Assembly...'.²³⁴ The Governor of the Western region had removed the Premier from office pursuant to a letter signed by a majority of the members of the House, the Governor purporting to be exercising his powers of removal under section 33 (10) (a) of the Western Nigeria Constitution. The Plaintiff who was the removed Premier challenged his removal in the High Court of the Western Region of Nigeria on the ground that section 33 (10) is a codification of England's constitutional convention on the subject-matter and that pursuant to that convention the Governor cannot remove the Premier except upon a prior decision or resolution of the House to that effect, not upon a letter signed by majority members of the House.

Upon a reference from the High Court to the Federal Supreme Court to determine the question in issue, the latter Court in upholding the argument of the Plaintiff pronounces thus:

Ours is a constitutional democracy. It is of the essence of democracy that all its members are imbued with a spirit of tolerance, compromise and restraint. Those in power are willing to respect the fundamental rights of everyone including the minority, and the minority will not be over-obstructive towards the majority. Both sides will observe the principle as accepted principles in a democratic society. Further, there are, in a democratic society, certain accepted conventions in responsible Government and tenure of office; when those forming the Government of the day find that they no longer command the support of a majority in the House, they resign; alternatively, the Premier asks for a dissolution and fresh elections in the belief that he and his supporters will get a majority in the elections. I think that the Constitution was framed in the light of normal constitutional practice and should be interpreted in that light rather than by a consideration of an extremely unlikely possibility that one can only imagine (sic) as being adopted by a Premier who would then, in truth, be entering the path of dictatorship; for if a Premier were to go on although he knew that he did not command a majority, he would be departing from the democratic principle of majority rule which pervades the Constitution—a departure which public opinion would not tolerate and which I think was not contemplated by the framers of the Constitution.²³⁵

As is clear from the extract above, the Court conceived Nigeria's independence democracy as a constitutional democracy of the majoritarian type.

²³⁴ Up until 1966 when the military abolished Nigeria's democracy, Nigeria's practice of federalism was such that each of the regions then consulting the Federation of Nigeria had their own regional constitutions. These were in addition to the federal constitutions operated at the centre by the Federal Government of Nigeria. A unified/central constitution was introduced from 1979 onward by the military.

²³⁵ (1962) 1 ANLR 440 at 453.

A majoritarian understanding of democracy was again displayed by the court in the much later case of *Senator B C Okwu v Senator Dr Wayas and Others*,²³⁶ decided under the 1979 Constitution of Nigeria. In the case, the plaintiff who was the leader of his party in the Senate was removed by the defendants from his position. He contested the removal in court on the ground that the removal contravened the provisions of new Standing Rules of the Senate. In dismissing his claim, the Court held that based on the doctrine of separation of powers, the courts are incompetent to interfere in any matter falling within the internal affairs of the other arms of government except where the matter contravened the provisions of the Constitution and/or the rights guaranteed under it. According to the Court: ‘The Judicial powers of the courts are confined to the provisions of the Constitution and the rights guaranteed thereunder.’²³⁷ The emphasis by the court here on the doctrine of separation of powers and the rights-centred approach of the court is of course symptomatic of majoritarian/liberal-legal constitutionalism/democracy as I have pointed out earlier.

Again, in *Alhaji Abdulkadir Balarabe Musa v Auta and 6 Others*,²³⁸ Nigerian courts were called upon to interpret section 170 (the impeachment section) of the 1979 Constitution. Section 170 of the 1979 Constitution was the section dealing with the procedure for the removal of a Governor or Deputy Governor of a state by the House of Assembly (the legislative arm) of a state of the Federation. By the provisions of section 170 (10), the jurisdiction of the court to inquire into the process of removal of above-named political office holders under the section was expressly ousted by the Constitution.²³⁹ In the above-named case, a committee was set up by the Speaker of the House of Assembly of Kaduna State to investigate the allegation of gross misconduct leveled against the applicant/appellant who was the Governor pursuant to section 170 (5) of the 1979 Constitution. The applicant/appellant applied to the High Court of Kaduna State for a stay of the proceedings of the investigating committee pending the determination of another suit in respect of the same subject-matter in another court. The respondent objected to the applicant’s application on the ground that the courts lacked jurisdiction to entertain the matter having regard to the provisions of section 170 (10) of the 1979 Constitution. The objection of the respondent was sustained by the trial Court. On appeal to the Court of Appeal, the Court upheld the trial

²³⁶ (1981) 2 NCLR 522.

²³⁷ Id at 528.

²³⁸ [1982] 3 NCLR 229.

²³⁹ Section 170 (10) of the 1979 Constitution provides as follows: ‘No proceedings or determination of the Committee [set up to investigate the allegations against a Governor or Deputy Governor] or of the House of Assembly or any matter relating thereto shall be entertained or questioned in any court’.

Court's verdict and held that the 1979 Constitution envisaged a clear break and departure from parliamentary democracy practiced in Nigeria between 1960 and 1966 to the enthronement of a truly republican constitution /democracy which rests upon 'a rigid and strict' separation of powers and clear demarcation of authority between the legislature, executive and judiciary. Thus, the authority vested in the legislature by the Constitution with respect to the removal of the applicant is not questionable in court.²⁴⁰ The applicant/appellant's case was thus dismissed by the court on similar reasoning and grounds as *Senator B C Okwu v Senator Dr Wayas and Others* above.

The kind of democracy that the 1979 Constitution was designed to operate was, however, more clearly spelt-out by the Nigerian Court of Appeal in *Ekpenkhio and Others v Egbadon*.²⁴¹ In this case, the respondent, former Speaker of Edo State House of Assembly was removed by other members of the House. The respondent challenged his removal as being violative of his right to a fair hearing guaranteed under Chapter IV of the 1979 Constitution.²⁴² In dismissing the claim of the respondent, the Court of Appeal held that the election and removal of principal officers of the House is a matter within the purview of internal proceedings of the House which the courts are incompetent to interfere in. And in relation to the kind of democracy the 1979 Constitution was designed to operate, the Court pronounces thus:

In my humble view those who worked assiduously to provide us with this Constitution must have considered that the election to the offices of the President of the Federation, Vice President of the Federation, Governor and Deputy Governor of a State is different from that of the holders of the offices of President of the Senate, Speaker of the House of Representatives, Speaker of a House of Assembly. The difference being that in a democracy such as this Constitution was designed to operate, it is expected that the holders of the offices of President and Vice President of the Federation, Governor and Deputy Governor would be elected to those offices by majority votes during elections at which voters who are qualified to vote would have freely voted for the candidates of their choice. Hence where a dispute should arise following such elections, any person who felt aggrieved could resort (sic) to the High Court declared competent for the resolution of such disputes. However, whereas the holders of the office of the President of the Senate, Speaker of the House of Representatives, Speaker of House of Assembly, must first be elected as a Senator, member of the House of Representatives or a State House of Assembly before they may be elected by their colleague in the Senate, or The (sic) House of Representatives or the State House of Assembly as the President of the Senate, the Speaker of the

²⁴⁰ *Alhaji Abdulkadir Balarabe Musa v Auta and 6 Others* [1982] 3 NCLR 229 at 250 – 251.

²⁴¹ (1993) 7 NWLR (Pt. 308) 717.

²⁴² The 1979 Constitution did not vest jurisdiction relating to the removal of principal members of Nigerian legislative houses in any court.

House of Representatives or the Speaker of the House of Assembly respectively. It follows then that to be elected to the office of the President of the Senate, the Speaker of the House of Representatives, or the Speaker of the House depend very much upon the majority votes that the person seeking to occupy any of these offices could muster among the other members of the Senate, the House of Representatives, and the House of Assembly, as the case may be. It is clear then that election to any of these offices has nothing to do with the success at a popular election of the person seeking to be elected either as the President of the Senate, Speaker of the House of Representatives or Speaker of a House of Assembly. It is therefore not surprising that by virtue of the provisions of section 260 of the Constitution, the drafters of the Constitution recognising that if the election into such offices are allowed to be questioned in the courts, then it would mean that the courts would be allowed to interfere with the Legislature in the management of its own internal affairs. I must state that in this regard, the internal proceedings of the legislature do not come within the purview of the courts.²⁴³

The above pronouncement of the Court emphasises popular elections by qualified members of society and it also shows commitment to the doctrine of separation of powers. It is based on this ground that the court declined to assume jurisdiction. As I have pointed out earlier, popular elections and commitment to separation of powers doctrine are pertinent features of representative/majoritarian democracy. The court's approach therefore mirrors the political philosophy of representative/majoritarian democracy as the kind of democracy the 1979 Constitution was designed to operate.

Although the courts carried over its hands-off approach and deference to the legislature in impeachment cases to the early part of the operation of 1999 Constitution,²⁴⁴ the Supreme Court of Nigeria made a departure from earlier precedents in its more recent decision in *Inakoju and Others v Adeleke and Others*²⁴⁵ where the Supreme Court was called upon to construe section 188 of the Nigerian Constitution, (the impeachment section of the 1999 Constitution) dealing with the removal of Governor s and Deputy-Governors of states from office.²⁴⁶ In the case, appellants, an 18 members' faction of the Oyo State House of Assembly had purported to remove the Governor of the State from office. When challenged, they contended that the courts had no jurisdiction to inquire into the propriety or otherwise of the

²⁴³ (1993) 7 NWLR (Pt. 308) 717 at 741.

²⁴⁴ See *Abaribe v The Speaker Abia State House of Assembly* (2000) FWLR (Pt. 9) 1558 where both the trial High Court and the Nigerian Court of Appeal held that section 188 (10) of the 1999 Constitution oust the jurisdiction of the court to inquire into the propriety or otherwise of impeachment/removal proceedings of the legislature.

²⁴⁵ (2007) 4 NWLR (Pt. 1025) 423.

²⁴⁶ Section 188 is the counterpart of section 143 of the current Nigerian Constitution which deals with the removal of the President and Vice-President of Nigeria from office.

removal pursuant to section 188 (10) of the 1999 Constitution, which ousts the jurisdiction of the courts with respect to such matters.²⁴⁷ This argument of the appellants was in the face of gross procedural irregularities committed in the removal proceedings contrary to the stipulations of section 188 of the Nigerian Constitution. In rejecting this argument, the Supreme Court held that in order for the provisions of section 188 (10) to avail the appellants they must have complied with constitutional requirements stipulated under sub-sections 1 – 9 of section 188. Thus, the courts have the jurisdiction to inquire into whether these constitutional requirements have been complied with. And where the courts found that the requirements have not been complied with, the courts have the jurisdiction to declare any action(s) taken pursuant to those irregularities unconstitutional. According to the Supreme Court:

The Legislature is the custodian of a country's Constitution in the same way that the Executive is the custodian of the policy of Government and its execution, and also in the same way that the Judiciary is the custodian of the construction or interpretation of the Constitution. One major role of a custodian is to keep under lock and key the property under him so that it is not desecrated or abused. ...The Legislature is expected to abide by the provisions of the Constitution like the way the clergyman abides by the Bible and the Imam abides by the Koran. And so, when the Legislature, the custodian, is responsible for the desecration and abuse of the provisions of the Constitution in terms of patent violation and breach, society and its people are the victims and the sufferers; Fortunately, society and its people are not totally helpless as the Judiciary, in the performance of its judicial functions under section 6 of the Constitution, is alive to check acts of violation, breach and indiscretions on the part of the Legislature.²⁴⁸

The Supreme Court in this case therefore declined to follow earlier precedents which regarded impeachment proceedings as internal proceedings of the legislature and refused to give effect to constitutional ouster of its jurisdiction except where constitutional requirements precedent thereto have been scrupulously complied with by the legislature. This view of the legitimacy of the courts to police constitutional compliance of other organs of government despite the prohibitions of the doctrine of separation of powers is rooted in the constitutional version of liberal democracy (constitutional democracy).

²⁴⁷ Section 188 (10) of the Nigerian Constitution provides thus: 'No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.'

²⁴⁸ *Inakoju and Others v Adeleke and Others* (2007) 4 NWLR (Pt. 1025) 423 at 637 – 638.

The changes noted in the Supreme Court stance in the cases discussed above have been attributed by Nwauche to a return by the Court in the fourth republic (under the 1999 Constitution) to its supremacist stance because of the Court's concern for constitutional breaches encouraged by judicial avoidance of certain issues.²⁴⁹ Be that as it may, I think the return by the Court to a supremacist stance is explainable by the Court's understanding of its legitimate policing role and oversight functions under a constitutional democracy. And it is not that the Court has embraced a new conception of democracy different from that of earlier constitutions. What appears to have happened is that the courts are assuming a supremacist stance as rightly pointed out by Nwauche and laying more stress on the constitutional component of its democratic understanding than their earlier conservative and deferent majoritarian conception/understanding.

Thus, in spite of the fact that a different and probably a more just decision is reached in *Inakoju and Others v Adeleke and Others* above, the Supreme Court is not displaying any new understanding of democracy or any major departure from earlier conceptions of earlier courts on similar issues. Thus, in the case, more stress appeared to have been laid by the court on the constitutional aspect of constitutional democracy and not necessarily on the democratic component. There is in fact nothing in that decision to suggest that the Supreme Court in *Inakoju* is mindful of or minded to advance the democratic element in constitutional form of government the Court agreed is being practiced in Nigeria so as to enlarge the political space. While the Supreme Court may be pardoned on the ground that the enlargement of political space issue was not before the Court, Tully has however pointed out that both the constitutional element and the democratic element must coincide in a constitutional democratic form of government before that form of government can be said to be legitimate.²⁵⁰ This point of Tully I have discussed in more detail earlier in Chapter Three. Therefore what appeared to account for the differences between *Inakoju* and earlier cases is the stress placed by the Court on the constitutional aspect/element of constitutional democracy and the legitimacy of the courts to police the compliance of other organs of government with regard thereto, to the detriment of the democratic component/norm of

²⁴⁹ E Nwauche 'Is the end near for the political question doctrine in Nigeria' C Fombad and C Murray (eds) *Fostering constitutionalism in Africa* (2010) 31 at 41.

²⁵⁰ J Tully 'The Unfreedom of the Moderns in Comparison to their ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204.

constitutional democracy, while earlier cases toed the more conservative and deferent majoritarian/representative democratic line.

4.2.6 Socio-economic rights in Chapter II of the Nigerian Constitution cases

With regard to the interpretation of Chapter II of the Nigerian Constitution, the Chapter deals with diverse subject-matter which range from duties and responsibilities of the organs of government, the relationship between the government and the citizens, the government's obligation to abolish corruption, to the socio-economic rights provisions of the Constitution, among others.²⁵¹ However, as a result of the provisions of section 6 (6) (c) of the Constitution of Nigeria, which provides that the provisions of the section are not enforceable before any court of law in Nigeria, many of the cases decided by the courts on a number of these aspects have been on the justiciability or otherwise of the provisions of the Chapter.²⁵² Thus, the cases that are most relevant to the discussion in this section and from which the court's conception of democracy are more or less clearly discernible are those cases dealing with the socio-economic rights aspects of the Chapter. In these cases, it does appear that Nigerian courts emphasise and have always given primacy to the fundamental human rights entrenched in Chapter IV of the Constitution over socio-economic rights in Chapter II. The courts from the records also appear to maintain a high level of deference to the other organs of government with regard to the implementation of the Chapter as the cases examined below reveal.

One of the first cases in this area of the law is *A J A Adewole & Others v Alhaji L. Jakande & Ors*²⁵³ In this case, the High Court of Lagos State held that social control legislation for implementing the provisions of Chapter II of the Constitution cannot derogate from or override the fundamental rights provisions of Chapter IV of the Constitution. This position was subsequently affirmed by the Nigerian Court of Appeal in *Archbishop Okogie v The*

²⁵¹ Sections 13 to 20 of the Nigerian Constitution.

²⁵² See for instance, *Attorney General of Ondo State v Attorney General of the Federation* (2000) 9 NWLR (Pt. 772) 222; *Attorney General of Lagos State v Attorney General of the Federation* (2003) 12 NWLR (Pt. 833) 1; among others.

²⁵³ (1981) 1 NCLR 262.

Attorney-General of Lagos State.²⁵⁴ The Court pronounced in the latter case thus: ‘It seems clear to me that the arbiter for any breach of and the guardian of the Fundamental Objectives and Directive Principles of State Policy, subject to what I will say hereafter, is the legislature itself or the electorate.’²⁵⁵ By the above pronouncement the Court unequivocally evinces a deferent intention and an avoidance/hands-off approach to the interpretation/enforcement of Chapter II in furtherance of the provisions of section 6 (6) (c) of the Constitution which other courts in Nigeria have since followed.²⁵⁶ The effect of this decision on efforts to advance democracy and social justice in Nigeria have been aptly captured by Owasanoye thus: ‘By the position taken by the Court in this case the hope of advancing democracy, social justice and promoting the security and welfare of the people as anticipated in section 14 of the Constitution²⁵⁷ was dealt a deadly blow from which there is yet no recovery.’²⁵⁸

The privileging of civil and political rights over socio-economic rights and the deferent attitude of courts to other organs of government in social matters as exhibited by Nigerian courts in the interpretation of Chapter II of the Nigerian Constitution as can be gathered from the above examples is a classical liberal-legal position. This is so for at least three reasons.

First, as I point out earlier in this Chapter, individual rights protection constitutes the very core of the liberal understanding of democracy. To privilege civil and political rights over socio-economic rights as the Nigerian courts have done in this regard is consistent with that understanding. Second, the avoidance of social matters by courts is also a liberal philosophical notion and is based on a liberal philosophical public/private dichotomy. This stance is premised on the supposition that social matters are private matters that are best left to individuals or societal political organs to resolve.²⁵⁹ As rightly pointed out by Frazer, a

²⁵⁴ [1981] 2 NCLR 337.

²⁵⁵ *Id* at 350.

²⁵⁶ Section 6 (6) (c) of the Constitution provides that: ‘The judicial powers vested in accordance with the foregoing provisions of this section –(c) ‘shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution’.

²⁵⁷ Section 14 of the Nigerian Constitution provides that:

²⁵⁸ B Owasanoye ‘Non-justiciability: Judicial avoidance or judicial timidity’ in E Azinge and B Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (2010) 34 at 49.

²⁵⁹ See for instance, D Brand ‘The “politics of need interpretation” and the adjudication of socio-economic rights claims in South Africa’ in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17. See

sharp distinction between the private and public sphere of society is a fundamental assumption and key signifier of bourgeois liberal orders.²⁶⁰ That the foregoing is consistent with the position of the Court is confirmed by the fact that the Court is of the opinion that the enforcement of Chapter II is better left to the legislature or the electorate to take care of.

Third, the Court's view as quoted above is also consistent with regarding the enforcement of Chapter II as a political question issue which the liberal-legal doctrine of political question forbids the courts from entertaining but is to be left to societal political organs to resolve. This is evidence from the Court's position that the legislature or the electorates are the ones competent to see to its enforcement. From the above, it can be seen that Nigerian courts' posture in the interpretation and enforcement of Chapter II of the Nigerian Constitution is reminiscent of liberal democratic theory.

The foregoing analysis shows that although Nigerian courts have not been as expressive and as forthcoming as the South African courts in denoting their conception of democracy. Nigerian courts' conception of democracy is deducible not from what the courts say but from what they do and decide. And the conception of democracy that is gatherable from the pronouncements the courts have made on the subject-matter and what they do in Nigeria is mainly the constitutional and the liberal/legal model of democracy as pointed out in the analysis above. The approach of the Nigerian courts has therefore been to restrict the participation of the citizens to the narrow province allowed by the liberal rights philosophy. Like in South Africa, the few cases where the courts' approach appears to have been expansive and participatory has nothing to do with the government at all. And when it does, it does not impinge upon policy. The exception in this regard in Nigeria in the cases examined is *FGN v Oshiomole* which both concerns the government and touched upon policy. The case was however brought by the government itself against the Nigerian Labour Congress to stop the labour organisation from going on strike. The court turned this application down. The case was also decided by one of the Nigerian High Courts where there are records of judicial

also N Fraser 'Talking about needs: interpretive contests as political conflicts in welfare-state societies' (1989) 99 *Ethics* 291.

²⁶⁰ N Frazer 'Rethinking the public sphere: A Contribution to the critique of actually existing democracy' (1990) 25/26 *Social Text* 56 at 70 – 74. See also S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 59.

activism. In addition to these, the case has been overturned by the Nigerian Court of Appeal in a different appeal lodged on the same subject-matter by same parties in *FGN v Oshiomole* as I point out earlier.

4.3 CONCLUSION

I have in this chapter examined the South African and Nigerian courts' conception of democracy. This I have done through the examination of the courts' records in cases touching upon the involvement and participation of citizens in public decision-making processes, the right to political action and the right to freedom of expression in South Africa. In relation to Nigeria, I examined the cases dealing with *locus standi*, the right to political participation, the right to freedom of association and assembly, the right to freedom of expression, cases dealing with the impeachment/removal of certain political office holders and cases dealing with the interpretation of socio-economic rights in Chapter II of the Nigerian Constitution. The paucity of constitutional provisions on democracy and explicit jurisprudence in that area of the law necessitated a wider field of inquiry than that of South Africa in order to sufficiently highlight the courts' conception of democracy in Nigeria.

A comparison of the analysis of South African and Nigerian courts' conception of democracy above renders the following: One, probably because of the robust provisions of democracy present in the South African Constitution, South African courts appear to have been more forthcoming about their conceptions of democracy than Nigerian courts. Two, probably also because of the robustness of the provisions on democracy in the South African Constitution many cases are brought that directly implicate the constitutional provisions on democracy in South Africa. This gives the courts the opportunity to deal with and pronounce directly on democracy. This is not the case in Nigeria where there is a paucity of constitutional provisions on the subject. Three, the analysis also shows that Nigerian courts are more conservative and show a higher level of deference to other organs of government than their South African counterparts.

The foregoing differences, however, appear more apparent than real for effective political action. One, because both courts lay strong stress on the importance of rights in their constitutional scheme consistent with liberal/representative democratic theory. Two, both courts also have similar conceptions of rights as enclaves of individual freedom with the function to act as a counterpoise to the exercise of governmental power consistent with liberal democratic theory. Three, despite the differences in the constitutional texts and schemes both courts displayed a conception of democracy that frowns upon citizens' involvement in policy issues and public decision-making processes beyond the narrow confines of rights. Finally, both courts also appear to proceed on the supposition of objective meaning of constitutional texts contrary to much research establishing the plasticity of legal texts and the political underpinnings of judicial decision-making.

Ultimately, the effectiveness of political action is measurable from how far and to what extent the citizens are able to make the government express the citizens' will. For this to be possible, there must not be any hallowed ground or area regarded as sacred or outside the involvement and participation of citizens. A conception of democracy that restricts citizens' involvement and participation to the narrow confines of rights or the periphery of politics and disavows such involvement and participation in politics, policy issues and public decision-making processes is hardly suitable for political action as conceived above. In fact, such conception of politics and democracy will tend to constrain rather than expand the opportunities and space for political action through the exclusion of the citizens as necessary stakeholders.

The conclusion is therefore that the likely implication on political action of the conception of democracy deduced from cases examined here is to constrain rather than enlarge the scope for effective political action – that is, it amounts to a negation of Frazer's participatory parity principle which I discussed in Chapters One and Two as central to realisation of rights and true democracy in terms of popular government. My argument is that this conclusion will be more so for political action which aim is to further socio-economic rights transformation.

The validation of the above conclusion as true in relation to effective realisation of socio-economic rights is the focus of the next chapter. I will be demonstrating that the conclusion reached in this chapter is correct that the courts' conception of democracy will constrain and ultimately impede effective political action in the area of socio-economic rights transformation in the next chapter. This I intend to do through the comparative examination and analysis of the records of both courts in relation to selected socio-economic rights related cases. I will also endeavour to show how the WABIA model of democracy I recommend in Chapter Three of this thesis is likely make a difference and facilitate a more effective political action in that regard.

CHAPTER FIVE

THE IMPLICATION OF SOUTH AFRICAN AND NIGERIAN COURTS' CONCEPTION OF DEMOCRACY ON SOCIO-ECONOMIC RIGHTS TRANSFORMATION

5. INTRODUCTION

I examine in Chapter Four the extant judicial conception of democracy in both Nigeria and South Africa. My analysis in the chapter shows that the judicial conception of democracy in these two jurisdictions is in the main the liberal democratic one. I argue there that this conception of democracy envisages a very narrow scope for the participation and involvement of citizens in politics and governance and that the effect of this conception of democracy will be to constrain political action and negate the poor's parity of participation, which I point out in Chapters One and Two is central to the effective realisation of rights and popular democracy. I further contend in the Chapter that the constriction of the political space for action will especially be the case with regard to socio-economic rights transformation. My aim in this chapter is to validate the foregoing supposition that the extant judicial conception of democracy in South Africa and Nigeria will especially constrain political action, an essential element in the transformation of socio-economic rights. This fact I try to demonstrate below through the examination of the impact of Nigerian and South African judicial conceptions of democracy on political action as deduced from selected socio-economic rights related cases.

5.1 THE COMPLEMENTARY ROLE OF LAW AND POLITICS IN SOCIO-ECONOMIC RIGHTS TRANSFORMATION

As I point out in Chapter One, the fact that law and politics play a complementary role in social change and transformation has been noted over time by many scholars from different

philosophical backgrounds.¹ However, while some scholars from the Critical Legal Studies movement (CLS scholars) will tend to deny the role of the law in the enterprise of social change,² other scholars, some from that same movement, have rightly in my opinion held the view that the law element cannot in fact be taken out of the social transformation equation.³ This point is succinctly put by Kairys thus: ‘The law though indeterminate, political and most often conservative, and though it functions to legitimate existing social and power relations, is a major terrain for political struggle that has, on occasions, yielded or encoded great gains and simply cannot be ignored by any progressive trend or movement’.⁴

On the other hand, because socio-economic rights transformation is a ‘profoundly political process’⁵ the role of political action in the socio-economic rights transformation process is probably much more important and essential than in other spheres of social life. Quite a number of scholars have pointed to the pivotal role of political action in this regard. As I point out in Chapter One, Diamond has in fact argued that politics is the major obstacle to the elimination of poverty.⁶ According to him, ‘[p]overty ... is not just a lack of resources. It is also a lack of political power and voice at all levels of authority.’⁷ Pieterse and Van Donk have also made the point that without consistent and purposeful pressure from civil society groups, and participation and engagement of citizens with government, socio-economic rights

¹ See for instance, K Klare ‘Law-making as praxis’ (1979) 40 *Telos* 123; P Gabel and P Harris ‘Building power and breaking images: Critical legal theory and the practice of law’ (1982-83) *Review of Law and Social Change* 369; U Baxi ‘Law, struggle and change: An agendum for activists’ (1985) 35 *Social Action* 118. More recent literature on this sub-theme includes, D Kairys ‘Introduction’ in Kairys D (ed) *The politics of law. A progressive critique* 3 ed (1998) 1; M Pieterse ‘Eating socio economic rights: The usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 (3) *Human Rights Quarterly* 796; A Woodiwiss ‘The law cannot be enough: Human rights and the limits of legalism’ in S Meckled-Garcia and B Cali (eds) *The legalization of human rights: Multidisciplinary perspectives on human rights and human rights law* (2006) 32; M J Matsuda ‘Looking the bottom: Critical legal studies and reparations’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323 at 337 – 338; among many others.

² See for instance, Mark Tushnet who opines that what is important in all circumstances is effective political action: M Tushnet ‘An essay on rights’ (1983 – 1984) 62 *Texas Law Review* 1363.

³ D Kennedy ‘Critical labor law theory: A comment’ (1981) 4 *Industrial Relation Law Journal* 503; M Pieterse ‘Eating socio economic rights: The usefulness of rights talk in alleviating social hardship revisited’ (2007) 29 *Human Rights Quarterly* 796; among others.

⁴ D Kairys ‘Introduction’ in Kairys D (ed) *The politics of law. A progressive critique* 3 ed (1998) 1 at 16. See also E P Thompson *Whigs and hunters: The origin of the Black Act* (1975) 266; K Klare ‘Judicial deradicalization of the Wagner Act and the origins of modern legal consciousness, 1937-1941’ (1977 – 1978) 62 *Minnesota Law Review* 265.

⁵ To borrow Pieterse & Van Donk’s phrase in E Pieterse and M Van Donk ‘Incomplete ruptures: The political economy of realising socio-economic rights in South Africa’ (2002) 6 *Law, Democracy and Development* 193 at 197.

⁶ L Diamond ‘Moving up out of poverty: What does democracy have to do with it?’ available at http://iis-db.stanford.edu/pubs/20669/Moving_Up_Out_of_Proverty.pdf (accessed on 21 November 2012) 1.

⁷ Id at 7.

are not likely to be realised in South Africa any time soon.⁸ Rosa has also opined that although democratic freedom is a veritable instrument for social justice and fairer politics, the process, according to her, is not ingrained.⁹ According to her, the process requires ‘...engagement and activism both by those affected by injustice, poverty and marginalisation, as well as those who contribute intellectually to the transformation of society, such as the legal fraternity, academics and the media.’¹⁰ Finally, no less a figure than a Justice of the Constitutional Court of South Africa, Pius Langa, has also argued that initiatives to turn around extreme poverty on the continent of Africa can only succeed ‘...if civil society gets involved in holding governments and relevant institutions accountable and exposing them when they fail to uphold the requirements of these Conventions [international human rights conventions] and values’.¹¹ For effective socio-economic rights transformation that will reduce poverty to happen, therefore, the citizens must be enabled to participate and engage with the government as Pieterse and Van Donk and others have so rightly pointed out.

Constitutional rights politics, which refers to the use of constitutional rights as tools of political empowerment by the poor oftentimes through the courts¹² have in this regard been correctly identified by scholars as one of the important ways through which the citizens can participate, engage and have a voice in addition to other types of available political action which citizens appear to be increasingly resorting to in their quest for a more just society.¹³ Raz put the foregoing point thus: ‘The politics of constitutional rights allows small groups easier access to the centres of power, including groups which are not part of the mainstream in society’.¹⁴ Constitutional politics, according to Raz, can even become a parallel of

⁸ E Pieterse & M Van Donk ‘Incomplete ruptures: the political economy of realising socio-economic rights in South Africa’ (2002) 6 *Law, Democracy and Development* 193 at 197; E Pieterse & M Van Donk ‘The politics of socio-economic rights in South Africa: Ten years after Apartheid’ (2004) 5 (5) *Economic and Social Rights Review* 12.

⁹ S Rosa ‘Transformative constitutionalism in a democratic developmental state’ (2011) 22 *Stellenbosch Law Review* 542.

¹⁰ *Id* at 549.

¹¹ P Langa ‘The role of the Constitution in the struggle against poverty’ (2011) 22 *Stellenbosch Law Review* 446 at 448.

¹² See J Raz ‘Rights and politics’ (1995) 71 *Indiana Law Journal* 27 for a more detailed discussion of this type of politics.

¹³ See for instance, M J Matsuda ‘Looking the bottom: Critical legal studies and reparations’ (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323 at 337 – 338 where the author points out the fact that minorities have traditionally used a combination of the rights rhetoric and political action to engage discrimination, exclusion and social hardship.

¹⁴ J Raz ‘Rights and politics’ (1995) 71 *Indiana Law Journal* 27 at 43.

parliamentary politics.¹⁵ In fact, the importance of constitutional politics to socio-economic rights transformation is aptly articulated by Pieterse thus:

Provided that courts are accessible, the adjudication process provides virtually the only space within which all, or most of, the other contributory voices to the dialogue over the meaning of socio-economic rights can simultaneously be present and heard. Indeed, a prime advantage of the courtroom as venue for dialogic deliberation over the meaning of socio-economic rights is that the individual beneficiaries of socio-economic rights are empowered to participate on a more-or-less equal footing with more powerful institutional players.¹⁶

Courts are consequently one of the most important *fora* for socio-economic rights related political action.

Without much argument, the place of courts in the scheme of participation and engagement outlined above becomes pivotal in ensuring the effectiveness and success of such political actions. This is even more so since apart from constitutional politics, courts have a very important role to play in either constraining or expanding the political space for effective action generally (a point I discuss in more detail in Chapter One). Many other scholars have also emphasised the essential connection between law, the work of courts and available space for political action of citizens.¹⁷

My aim in this chapter is first to show that a combination of law and politics is needed for effective implementation/transformation of socio-economic rights. Second, I also seek to

¹⁵ Id at 42.

¹⁶ M Pieterse 'On 'dialogue', 'translation' and 'voice': A reply to Sandra Liebenberg in SC Woolman & M Bishop (eds) *Constitutional conversations* (2008) 331 at 336 – 337. This also accords with Frazer's theory of participatory parity that I discussed in Chapter One. N Frazer 'Social justice in the age of identity politics: Redistribution, recognition and participation' in N Frazer and A Honneth *Redistribution or recognition? A political-philosophical exchange* trans J Golb *et al* (2003) 36. A somewhat expanded discussion Frazer's theory is in N Frazer 'Social exclusion, global poverty and scales of (in) justice: Rethinking law and poverty in a globalizing world' (2011) 22 *Stellenbosch Law Review* 452.

¹⁷ According to Piven and Cloward, rule-making [as end product of adjudication] is a strategy of power '...which creates new and lasting constraints on subsequent political action. Once objectified in a system of law, the rules forged by past power struggles continue to shape ongoing conflicts by constraining or enhancing the ability of actors to use whatever leverage their social circumstances yield them. That is why new power struggles often take the form of efforts to alter the parameters of the permissible by challenging or defying the legitimacy of prevailing norm themselves.' F Piven and R A Cloward 'Collective protest: A critique of resource mobilization theory' (1991) 4 *International Journal of Politics, Culture and Society* 435 at 436 – 437. See also J Habermas 'Law as medium and law as institution' in Teubner G (ed) *Dilemmas of law in the welfare state* (1986) 204 where the author also made the point that the law has both a liberating and a limiting and restraining effect.

demonstrate that the question whether courts will have a liberating or limiting effect on socio-economic rights related political action is dependent on the courts' conception of democracy and the consequent understanding of their proper role within the democratic/constitutional scheme. This I illustrate in this chapter by examining the courts' records vis-à-vis their conception of democracy and the impact of such conception on selected socio-economic rights related political action in both South Africa and Nigeria. Third, I additionally illustrate how the robust conception of democracy of the WABIA model recommended in Chapter Three is likely to make a difference in enlarging the space for political action in the cases examined.

In furtherance of the above objectives, this chapter is divided into six sections apart from the introduction. Section one is this section laying a proper foundation through the examination of the complementary roles of law and politics in social transformation. Section two examines South African courts' records in selected socio-economic rights related cases vis-a-vis the courts' conception of democracy and impact on political action. Section three examines Nigerian courts' record in selected socio-economic rights related cases vis-a-vis the courts' conception of democracy and impact on political action. Section four is an analysis of the comparisons between South Africa and Nigeria done in this chapter. Section five is a discussion of how the WABIA conception of democracy by the courts is likely to make a difference in the cases examined in this work. Section six concludes the chapter.

5.2 SOUTH AFRICAN COURTS' CONCEPTION OF DEMOCRACY IN SELECTED SOCIO-ECONOMIC RIGHTS RELATED CASES AND ITS IMPACT ON POLITICAL ACTION

There are in fact relatively few cases with documentation/records of the politics that preceded or post-date litigation so as to be able to examine the specific impact of litigation therein or *vice-versa*. The first of the few available cases examined here that demonstrates my thesis that both political action and law (specifically judicial law) invigorate each other and are essential for effective realisation of socio-economic rights in particular is *Minister of Health*

*and Others v Treatment Action Campaign and Others No 2.*¹⁸ The case arose out of the efforts of a non-governmental organisation, the Treatment Action Campaign (TAC), to make nevirapine, an anti-retroviral drug, available to pregnant South African mothers in order to prevent mother-to-child transmission of HIV/AIDS.

In the wake of the HIV/AIDS pandemic in South Africa, it was discovered that nevirapine, an anti-retroviral drug, is effective in preventing mother-to-child transmission of the disease; one of the major ways that the disease was being spread. And despite scientific evidence to the contrary, the government of South Africa had refused to allow the wide and effective use of nevirapine to counter the mother-to-child aspect of the HIV/AIDS infection in South Africa. Initial opposition of the South African government to the use of nevirapine was two-fold: first, it was alleged that the disease was a Western invention to create a market for Western drugs and; second, that the drug was unsafe.¹⁹ The government, therefore, restricted the use of the drug to pilot training sites and private medical clinics. The use of the drug in public hospitals where most of the pregnant women needing the drug frequented was prohibited. This prompted TAC, a South African NGO established on 10 December 1998 to campaign for greater access to appropriate treatment for South Africans afflicted by the HIV/AIDS pandemic to wade into the matter to campaign for the rights of HIV/AIDS victims and force the government to fulfil its constitutional obligations.²⁰ After several unsuccessful attempts by TAC to convince the South African government to make nevirapine available in the public health sector, the former resorted to petitions, mass marches/demonstrations and civil disobedience, among others, to press home their demands. Still, the government remained recalcitrant.

Things, however, started to change for the better when TAC together with other interested NGOs (the applicants) resorted to litigation by filing a constitutional rights challenge against the government at the Pretoria High Court (the trial Court) in August 2001. The applicants

¹⁸ 2002 (10) BCLR 1033 (CC).

¹⁹ See for instance, M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 at 281 – 282.

²⁰ S Friedman and S Mottiar 'A moral to the tale: The Treatment Action Campaign and the politics of HIV/AIDS' Centre for Policy Studies, University of KwaZulu-Natal (2004) available at <http://www.ukzn.ac.za/ccs/files/Friedman%20Mottier%20TAC%20Research%20Report%20Short.pdf> (accessed on 27 December 2013).

contended, among other things, that the restriction of the use of the drug to pilot training sites was unreasonable and unconstitutional. According to Heywood, one of TAC's senior officials, the mere fact of commencing litigation pressured national and provincial government to begin immediately to expand the availability of nevirapine and sites for its administration.²¹ This is something the government had refused to do all the while. At the conclusion of the trial, the trial Court found in favour of the applicants; declared the government's restriction of nevirapine to trial sites unconstitutional and made bold and wide ranging orders which required the government to make nevirapine widely available to pregnant women in need of it, among others remedies ordered by the Court. The government appealed to the Constitutional Court.²²

At the Constitutional Court, the Court held in relation to the minimum core argument advanced by the applicants that courts are not institutionally equipped to make factual and political determinations necessary for the articulation of a minimum core content of socio-economic rights as this is reserved for other arms of government in order to maintain an appropriate constitutional balance among the arms of government.²³ Applicants' minimum core argument was thereby rejected. The Court was not, however, that reserved in relation to its competence to make coercive orders in cases where violations of rights are found by the courts. The Court pronounced in this regard thus:

The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.²⁴

As far as the Court is concerned, therefore, the judiciary is competent to police other governmental arms' compliance with constitutional obligations because this is constitutionally mandated by the Constitution itself. There are at least two features of this

²¹ M Heywood 'Preventing mother –to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 at 293.

²² *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (10) BCLR 1033 (CC).

²³ *Id* at paras 37 – 38.

²⁴ *Id* at para 99.

decision that points towards the Court's conception of democracy in this case. The first is that the Court regards as inviolable the separation of powers doctrine. Second, the Court views rights as trump over governmental exercise of power. As I point out in Chapter Four, these views are most consistent with a liberal democratic understanding of democracy.²⁵ The Court's views in this regard mirror the constitutional democratic version of liberal democracy which sees the judiciary in a constitutional democracy as a competent guardian and interpreter of constitutions. On the strength of this conception of democracy, the Court found for the applicants and dismissed the government's appeal. The Court therefore confirmed the order of the High Court directing the government to make nevirapine available in public medical facilities.

The immediate effect of this decision of the Constitutional Court for political action was not only to affirm the legitimacy and legality of applicants' prior extra-curial action; it also provided a platform for further HIV/AIDS related political action beyond the immediate scope of the case at hand. Evidence that this is actually the case was further confirmed when the government became reluctant to execute the orders of the Constitutional Court. Available records revealed that the decision of the Court in *Treatment Action Campaign and Others* in fact provided a platform for both curial and extra-curial action at the execution stage of the order of the Constitutional Court. These actions took the form of institution of contempt proceedings and demonstrations/protests against reluctant and erring provincial government; actions which later forced the latter to comply with orders of the Court.²⁶

The importance and nature of the platform provided by the favourable decision of the Court in *Treatment Action Campaign and Others* can be gathered from the opinion of Budlender, one of the attorneys that prosecuted the case thus:

... [*Treatment Action Campaign and Others*] demonstrates that social and economic rights are only as strong as the willingness of civil society to enforce them. *There is a sharp and illuminating contrast between the consequences of the TAC case and the*

²⁵ See for instance, S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 63 – 71. See also generally, M H Marshall 'The separation of powers: An American perspective' (2006) 22 *South African Journal on Human Rights* 10.

²⁶ See for instance, M Heywood 'Contempt or compliance: The TAC Case after the Constitutional Court Judgment' (2003) 4 *Economic and Social Rights Review* 7.

earlier *Grootboom* case. In *Grootboom*, the Constitutional Court dealt with the right to housing. It explained the obligation of the government to people who are in a desperate situation and are truly homeless. The government's compliance with the judgement (*sic*) only started a year later, after the high-profile Bredell land invasion. And there are still major cities that continue to act in breach of the Constitution. A major reason for this is that civil society organisations have failed to take up the opportunity created by *Grootboom*, to compel the government to deal effectively with the needs of the truly homeless. The TAC case shows that the Constitution creates a powerful tool in the hands of civil society, to ensure that the government gives proper attention to the fundamental needs of the poor, the vulnerable and the marginalised.²⁷

Thus, as rightly pointed out by Budlender, 'In some ways, the final judgment of the Constitutional Court was simply the conclusion of a battle that the TAC had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.'²⁸

While *Treatment Action Campaign and Others* illustrates, in the main, constitutional politics delivering socio-economic rights where extra-curial action failed, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Joe Slovo 1)*²⁹ on the other hand illustrates extra-curial action delivering benefits where the law cannot. The *Joe Slovo* cases arose out of the attempts of the state to upgrade informal settlements (a politically correct term for ghettos) in South Africa. The informal settlements affected were to be upgraded either through *in situ* upgrade or the mass relocation of occupiers where *in situ* upgrade is either not desirable or feasible. The Joe Slovo community, where about 20 thousand South African poor are resident, happened to be one of the informal settlements slated for upgrade under the mass relocation method. The residents of Joe Slovo, however, opposed right from the start, the mass relocation option of the state for the upgrade of the informal settlement on the grounds first, that the upgrade of the settlement can be more conveniently done through the *in situ* method; and, second that far off Delft where the state proposed to relocate the residents is too far away from their sources of livelihood. When the state refused to listen to

²⁷ G Budlender 'A Paper Dog with Real Teeth' *Mail and Guardian* 12 July 2002 available at http://www.tac.org.za/Documents/Other/geoff_budlender.txt (accessed on 27 December 2013). [Emphasis supplied].

²⁸ *Ibid.*

²⁹ 2009 (9) BCLR 847 (CC).

the residents but persisted on the unpopular mass relocation option, the residents took matters into their own hands and sought to press home their demands through mass protests, riots and violence.³⁰ When Thubelisha Homes, the private entity charged with the upgrade of Joe Slovo, saw that the refusal to relocate and the violent reaction of the residents were about to abort the objectives of its concession, it in conjunction with other applicants, applied to the Western Cape High Court, Cape Town (the trial Court) to have the residents evicted under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (the PIE Act).³¹

At the trial Court, the state represented by the applicants contended that the residents are illegal occupiers and are therefore liable to be evicted under the relevant provisions of the PIE Act. The residents/respondents on the other hand argued that the alternative accommodation proposed by the state/applicants is neither suitable nor appropriate as it is about ten kilometres from their sources of livelihood, among others. The trial Court deplored the protest and violence of the residents³² and in a rather harsh tone, found in favour of the applicants and ordered the eviction of the residents in a judgement and order described by the Constitutional Court as rather unusual.³³ The residents appealed directly to the Constitutional Court.

At the Constitutional Court, one of the bones of contention between the parties was whether the mass relocation of the residents was inevitable as contended by the government. The residents presented expert and other evidence to the contrary. Despite this, the Court held in this regard as follows:

It is not for the courts to tell the government how to upgrade the area. This is a matter for the government to decide. The fact that there may be other ways of upgrading the area without relocating

³⁰ The violent reaction of the residents of Joe Slovo has been noted in much of the literature which include the trial High Court, *Thubelisha Homes and Others v Various Occupants and Others* [2008] ZAWCHC 14 para 16; and at the Constitutional Court, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (Joe Slovo 1) 2009 (9) BCLR 847 at paras 34, 327 and 376 (CC). See also M Langford 'Housing rights litigation: *Grootboom* and beyond' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 211 – 212.

³¹ Act 19 of 1998.

³² *Thubelisha Homes and Others v Various Occupants and Others* [2008] ZAWCHC 14 para 16

³³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (Joe Slovo 1) 2009 (9) BCLR 847 at para 8.

the residents does not show that the decision of the government to relocate the residents is unreasonable. It is not for the courts to tell the government how best to comply with its obligations. If, in the best judgement of the government it is necessary to relocate people, a court should be slow to interfere with that decision, as long as it is reasonable in terms of section 26(2) of the Constitution and just and equitable under PIE.³⁴

As can be gathered from the above, the Court declined to question the policy decision of the government to relocate the applicants on the ground that this is within the exclusive domain of the government. The position of the Court is apparently based on the hallowed doctrine of separation of powers which reserves social and policy decisions for the executive arms of government and barred the courts from interfering in same. This is a liberal democratic conception of democracy as I have pointed out in Chapter Four. The hands-off view of the Court can therefore be seen to be reminiscent of the hands-off approach of a liberal democratic conception of democracy regarding the proper place of the judiciary vis-à-vis other arms of government on policy issues.

On the strength of the above understanding of democracy and in a judgement described as a partial victory for the residents of Joe Slovo by De Vos,³⁵ the Court sanctioned the eviction of the residents from Joe Slovo. However, in a rare show of empathy, the Court ordered that suitable alternative accommodations, the exact details of which are prescribed by the Court, are to be provided for the displaced residents by the state.³⁶ The Court also ordered that the state engage meaningfully with the residents in the relocation processes.³⁷

What is noteworthy for the purposes of this chapter, however, is how the combination of the meaningful engagement ordered by the Constitutional Court, the rather detailed and onerous order of the Court as regards the alternative accommodation to be provided by the state and the change of government in the Cape Town province all appear to work together to achieve for the residents what the law/courts had declined to give. In that the government later agreed

³⁴ Id at para 253.

³⁵ P De Vos 'A (partial) victory for Joe Slovo residents' in *Constitutionally speaking* (blog) available at <http://constitutionallyspeaking.co.za/?p=1112> (accessed on 04 January 2014).

³⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (Joe Slovo 1) 2009 (9) BCLR 847 at paras 7 – 10, for instance.

³⁷ Id at para 11.

to upgrade Joe Slovo informal settlement *in situ* after engagement with the residents. *In situ* upgrade is an option the government had ruled out prior to and during litigation.

Although the meaningful engagement concept was first mentioned by the Constitutional Court of South Africa pursuant to section 26 (2) of the South African Constitution in *Government of the Republic of South Africa and Others v Grootboom and Others*,³⁸ it became an important and permanent feature of the Court's eviction jurisprudence from *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*³⁹ onwards. The concept of meaningful engagement mandates the state to deliberate and engage with persons liable to eviction in the eviction processes. This is in order to promote the participatory and deliberative model of democracy inherent in section 26 of the South African Constitution right to access adequate housing in the settlement of eviction disputes in South Africa.⁴⁰ Since the successful use of the concept by the Constitutional Court to avoid deciding substantive issues of law in *Occupiers of 51 Olivia Road*, the Court has deployed the concept in the adjudication of a number of other eviction disputes in South Africa.⁴¹

The potential political role of meaningful engagement mechanisms of the Constitutional Court in the realisation of socio-economic rights has been noted by a number of scholars.⁴² According to Ray:

Engagement has the potential to radicalise that political role even further by giving citizens and civil society groups the right to demand consultation from the outset of any policy development process. The right to consultation at the very beginning of the process offers much greater opportunity to

³⁸ 2000 (11) BCLR 1169 (CC).

³⁹ 2008 3 SA 208 (CC).

⁴⁰ See also S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 1 at 14 – 17.

⁴¹ See S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 1 and B Ray 'Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement' (2010) 10 *Human Rights Law Review* 360 for a detailed discussion of the meaningful engagement concept of the South African Constitutional Court and a review of the relevant cases.

⁴² See for instance, S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 *African Human Rights Law Journal* 1 and B Ray 'Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement' (2010) 10 *Human Rights Law Review* 360.

meaningfully affect policy and to ensure appropriate attention to the obligations these rights impose than litigation challenging the implementation of an existing policy.⁴³

The above description of the potential political role of meaningful engagement appears to be borne out by what later transpired between the residents of Joe Slovo and the government after the Constitutional Court decision in the case as described earlier.

In furtherance of the order of the Court to engage meaningfully with Joe Slovo residents, the government engaged. And it does appear that the residents, taking advantage of the order of the court to engage, mobilised and presented a formidable opposition against the government at the discussions that followed. It also appeared that by refusing to agree with the government on any of the issues at stake, the government missed several deadlines to report back to the court and was forced to make some kind of plan.⁴⁴

In other words, the residents used the power afforded them by the engagement order to stall the process indefinitely and so force the state's hand. In addition to this, the stringent order of the court about the kind of alternative accommodation to be provided to the residents also made the cost of the relocation of the residents prohibitive.⁴⁵ The foregoing coupled with a change of government in the province all appeared to have worked together to force the government to decide to upgrade the settlement *in situ* contrary to its earlier position and in accordance with the residents' demands all along. As aptly put by Langford: 'As these political, economic, and legal stars aligned, the provincial government agreed to look again at upgrading on site.'⁴⁶ An application to suspend the order of eviction was thereafter made at the Constitutional Court by the government and the Court quietly suspended the eviction order.⁴⁷

⁴³ B Ray 'Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement' (2010) 10 *Human Rights Law Review* 360 at 371.

⁴⁴ M Langford 'Housing rights litigation: *Grootboom* and beyond' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 212.

⁴⁵ P De Vos 'Sanity and humanity prevails – for now' *Constitutionally Speaking* (blog). Available at <http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/comment-page-1> (accessed on 04 January 2014).

⁴⁶ M Langford 'Housing rights litigation: *Grootboom* and beyond' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 212.

⁴⁷ *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC) (Joe Slovo 2). See also P De Vos 'Sanity and humanity prevails – for now' *Constitutionally Speaking* (blog).

It is interesting to note that the achievement of Joe Slovo residents in this instance has been directly traced by Langford to their effective use of law in their political action. According to him: ‘Although the broader political changes clearly helped, the community demonstrated a high level of internal organisations and an ability to make multiple alliances with civil society organisations, experts, and bureaucrats who were unhappy with the approach of the project to leverage what gains they made through the legal process.’⁴⁸

Furthermore, the more recent decision of the Constitutional Court in *Abahlali BaseMjondolo Movement SA and Others v Premier of the Province of Kwazulu and Others*⁴⁹ further illustrates how the courts can open up the space for political action in aid of socio-economic rights transformation. In the case, Abahlali baseMjondolo, which in isiZulu means ‘occupiers of informal homes,’⁵⁰ a social movement for the poor formed for purposes of protecting the rights of shack-dwellers in South Africa, brought a constitutional challenge against the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (the Slums Act).⁵¹ The Slums Act was enacted by the KwaZulu-Natal’s provincial legislature to eliminate and prevent the re-emergence of slums in the province. Section 16 of the Act mandates an owner of land or the municipality in whose area there are informal settlements to initiate eviction proceedings against unlawful occupiers of informal settlements upon notice to that effect in the Gazette by the responsible member of KwaZulu-Natal’s Executive Council. Section 20 of the Slums Act also criminalises non-legal interference with evictions.

Abahlali baseMjondolo, the applicant representing KwaZulu-Natal’s shack dwellers,⁵² contended that the Slums Act is unconstitutional on the grounds that the KwaZulu-Natal provincial legislature has no competence to enact the Act as it deals with land tenure, which

Available at <http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/comment> page 1 (accessed on 04 January 2014).

⁴⁸ M Langford ‘Housing rights litigation: *Grootboom* and beyond’ in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 212.

⁴⁹ 2010 (2) BCLR 99 (CC).

⁵⁰ *Id* at para 87.

⁵¹ Act 6 of 2007.

⁵² Shacks are rudimentary housing structures often made of woods and corrugated iron sheets or similar basic materials inhabited by poor and homeless people in South Africa’s slums.

is within the exclusive competence of the national legislature. The applicants also contended that section 16 of the Slums Act contravenes section 26 (2) of the South African Constitution in that it nullifies the procedural safeguards put in place by the Constitution to protect illegal squatters against arbitrary evictions and negates the constitutional obligation of the government to engage meaningfully with persons liable to eviction. Upon the dismissal of the applicants' claims by the KwaZulu-Natal High Court, Durban, the applicants appealed directly to the Constitutional Court. The two issues mentioned above were the main questions for determination before the Constitutional Court.

On the first issue regarding the competence of the KwaZulu-Natal's provincial legislature to enact the Slums Act, the Constitutional Court held that the legislature is competent to enact the Act because the primary objectives of the Act is to ensure adequate provision of suitable housing in the province, a subject-matter on which the provincial legislature has concurrent jurisdiction with the national legislature.⁵³ On the second issue of section 16 of the Slums Act, the Court held that the section violates section 26 (2) right of access to adequate housing of the South African Constitution because it tends to remove the procedural safeguards put in place by the Constitution to protect unlawful occupiers against arbitrary evictions and negates the constitutional obligation of the government to engage meaningfully with persons liable to eviction. It was for that reason held invalid.⁵⁴

There are two points in the decision of the Constitutional Court in this case that are important to emphasise with regard to my focus in this Chapter. The first point to note is the emphasis of the majority opinion on consultation as precondition for lawful eviction and other procedural safeguards which cannot be reconciled with section 16 of the Slums Act. The second point to note is the emphasis of the majority on doctrines of the rule of law and separation of powers.

⁵³ *Abahlali BaseMjondolo Movement SA and Others v Premier of the Province of Kwazulu and Others* 2010 (2) BCLR 99 at paras 28 – 40 and 97 (CC).

⁵⁴ *Id* at para 122.

As regards the first point, it is noteworthy that the main point of disagreement between the majority and minority opinion in the case is whether and to what extent section 16 of the Slums Act violate the procedural safeguards against arbitrary eviction which includes the obligation of owner of property or the state to consult and engage with persons liable to eviction before same is carried out as enshrined in 26 (2) of the South African Constitution. Thus, the main point of departure of the majority opinion from the minority is the emphasis of the majority on consultation with would be evictees as a precondition of lawful eviction alongside other safeguards entrenched in section 26 (2) of South African Constitution and in statutes enacted to give effect to the section which section 16 of the Slums Act nullifies. According to the majority of the Court, '[p]roper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.'⁵⁵ This requirement, the Court observed, is nullified by the coercive nature of section 16 of the Slums Act and compulsory nature with which evictions are to take place under the section. Section 16 of the Slums Act is for that reason declared unconstitutional because it violates section 26 (2) of the South African Constitution and other statutes enacted to give effect to it.⁵⁶

As regards the second point to be noted, the majority also laid particular emphasis and based its decision on the doctrines of the rule of law and separation of powers. In a bid to make section 16 of the Slums Act constitutionally compliant, the minority has proposed six different qualifications to be read into the interpretation of the section.⁵⁷ The majority rejected this reading in. The majority held that the rule of law is a founding value of the South African constitutional democracy.⁵⁸ And that to read in six different qualifications in order to make a statute constitutionally compliant strains and is tantamount to rewriting the text of the statute. These effects the majority held violate the tenets of the rule of law which

⁵⁵ Id at para 114 (fn omitted).

⁵⁶ Id at para 122.

⁵⁷ Id at para 80.

⁵⁸ Id at para 124.

states that law must be clear and ascertainable and breach the principles of separation of powers.⁵⁹

In so emphasising consultation and the concept of the rule of law in the eviction process, *Abahlali BaseMjondolo Movement SA and Others v Premier of the Province of Kwazulu and Others* is one of the very few South African Constitutional Court decisions that come close to satisfying the twin conditions for the legitimacy of constitutional democracy. As I discussed in Chapter Three, for a constitutional democracy to be legitimate, it must be both constitutional and democratic.⁶⁰ It must be constitutional in the sense that exercise of rights, duties and powers in the system must follow the path of constitutionalism i.e. be subject to the dictates of the constitution. And it must be democratic in the sense that citizens must not only be able to participate, but must also be able to take a step back, dissent, question and challenge the founding rules themselves, including the constitution. A constitutional democracy where the democratic principle is missing privileges constitutionalism over democratic deliberation and is for that reason suffering a democratic deficit and is illegitimate. On the other hand, a constitutional democracy that privileges democratic deliberation over constitutionalism is operating a system of the tyranny of the majority and is also for that reason deficient and cannot be said to be truly democratic.⁶¹ In emphasising that there must be reasonable engagement with would be evictees in the eviction process and in highlighting the importance of the principle of the rule of law in its decision-making processes; the decision came very close to satisfying the important pre-conditions for a legitimate democratic system.

The emphasis placed by the majority of the Court on the concepts of reasonable engagement, the rule of law, separation of powers and the important place that the Court allocates to constitutional rights⁶² in its decision-making process shows clearly that the Court was true to its categorisation of the South African governance system as a constitutional democracy. It can therefore be inferred from what the Court said and decided in the case that the Court has

⁵⁹ Id at paras 124 – 125.

⁶⁰ J Tully ‘The Unfreedom of the Moderns in comparison to their ideals of constitutional democracy’ (2002) 65 *Modern Law Review* 204 – 206.

⁶¹ Id at 205.

⁶² Id at para 119.

in contemplation the constitutional version of liberal democracy (constitutional democracy). This may be gathered from the Court's emphasis on the principles of the rule of law, the doctrine of separation of powers and the prominent role that constitutional rights play as basis of the Court's decision. The afore-mentioned principles and doctrines, as I have discussed earlier on in Chapter Four and the present Chapter, are the hallmarks of liberal democratic theory. The Court's conception of democracy is therefore the constitutional version of the liberal democratic one.

The likely impact of the Constitutional Court decision in this case lies in the legitimization of the extra-curial action of the applicants and the provision of a platform upon which housing related struggle and activism can be furthered. Thus, although only section 16 of the Slums Act was invalidated, I suggest that the bottom was also taken out of the provisions of section 20 of the Slums Act, which criminalises all non-legal attempts to stop evictions.⁶³ This is because action that would have been unlawful if section 16 was not invalidated has now become lawful by such invalidation. Any eviction under the Slums Act without the offending section 16 will now have to comply with the provisions of section 26 of the South African Constitution and the obligation of the state to engage meaningfully with would be evictees. Since all political action except, perhaps, adjudication is likely to fall within the ambit of non-legal action, the prohibitive and constraining effects of section 20 of the Slums Act on political action is apparent. Therefore, the implied invalidation of section 20 of the Act and the express obligation of the state to engage with would-be evictees would ordinarily have a salutary effect on political action if the case of *Residents of Joe Slovo* where residents were able to leverage on the reasonable engagement order of the Constitutional Court to deliver results denied by the law as discussed above is anything to go by.

However, as has been rightly pointed out by Zikode, the leader of the Abahlali baseMjondolo social movement, not all engagement between the people and the state is meant to be meaningful.⁶⁴ According to him:

⁶³ L Chenwi 'Housing rights of 'slum' dwellers at stake' (2009) 10 (1) *Economic and Social Rights Review* 25.

⁶⁴ S Zikode 'Meaningful engagement' available at <http://www.abahlali.org/node/5538> (accessed on 10 July 2014).

What is called ‘engagement’ or ‘public participation’ is often just a kind of instruction, sometimes even a threat. Many times it is done in such a way that all possibilities for real discussion and understanding are closed from the start. In these cases what is called engagement is really just a way for the state to pretend to be democratic when in reality all decisions are already taken and taken far away from poor people.⁶⁵

Zikode is therefore of the view that active participation is discouraged by those in power.

Some evidence that those in power may not be in favour of active political participation and empowerment of the poor as observed by Zikode is presented by the aftermath of the Constitutional Court judgement in *Abahlali BaseMjondolo Movement SA and Others*. Shortly after the decision of the Constitutional Court in favour of the social movement, Abahlali baseMjondolo, there was attempt to violently, with force of arms, put down and disband the movement. Armed attacks against the persons and property of members of the movement were reported, sometimes in the full view of law enforcement officials who stood idly by and watched.⁶⁶ It was also reported that the leaders of the movement were being searched out for elimination by armed men alleged to be members of the African National Congress (ANC), South African ruling party and that repeated cry for help and assistance from the police by the members of the Abahlali BaseMjondolo social movement and other members of the community went unheeded.⁶⁷ To make matters worse, when the state decided to react, they only arrested and prosecuted members of the Abahlali BaseMjondolo social movement who were subjects of the attacks; no perpetrator of the attacks was reported arrested or prosecuted.⁶⁸ The response of the state and the way it handled the violence gave the impression that the violence was state sponsored. It thus drew both national and international uproar and condemnation.⁶⁹

⁶⁵ Ibid.

⁶⁶ Centre on Housing Rights and Evictions (COHRE) ‘South Africa: Attacks on housing rights activists must stop’, available at <http://www.cohre.org/news/press-releases/south-africa-attacks-on-housing-rights-activists-must-stop> (accessed on 06 January 2014).

⁶⁷ Centre for Constitutional Rights ‘Re: Urgent Appeal Regarding Abahlali baseMjondolo, Durban, South Africa’ available at http://abahlali.org/files/S_R_Human_Rights_Defenders.pdf (accessed on 06 January 2014)

⁶⁸ Ibid.

⁶⁹ Amnesty International ‘South Africa: Failure to conduct impartial investigation into Kennedy Road violence is leading to further human rights abuses’ available at <http://www.amnesty.org/en/library/asset/AFR53/011/2009/en/0c2ddb2a-0659-41b8-a946-09556ecc43b7/afr530112009en.pdf> (accessed on 07 July 2014).

As rightly observed by Langford, the attacks against the Abahlali BaseMjondolo social movement and others like it are ‘...indicative of simmering and deep hostility against shack dwellers and social movements.’⁷⁰ Some members of the political class were probably miffed at the fact that some movement of some poor people dared to stand up to them. This reaction of the political class (perhaps with active support of the state) underscores, in my opinion, the importance and the role of the courts as impartial arbiters in the inevitable political conflicts and clashes that are bound to arise between the well-resourced bourgeois class who may want to maintain the status quo at all cost and the proletariat class and the poor who will want to transform the existing system.

If *Treatment Action Campaign, Residents of Joe Slovo and Abahlali BaseMjondolo Movement SA and Others* cases are, however, contrasted with *Government of the Republic of South Africa and Others v Grootboom and Others*,⁷¹ the essential importance of political action as the reverse side of the coin of law in the effective realisation of socio-economic rights is brought into sharp relief. *Grootboom* stems from the resistance of the poor and homeless to their eviction from private land where they had put up shacks. The poor and homeless respondents in the case had contended that their eviction from the land without the provision of alternative accommodation violated their right of access to adequate housing under section 26 of the South African Constitution. The Constitutional Court held that the government is obliged under section 26 of the Constitution to take reasonable steps to progressively realise the right to adequate housing within available resources. The reasonable steps to be taken by the government to progressively realise the right to access adequate housing must however take care of the most vulnerable members of the society. The Court therefore held that the failure of state’s programme to take account of the need of the most vulnerable members of the society violates section 26 of the South African Constitution.

In spite of the favourable decision of the Constitutional Court in *Grootboom*, it has been observed that it has failed to live up to the expectation of the litigants because after more than a year of the judgement the government had failed to take any concrete steps to ameliorate

⁷⁰ M Langford ‘Housing rights litigation: *Grootboom* and beyond’ in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 206.

⁷¹ 2000 (11) BCLR 1169 (CC).

the desperate situation of the respondents or execute the terms of the orders of the Court.⁷² The reason for the less than effective effect of the Court's decision has been rightly ascribed to absence of political action by Budlender, an attorney who was active in the prosecution of both the *Grootboom* and *Treatment Action Campaign* cases as I already discussed above.⁷³

Thus, in contrast to the *Treatment Action Campaign* where civil society groups initiated action for and on behalf of the poor and followed up the enforcement of the orders of the Constitutional Court through both curial and extra-curial political action as discussed above, the poor in *Grootboom* acted for themselves and was only assisted by civil society groups at the litigation point. Thus, civil society involvement in *Grootboom* was at the periphery of the struggle of the *Grootboom* community. This may have accounted for the omission of civil society groups to take advantage of the platform provided for political action by the favourable decision of the Constitutional Court in the case. This involvement and mobilisation for action by civil society groups appear therefore to have been the critical factor which accounted for the relative success of *Treatment Action Campaign* over *Grootboom*.⁷⁴

Another aspect of *Grootboom* which appears to confirm the critical role of political action in the transformation of socio-economic rights process is that, as pointed out by Budlender above, implementation of the orders of the Court in *Grootboom* did not actually start until some poor and homeless individuals started to invade government land in Bredell and other parts of the country in order to force the state's hands.⁷⁵ Invasion of land to force the state's hands is a form of political action, unpalatable perhaps, but political nonetheless. And it does appear to have worked beyond the narrow confines of the actors in Bredell, as it appear to

⁷² K Pillay, 'Implementing Grootboom: Supervision needed' (2002) 3 (1) *Economic and Social Rights Review* 16; G Budlender 'Basic needs' (interview) available at http://www.escr-net.org/sites/default/files/Interview_-_Basic_Needs.pdf (accessed 07 January 2014).

⁷³ See for instance, G Budlender 'A Paper Dog with Real Teeth' *Mail & Guardian* 12 July 2002 available at http://www.tac.org.za/Documents/Other/geoff_budlender.txt (accessed on 27 December 2013); G Budlender 'Basic needs' (interview) available at http://www.escr-net.org/sites/default/files/Interview_-_Basic_Needs.pdf (accessed 07 January 2014).

⁷⁴ Langford confirmed that there was in fact no significant social mobilisation and follow up in *Grootboom* in contrast to what happened in *Treatment Action Campaign*. M Langford 'Housing rights litigation: *Grootboom* and beyond' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 188.

⁷⁵ See D James "'Human rights" or "property"? State, society and the landless in South Africa' available at <http://humanrights.uconn.edu/documents/papers/HumanRightsOrPropertyJames.pdf> (accessed on 10 January 2014) for a more detailed discussion of the problems of landlessness/homelessness and land invasion in South Africa.

have finally moved the state to implement the orders of the Court in *Grootboom* which it has hitherto omitted to implement.

Langford recently contends, however, that the overly pessimistic evaluation of the impact of *Grootboom* stemmed from the convolution of different methodological assumptions.⁷⁶ He argues that an impact analysis that takes a ‘before and after approach’ will yield a more favourable impact results than an impact analysis that takes an ‘idealist expectations’ approach.⁷⁷ Taking a hybrid approach of the claims of the Grootboom community before the High Court, Langford argued that there is a clear nexus between the case and attainment of permanent housing by the Grootboom community.⁷⁸ He also argued that on the political power side, litigation appeared to have enhanced the overall political standing and power of the community in that *Grootboom* has provided a veritable weapon that could be used by activists in the political arena.⁷⁹ According to Langford, evidence of this can be gathered from the forestalment of the evictions in *Grootboom* and subsequent cases; and the development of a plan for permanent housing. He, however, conceded that lack of mobilisation and action appeared to have hampered a broader and more robust development of this power by the community.⁸⁰ Langford concession here only goes to confirm, again, the likely negative implication of the absence of political action in socio-economic rights transformation processes as discussed above.

*Mazibuko and Others v City of Johannesburg and Others*⁸¹ is a case which appears to take further and illustrate better the critical nature of political action in socio-economic rights transformation processes. The case relates to the attempts of the respondents/state to commercialise the provisions of water in Phiri, one of South Africa’s poorest suburbs. Prior to the 2001 attempts of the respondents to commercialise water provision in Phiri, residents of the town were billed a monthly flat rate fee on deemed consumption of 20 kilolitres of

⁷⁶ M Langford ‘Housing rights litigation: *Grootboom* and beyond’ in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 188.

⁷⁷ Id at 194.

⁷⁸ Id at 198.

⁷⁹ Id at 204.

⁸⁰ Id at 198 – 199.

⁸¹ 2010 (3) BCLR 239 (CC).

water, a fee they rarely paid in practice.⁸² As a result of the huge debt accumulated by suburbs like Phiri and the desire of respondents to conserve water and make municipalities financially independent, the government initiated a scheme referred to as *Gcin'Amanzi* (which means to conserve water in isiZulu).⁸³ Under the scheme, the respondents limited the amount of free water available to residents of Phiri to six kilolitres of water per household monthly and initiated the installation of prepaid water meters. The installed water meters automatically terminate supply of water once the monthly allowance of six kilolitres of water is exhausted unless the household purchases additional credit to top up their accounts. The *Gcin'Amanzi* scheme has been recorded to discriminate against the poor residents of Phiri because of the inadequate amount of free water provided them against unlimited amount of water available to residents of richer suburbs (provided water on credit) who use it for largely hedonistic purposes. There was also the issue of the abrupt cessation of water supply when the free water allowance/credit loaded is exhausted against conventional meters installed in richer suburbs which provided water to residents on credit with various procedural safeguards against disconnection.⁸⁴

The prejudicial impact of the *Gcin'Amanzi* scheme is described by Dugard as follows:

From the outset, PPMs compromised Phiri residents' access to water in very tangible ways. With an average number of 13 or more people living across multidwelling households, the standard FBW allocation (6 kilolitres per property per month) has always been insufficient to meet the basic needs of Phiri residents. This means that in the context of high unemployment and endemic poverty, Phiri residents are forced to make undignified and unhealthy choices. For example, people living with HIV/AIDS must choose between bathing or washing their soiled sheets, and parents must choose between washing their children before they go to school, or flushing the toilet. Even so, households such as Lindiwe Mazibuko's regularly go without water for days at a time because the FBW supply usually only lasts until mid-month, and there is often insufficient money to buy additional water credit... For the many large households in Phiri that exhaust their FBW supply before the end of the month, and are too poor to afford additional water credit, the ultimate punishment is the PPM's automatic and sudden disconnection, which often takes households by surprise. The continuous infringements to dignity and health are serious, and a direct risk to life is posed in the event of fire. This was tragically demonstrated in a shack fire on the property of Vusimuzi Paki (the fifth applicant in

⁸² See for instance, J Dugard 'Civic action and legal mobilisation: the Phiri water meters case' in J Handmaker and R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 73 at 81.

⁸³ Id at 73.

⁸⁴ Id at 73 – 74.

the *Mazibuko* case), on 27 March 2005, which resulted in the death of two small children when there was insufficient water to put out the fire. More routinely, PPMs exacerbate already difficult lives by adding the stress of trying to manage with insufficient water for basic household and hygiene needs. PPMs represent the ultimate technicist solution to poverty, delegating the administrative burden of access to water to the individual household, thereby individualising ‘the relationship of people to the resources necessary for life’.⁸⁵

The situation described above led to the mobilisation and resistance of the residents of Phiri by the Anti-Privatisation Forum (APF), a socialist social movement organisation.

The resistance started with mass marches to respondents’ water offices and later to physical attempts by residents and activists of Phiri to prevent the installations of prepaid water meters in Phiri. The direct prevention of respondents’ agents to install the water meters led to face-offs and altercations between the respondents’ agents and the security apparatus and appeared set to derail the respondents’ commercialisation scheme. This led the respondents to obtain an interdict from the Johannesburg High Court. Under the terms of the interdict, residents and activists were banned from interfering with the respondents’ work; they were prohibited from coming within 50 metres of any work being undertaken by respondents’ agents; and the court’s sheriff was also authorised to engage the services of private security guards to enforce the terms of the interdict.⁸⁶ The respondents followed up the interdict with the harassment and arrest of the activists and charged them with various public peace and property offences. Thus, the more activist the residents became the more repressive the state’s response. According to Dugard:

By the end of September 2003, 14 residents of Phiri and activists supporting them had been charged with ‘public violence’, ‘malicious damage to property’ and ‘incitement’ for handing out flyers. The APF and its affiliate organisations, especially the SECC and CAWP, had to divert much energy and funding to securing bail and defending those charged. In the end, almost all charges were dropped, but battling against state repression took a heavy toll on the organisation, and effectively undermined its ability to halt the City’s operations in Phiri. In turn, this failure to stop the rollout of PPMs fundamentally weakened the overall campaign.⁸⁷

Thus, state repression not only effectively put paid to the residents’ ability to continue the struggle but also neutralised their resolve. The resultant effect of this is that most of the

⁸⁵ Id at 84 – 85 (fns omitted).

⁸⁶ Id at 88.

⁸⁷ Id at 88

households capitulated, signed on to the prepaid water meters and jettisoned the struggle altogether.⁸⁸ This led the leftist social movements and some residents who were initially ideologically opposed to the use of the law and the courts to turn to the courts and constitutional rights politics.

With the help of the Freedom of Expression Institute and the Centre for Applied Legal Studies, some Phiri residents and activists first took their politics of constitutional rights to the South Gauteng High Court (the trial Court) on July 2006 where they questioned the constitutionality of the respondents' *Gcin'Amanzi* scheme. The scheme was questioned on two main grounds. First, is that the six kilolitres of free water per month allowed to each Phiri household was insufficient and unconstitutional having regard to the provisions of section 27 (1) (b) of the South African Constitution;⁸⁹ and second that the installation of prepaid water meters by the respondents was lawful. The allegation of the applicants here was that the City's Water Services By-laws under which the respondents' purported to act did not provide for the installation of prepaid meters and thus that their installation was *ultra vires* in terms of those regulations.

The trial Court found for the applicants on the two grounds/issues raised above. The Court held, among other things, that the six kilolitres of free water per household per month is insufficient for a dignified life and that the installation of prepaid meters was unlawful. The way and manner the respondents went about installing the water meters was also found by the Court to be unfair. The respondents' scheme was in effect declared unlawful and unconstitutional. The trial Court ordered that the respondents furnish the applicants and other similarly situated residents of Phiri with a free basic water supply of 50 litres per person per day and the option of a metered supply of water which was to be installed at the respondents' cost, among other remedies.⁹⁰ The respondents, being dissatisfied with the High Court judgment appealed to the Supreme Court of Appeal who upheld the judgement of the High Court in substantially similar terms save that 42 litres of water per person per day was found

⁸⁸ Id at 89.

⁸⁹ Section 27 (1) (b) of the South African Constitution provides that: 'Everyone has the right to have access to— sufficient food and water'.

⁹⁰ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 paras 25 – 27 (CC).

by the Supreme Court of Appeal to be required in terms of section 27 (1) (b) of the South African Constitution. The Court ordered accordingly.⁹¹

The favourable decisions of the lower courts in *Mazibuko* did not only boost the morale of the struggle of the applicants against the neo-liberal agenda of the respondents and resulted in reversal of some of the more unreasonable aspects of the respondents commercialisation scheme; it also, much more importantly, broaden the scope for political action in water related struggles in other parts of the country.⁹²

Whatever gains were made via the lower courts' decisions in *Mazibuko* were, however, reversed by the Constitutional Court in a unanimous decision when the appeal came to it from the respondents.⁹³ The two issues of whether the six kilolitres of free water per month allowed to each Phiri household is sufficient water and constitutional having regard to the provisions of section 27 (1) (b) of the South African Constitution and whether the installation of prepaid water meters by the respondents is lawful as raised by the applicants in the trial High Court and the Supreme Court of Appeal were also before the Constitutional Court in *Mazibuko*. The Constitutional Court found against the applicants on both grounds.

According to the Constitutional Court, both the High Court and the Supreme Court of Appeal were in error to have held that the six kilolitres of water per month prescribed by the respondents and the installation of prepaid water meters were unconstitutional. The Court held, among others things, that the sufficiency or otherwise of the prescribed amount of free water by the respondents or any measures taken by the government to preserve as scarce a

⁹¹ Id at paras 28 – 29.

⁹² It was on record that while litigation was pending in the High Court the respondents increased the amount of free water per household to ten kilolitres of water per month under the respondents' newly created indigent registration policy. This move of the respondents was alleged by the applicants to be spurred by the pending litigation. See *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 paras 81 and 96 (CC). As regards the fact that the favourable decisions boosted the morale of the struggle and enlarged the scope for political action, Dugard recorded that the *Mazibuko* case has apparently played a 'fundamental role in reinvigorating water-related struggles around the country' as activists in other municipalities around South Africa were, at the time of the favourable decisions, already using the High Court judgment to mobilise against commercialisation of water in other parts of the country. See J Dugard 'Civic action and legal mobilisation: the Phiri water meters case' in J Handmaker and R Berkhout (eds) *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (2010) 73 at 91 – 95.

⁹³ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC).

commodity as water cannot be questioned because the South African Constitution does not confer a right to claim sufficient water or impose any obligation on the state to provide sufficient water to anyone immediately.⁹⁴

More importantly, however, is the Court's view that the determination of the appropriate step(s) to take to fulfil socio-economic rights lie within the province of the legislature and the executive arms of government and that the Court is institutionally incompetent having regard to the hallowed doctrine of separation of power to intervene. According to the Court:

...ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.⁹⁵

In other words, the Constitutional Court is of the view that the South African Constitution does not prescribe a particular amount of water as sufficient water and it is not within the competence of a court to determine such an amount, but within the competence of the legislative and/or the executive branch of government.

Additionally, as part of the sub-issues in the case, applicants had contended first, that the implementation of the project is an administrative decision and is therefore caught by the adequate notice and public participation provisions of the Promotion of Administrative Justice Act (PAJA).⁹⁶ The Court rejected this contention and held that the implementation of the project was approved by the City Council which is a deliberative body and is for that reason an executive and not an administrative decision within the ambit of PAJA.⁹⁷ Second, the applicants had also contended that the manner in which the respondents implemented the project was procedurally unfair in that residents were not, for instance, informed that they had a choice between prepaid water meters and standpipes which would not subject them to

⁹⁴ Id paras 56 – 57.

⁹⁵ Id at para 61.

⁹⁶ Act 3 of 2000.

⁹⁷ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 at paras 130 – 131 (CC).

abrupt cessation of water supply upon exhaustion of the monthly free basic water supply/credit.⁹⁸ In answer to this contention, the Court held that there was ample evidence that there were wide consultations with and enlightenment of residents through several public meetings and house to house visits by agents of the respondents to explain the workings and details of the projects to all the residents.⁹⁹ And that if in fact Mrs Mazibuko was not informed of this choice when she was visited at home by the agent of the respondents that that was not sufficient ground to impugn the implementation of the project as a whole. The remedy that would flow from this breach, according to the Court, would be for Mrs Mazibuko's household to apply to change her prepaid water meter to a standpipe. A request the Court has no doubt the respondents would consider.¹⁰⁰ The Court therefore interpreted procedural fairness here as something that has no invalidating effect on well considered policies of government but as something that can be remedied after the fact.

It should be noted, however, that the principle of procedural fairness is one of the important components of South Africa's socio-economic rights frameworks.¹⁰¹ The requirement of the principle is in two parts.¹⁰² First, in relation to new services, the principle states that administrative decisions that prejudicially affect the public are to be preceded by public participation and engagement.¹⁰³ And since the Court had held that the decision to implement the project was an executive one this requirement is clearly not applicable to the case. Second, in relation to existing services, the principle of procedural fairness requires that adequate notice and opportunity to make representation be given before existing services are discontinued.¹⁰⁴ By the way the Court interpreted procedural fairness in *Mazibuko*, however, bite has evidently been taken out of the principle of procedural fairness. The protection envisaged for the poor in South Africa's neo-liberal and market driven economy by the procedural fairness principle appears to have also been considerably watered down.

⁹⁸ Id at para 132.

⁹⁹ Id at paras 132 – 134.

¹⁰⁰ Id at 134.

¹⁰¹ J Dugard 'Urban basic services: Rights, reality, and resistance' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 275 at 277 – 282.

¹⁰² Id at 281 – 282.

¹⁰³ Section 4 (1) of PAJA.

¹⁰⁴ Section 3 (2) (b) of PAJA.

Furthermore, applicants have argued that if the Court is not persuaded by its arguments in the case that that would mean litigation in relation to the positive obligation of the state with respect to socio-economic rights is a futile exercise.¹⁰⁵ In response to this submission, the Court held that litigation in respect of positive obligations imposed on the state by socio-economic rights fosters a form of participative democracy and enable citizens to hold government to account between elections.¹⁰⁶ The precise ambit of the participation of the citizens and the courts in the endeavour is explicitly set out by the Court as follows:

When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.¹⁰⁷

From the above, the scope of citizens' participation through the instrumentalities of rights and the courts appear to be limited to calling upon the government to explain. Once the government has explained, that is the end of the matter. Courts are not competent to intervene beyond requiring that the government explain its programmes to the citizens. Government is not required to reflect the will of the citizens nor are the courts competent to give concrete entitlements to the citizens. And all this is because the hallowed doctrine of separation of powers requires that each organ of government keep within its institutional competence.

The Court clearly, from the foregoing, envisages for the courts and citizens alike a rather limited role for participation or involvement in socio-political issues as these have been reserved, according to the Court, to other competent arms of government based on the hallowed doctrine of separation of powers. This reliance on hallowed doctrine of separation of powers and the alleged incompetence of the courts to wade into socio-political issues are the characteristic features of liberal democratic theory as I have pointed out in Chapter Four and earlier in this Chapter. The Court's position here therefore mirrors the hands-off

¹⁰⁵ *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 at para 159 (CC).

¹⁰⁶ *Id* at para 160.

¹⁰⁷ *Id* at para 161.

approach of liberal democratic theory. On the strength of this understanding of democracy the Court dismissed all of applicants' arguments and found for the respondents.

Apart from Eusebius and Heleba who appear to support the Constitutional Court's decision in this case,¹⁰⁸ the decision has been roundly condemned by other scholars and commentators alike. According to Dugard, the Court's approach, standard of review and even remedies are not pro-poor because they serve as disincentives for the poor to bring socio-economic rights cases before the Court and denude the poor's victories of any substance and benefit in the few instances of successful litigation.¹⁰⁹ In Liebenberg's opinion, the Court took refuge under the alleged institutional incompetence of courts to police other arms of government on policy issues in order to refuse to give meaning to constitutional provision on the right of access to sufficient water. This refusal of the Court in turn imperiled the right of the poor to hold the government accountable.¹¹⁰ To the Anti-Privatisation Forum, the Constitutional Court failed miserably to strike a constitutional blow for the poor in their struggle to enjoy basic human needs.¹¹¹ And as far as De Vos is concerned, the Court is even wrong from point of view of the relevant law as the Court in fact misinterpreted relevant statutory provisions in order to give effect to a particular ideological viewpoint.¹¹²

Be that as it may, the decision of the Constitutional Court in *Mazibuko* is likely to impact on political action in three main ways. The first is the obvious legitimisation of the neo-liberal agenda and programmes of the state. By unanimously finding for the state in this case, the Court has given sanction and approval to the neo-liberal drive of the state regardless of the

¹⁰⁸ According to Eusebius who apparently was writing from a neo-liberal point of view, the Court's decision was correct as it comfortably balances between '...the rock of passively deferring to government policy processes on the one hand and the hard place of subverting the government's right to make policy on the other.' See M Eusebius 'Court strikes right balance on water for poor people' *Business Day* 13 October 2009 available at: <http://www.businessday.co.za/articles/Content.aspx?id=83847> (accessed on 27 December 2013). According to Heleba on the other hand, the judgement of the Court was correct and difficult to fault. See S Heleba 'The right of access to sufficient water and the Constitutional Court's judgement in *Mazibuko*' (2009) 10 (4) *Economic and Social Rights Review* 12 at 15.

¹⁰⁹ J Dugard 'Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's transformation' (2007) 20 (4) *Leiden Journal of International Law* 965 at 973.

¹¹⁰ S Liebenberg 'Water rights reduced to a trickle' *Mail & Guardian* 21 October 2009 available at: <http://www.mg.co.za/article/2009-10-21-water-rights-reduced-to-a-trickle> (accessed on 27 December 2013).

¹¹¹ Anti-Privatisation Forum, 'Constitutional Court rules against Phiri' available at: <http://apf.org.za/spip.php?article373> (accessed on 27 December 2013).

¹¹² P De Vos 'Water is life (but life is cheap)' available at: <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/> (accessed on 27 December 2013).

impact of such neo-liberal programmes on constitutionally guaranteed socio-economic rights. This is because the Court appears to be clear enough in saying that socio-economic rights are not to become a clog in the wheel of privatisation and commercialisation process. Also, the Court is very clear, from the statement quoted above, that the scope of rights litigation and participation of citizens in relation to the positive obligation imposed on the state by socio-economic rights is limited only to calling on the government to explain its programmes in between elections. The citizens are not entitled to demand concrete entitlements on the basis of socio-economic rights nor are the courts competent to grant same.

Second, by removing the base provided by earlier favourable decisions of the lower courts for water related struggle, the Constitutional Court decision is likely to remove a platform around which activists and other interested stakeholders can organise and mobilise. As I point out earlier in this chapter, favourable decisions of courts can foster emancipatory consciousness and pretext for political action by political actors.¹¹³ Thus, the pretext for political action and the emancipatory political consciousness fostered by the lower courts' decisions have the potential of being removed by the contrary decision given by the Constitutional Court in the case.

Third, since courts decisions also have the potential of setting the parameters and standards for future socio-political practices in the society, the decision is also likely to cast the parameters of subsequent struggle (*in futuro*) in stone and therefore constrain further struggle around the subject-matter for all times. This is because courts' decisions can exert lasting constraints on subsequent political action. As rightly observed by Piven and Cloward:

Once objectified in a system of law, the rules forged by past power struggles continue to shape ongoing conflicts by constraining or enhancing the ability of actors to use whatever leverage their social circumstances yield them. That is why new power struggles often take the form of efforts to alter the parameters of the permissible by challenging or defying the legitimacy of prevailing norm themselves.¹¹⁴

¹¹³ R Uprimmy and M Garcia – Villegas 'The Constitutional Court and social emancipation in Colombia' in B De Sousa Santos (ed) *Democratising democracy: Beyond the liberal democratic cannon* (2005) 66 at 81.

¹¹⁴ F Piven and R A Cloward 'Collective protest: A critique of resource mobilization theory' (1991) 4 *International Journal of Politics, Culture and Society* 435 at 436 – 437.

The decision is therefore likely to constrain future water related struggles by the narrow parameters that the decision sets for the scope of rights and citizens' participation.

The foregoing notwithstanding, however, Dugard has argued that despite its negative outcome in court, '...*Mazibuko* illustrates that real gains can be made through legal mobilisation conducted in the wings of litigation, especially if such mobilisation is advanced as a means in itself beyond the spatial, temporal, and professional constraints of the courtroom.'¹¹⁵ According to Dugard, *Mazibuko*, despite judicial defeat, has impacted the socio-political conditions of the poor even more than some cases where there were favourable decisions.

Some of the material benefits and gains highlighted by Dugard as flowing from *Mazibuko* includes the invigoration of water related struggles and the struggles against commercialisation of basic services; the politicisation of the desperate needs and conditions of the poor; the provisions of a platform for activist to organise around; the raising of the amount of free water to the poorest of the households to 50 litres per person per day as originally claimed by the applicants and rejected by the Constitutional Court; an installation of 'trickler' device which allows water to keep trickling out of the taps after the exhaustion of the monthly free water allocation or credit instead of outright/abrupt cessation; an undertaking by the state not to prosecute persons who bypasses prepaid water meters or stand pipe. These gains/impacts Dugard attributed to ongoing legal mobilisation (political action) during and after proceedings in the case rather than simple reliance on litigation.¹¹⁶ *Mazibuko* therefore strongly illustrates the essential place and importance of political action in socio-economic rights transformation processes. The case also appear to validate Bishop's argument that contrary decisions of courts can sometimes be a kiss of life which focuses citizens' attention on alternative forms of participation and action as happened in *Merafong* which I discuss in Chapter Four.¹¹⁷

¹¹⁵ J Dugard 'Urban basic services: Rights, reality, and resistance' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 275 at 294.

¹¹⁶ Id at 298 – 302,

¹¹⁷ M Bishop 'Vampire or Prince? The listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa and Others*' (2009) 2 *Constitutional Court Review* 313.

Having illustrated the essential nature of combining law and politics in the realisation of socio-economic rights and the impact of the courts' conception of democracy in the process from selected socio-economic rights cases in South Africa, I now turn to the illustration of same through selected cases from Nigeria.

5.3 NIGERIAN COURTS' CONCEPTIONS OF DEMOCRACY IN SELECTED SOCIO-ECONOMIC RIGHTS RELATED CASES AND ITS IMPACT ON POLITICAL ACTION

There are not as many relevant cases for examination with regard to the subject-matter of this Chapter in Nigeria as there are in South Africa. Apart from political action occurring at the level of labour related disputes, there appears to be much less socio-economic rights related action in Nigeria relative to the case in South Africa. This is probably because of the alleged non-justiciable nature of the socio-economic rights regime in Nigeria and the consequent absence of a platform around which extra-curial and curial action can be organised. It might also be that Nigerians are much more complacent than their South African counterparts. The former reason appear to me to be the more likely rather than the latter for the reasons adduced below.

That there are much more socio-economic rights related action in South Africa relative to Nigeria appears from evidence to be beyond doubt. There is evidence that service delivery protests in South Africa, which are mainly protests about basic socio-economic entitlements, started in 2004 and peaked in 2009 with an average of 19.8 protests per month.¹¹⁸ The frequency of these protests in South Africa has in fact made some scholars to classify South Africa as one with the highest rate of protests in the world.¹¹⁹ Although the claim that South Africa has the highest rate of protests in the world have been questioned,¹²⁰ my own observation and hands on experience of the Nigerian situation show that Nigeria is not

¹¹⁸ J Dugard 'Urban basic services: Rights, reality, and resistance' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 275 at 285.

¹¹⁹ See for instance, P Bond 'South Africa's bubble meets boiling urban social protests' (2010) 62 *Monthly Review* available at <http://monthlyreview.org/2010/06/01/south-africas-bubble-meets-boiling-urban-social-protest/> (accessed on 14 July 2014).

¹²⁰ J Duncan 'On protests hotspots and analytical blind spots' (2010) South African Civil Society Information Service available at <http://www.sacsis.org.za/site/article/439.1> (accessed on 14 July 2014).

anywhere near South African records of service delivery/socio-economic rights protests/action.

There is also little doubt that South African service delivery protests are informed by and structured around South Africa's socio-economic rights guarantees. Dugard has argued in this regard that although more empirical and discourse analysis researches are needed for a firm conclusion, available evidence points to the fact that the protests are oftentimes informed by and underpinned by rights.¹²¹ The South African socio-economic rights framework which makes provisions for basic necessities of life like access to water, sanitation and housing, among others appear to be a veritable instrument informing and enabling political action in South Africa. This is because these are the rights around which the protests and similar political action are organised and conducted. Thus, the absence of a justiciable socio-economic rights framework in Nigeria therefore appears to me to be the reason for the relative paucity of socio-economic rights related action in Nigeria.

Despite the relative paucity of relevant cases/instances, however, there are two major terrains where Nigerians civil society groups and public spirited individuals appear to have been very active. The first is in relation to fuel subsidies on petroleum products. The second is in relation to efforts to arrest the scourge of corruption and to promote good governance and accountability in Nigeria. Both of these terrains of contestations have a tangible nexus with and affect socio-economic rights realisation in Nigeria. The importance of oil to the socio-economic well-being of Nigeria cannot be gainsaid and same is underlined by the fact that oil resources contribute about 99% of government revenues and about 38.8% of the country's GDP.¹²² It has in fact been pointed out that '[n]ational and personal dreams, hope and aspiration are built around oil.'¹²³

¹²¹ J Dugard 'Urban basic services: Rights, reality, and resistance' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 275 at 291 – 292.

¹²² See for instance, S O Ering and F U Akpan 'The politics of fuel subsidy, populist resistance and its socio-economic implications for Nigeria' (2012) 12 (7) *Global Journal of Human Social Science* 13.

¹²³ *Ibid.*

As regards the second terrain of contestation identified to be discussed under this section, it has been pointed out that corruption is the reverse side of good governance and accountability and that same accounts for the perennial poverty and under-development of developing countries, including Nigeria.¹²⁴ The problem of corruption is, however, a more prominent concern in Nigeria having regard to the infamous reputation of the country in this regard.¹²⁵ As a result of the foregoing, there is noticeable activism and action of civil society groups and public spirited individuals to use law and politics to address the challenges and issues discussed above in Nigeria. I examine some of these instances and cases to tease out the combination of the courts' conception of democracy with and its impact on the processes.

5.3.1 The struggle against removal of fuel subsidy

As a result of the centrality of petroleum products, especially Premium Motor Spirit (PMS) (otherwise known as petrol) to personal and national socio-political life in Nigeria, the pricing of petroleum products has always been a very thorny issue. While governments have always tried to maximise revenue through increases in the price of petroleum products, individual and civil-society groups have always resisted this because of the prejudicial impact of the increases on the majority of the people who are poor. Thus, since 1978 when the first removal of the fuel subsidy took place in Nigeria, prices of PMS have been increased 16 times.¹²⁶ Most of these increases have been accompanied by widespread resistance, protests and, most-times, even nationwide strikes.¹²⁷

¹²⁴ See for instance, the US Library of Congress, Federal Research Division, *Country Profile – Nigeria, July 2008* available at <http://memory.loc.gov/frd/cs/profiles/Nigeria.pdf> (accessed on 5 November 2009); J S Nye 'Corruption and political development: A cost-benefit analysis' (1967) 61 *American Political Science Review* 417. See also the foreword to the United Nations Convention against Corruption where the United Nations opines that 'Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development'. See the Foreword to United Nations Convention against Corruption, (United Nations) iii.

¹²⁵ Transparency International has quite for some time now been ranking Nigeria as one of the most corrupt nations in the world. The organisation ranked Nigeria as the 35th most cost corrupt nation in the world in the year 2012. See Channels Television 'Transparency Int'l ranks Nigeria 35th most corrupt country' available at <http://www.channelstv.com/home/2012/12/05/transparency-intl-ranks-nigeria-35th-most-corrupt-country/> (accessed on 5 December 2012).

¹²⁶ Prices of PMS was increased from 8.4 kobo to 15.37 kobo per litre in 1978; from 15:37 kobo to 20 kobo per litre in January 1982; from 20 kobo to 39.50 kobo per litre in March 1986; from 39:50 kobo to 42 kobo per litre in April 1988; from 42 kobo to 60 kobo per litre for private cars in January, 1989; from 60 kobo to 70 kobo per litre in March 1991; from 70 kobo to N5. 00 per litre in November 1993 but reduced to N3. 25 kobo per litre after nation-wide protests; from N3. 25 kobo to N15.00 per litre in October 1994 but reduced to N 11. 00 per

Although strikes and mass protests by organised labour and civil society groups were a feature of earlier struggle against the removal of the fuel subsidy in Nigeria, it became a much more important and potent tool of the struggle from 1999 onward. For instance, in June 2000, the government of Nigeria once again increased the price of petroleum products from N20 to N30 per litre. This prompted a volatile reaction from organised labour and civil society groups who, in conjunction with organised labour declared a strike and mass protests against the increase. The strike and protests ground to a complete halt the social and economic life of the Nation for about two weeks. As a result of this political action, the government of Nigeria reduced the price of petrol from N30 to N25 per litre after one week of continuous protests. Organised labour rejected this reduction and continued the action insisting on the total reversal of the increase. The price was later reduced to N22.00 per litre on the 13th of June 2000. Consequent upon the reversal of the price and after consultation and dialogue with organised labour, the strike and mass protests were called off.¹²⁸

The impact of courts' interpretive function and conception of democracy on the struggle/political action against removal of fuel subsidy in Nigeria is, best exemplified by the *FGN v Oshiomole* cases. In *FGN v Oshiomole*,¹²⁹ a decision of the the High Court of the Federal Capital Territory Abuja, the Federal Government of Nigeria (FGN) had increased the price of petrol again from N26 to N40 per liter in June 2003.¹³⁰ A strike and mass protests were spearheaded by the Nigerian Labour Congress to force down the price. As a result of this, the FGN first approached the High Court of the Federal Capital, Abuja, for an injunction

litre two days later after widespread protests; from N11.00 to N25.00 per litre in December 1998, later reduced to N20.00 per litre after much protests by Nigerians; from N20.00 to N30.00 per litre in June 2000 only to be reduced to N22.00 per litre after massive protests and strikes by organised labour and civil society organisations; from N22.00 to N26.00 per litre in January, 2002; from N26.00 to N40.00 per litre in June 2003; from N40.00 to N70.00 per litre in 2007 but later reduced to N65.00 per litre; from N65.00 it was increased to N141.00 per litre in January of 2012 pursuant to a policy of total deregulation of the downstream of Nigerian oil sector but was later reduced to N97.00 per litre after weeks of massive and widespread protests by organised labour and civil society organisations.

¹²⁷ See S O Ering and F U Akpan 'The politics of fuel subsidy, populist resistance and its socio-economic implications for Nigeria' (2012) 12 (7) *Global Journal of Human Social Science* 13; A Lasisi and J Augoye 'A history of protests against subsidy removal' <http://www.punchng.com/news/a-history-of-protests-against-subsidy-removal/> (accessed on 10 September 2012) for more detail.

¹²⁸ See also S O Ering and F U Akpan 'The politics of fuel subsidy, populist resistance and its socio-economic implications for Nigeria' (2012) 12 (7) *Global Journal of Human Social Science* 13 at 14.

¹²⁹ (2004) 9 WRN 129.

¹³⁰ One of the many instances the Federal Government of Nigeria increased the price of petroleum products in Nigeria.

to restrain organised labour from proceeding on the strike or mass protests against the increase. The Court, toeing a rights-centered line, declined the injunction, holding that the right of association and assembly in the Constitution of Nigeria confers a right on all Nigerians to meet and discuss all matters of common interest.¹³¹ According to the Court, '[i]f the Nigerian workers through the Nigerian Labour Congress consider the imposition of the N1.50k fuel sales tax inimical to their interest, they have a fundamental right to assemble or mass protest in opposition to such imposition.'¹³²

This unfavourable ruling did not, however go down well with the government who proceeded to the Federal High Court Abuja (the High Court) to file the very same action against organised labour and obtained what some activists have called 'a black market injunction'. It was argued by the government before the High Court that the strike and mass protests being contemplated by organised labour is not in furtherance of a trade dispute as defined by law and is therefore illegal. It was also argued that the defendant (organised labour) is not entitled to use constitutionally guaranteed rights of freedom of expression, association and assembly to challenge government policies. The High Court agreed with all the arguments of the government and declared the contemplated strike and mass protests illegal. Dissatisfied with the decision of the High Court, the defendant/appellant appealed to the Court of Appeal.¹³³

At the Court of Appeal, the case proceeded on similar grounds as before the High Court. The Court of Appeal is of the opinion that the pricing of petroleum products is a policy matter for the government which is of no concern to organised labour because the issue is not a trade dispute. And thus that organised labour have no business calling workers out on strike to challenge the policy decisions of government. In the Court's, view therefore, the political action of strike and mass protests of organised labour to challenge government policies and force down the price of petroleum products in Nigeria is illegal and not within the ambit of a trade dispute. Notably, the Court also held that organised labour cannot hide behind the

¹³¹ *FGN v Oshiomole* (2004) 9 WRN 129 at 137.

¹³² *Ibid.*

¹³³ *Oshiomole and Another v FGN and Another* [2007] 8 NWLR (Pt. 1035) 58 at 68 – 70.

constitutionally guaranteed rights of expression, association and assembly as same cannot be exercised to challenge considered policies of government.¹³⁴

Although there is no express articulation by the Court of any particular conception of democracy in this case, the Court's conception of democracy can however be gathered from what and how the Court arrived at its decision. The first thing to note here is how the Court appears to have privatised suffering or hardship. This is apparent from the Court's disregard of the appellant's argument of prejudicial effects that will be occasioned by the increase in the prices of petroleum products in terms of adverse effects on workers' and citizens' purchasing power and general living standards. The implication of this disregard is that the Court is apparently of the view that this is not a matter for the courts to deal with but a private matter of negotiation between the employees and the employers. The second point to note also is how the Court takes policy decisions of the government out of the scope and ambit of the fundamental rights of the citizens and the competence of the courts. This the Court did by saying that organised labour cannot hide under the umbrella of freedoms of association and assembly to challenge considered policies of government.

Underlying the above two important features of the decision is a sharp distinction between the private/public realm and the hallowed doctrine of separation of powers. The private/public dichotomy is apparent from the Court's privatisation of hardship and refusal to consider the prejudicial impact of the governmental policy in question on the well-being of the people while the operation of the doctrine of separation of powers is apparent from the Court's refusal to question or examine the impact of the policy. The foregoing informed the Court's hands – off approach to the case. As has been pointed out by Frazer, a sharp distinction between the private and public sphere of society is a fundamental assumption and key signifier of bourgeois liberal orders.¹³⁵ Under this fundamental assumption, bourgeois liberal orders depoliticises needs and poverty and transfers them into the private realm.¹³⁶

¹³⁴ Id at 74 – 80.

¹³⁵ N Frazer 'Rethinking the public sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25/26 *Social Text* 56 at 70 – 74.

¹³⁶ See for instance, N Fraser 'Talking about needs: Interpretive contests as political conflicts in welfare-state societies' (1989) 99 *Ethics* 291 and D Brand 'The "politics of need interpretation" and the adjudication of socio-economic rights claims in South Africa' in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17.

Slavish observance of the doctrine of separation of powers is also a fundamental assumption and key signifier of liberal democracy as I have variously discussed in Chapter Four and earlier in this Chapter. Under this doctrine, policies are regarded as the exclusive preserve of the executive arm of government; a terrain upon which the judiciary or the citizens must not tread. Thus, even though there is no express articulation of particular conception of democracy by the Court of Appeal in *Oshiomole and Another v FGN and Another*, the decision of the Court therein could be seen to mirror a liberal democratic conception of democracy. On the strength of this conception of democracy, the Court of Appeal affirmed the decision of the High Court on all grounds and dismissed the appeal of the appellant.

The impact of the rather narrow conception of democracy of the Federal High Court and the Court of Appeal on the political action of organised labour and members of civil society to struggle against the neo-liberal policies of incessant increase in the price of petroleum products is probably apparent in the relative incapacity of these role players to effectively challenge the spate of price increases from 2003 onwards compared to earlier periods. While there may not be a direct connection between these decisions and price increases between 2003 and 2007, one is bound to wonder whether the relative incapacity of organised labour to mobilise the citizenry for action against price increases that took place between 2003 and 2007 is not a direct fall-out of a declaration of illegality by the courts of the action of organised labour. This is having regard to the fact that except in 2007 when the price of petroleum products was reduced to N65.00 from N70 per litre by executive fiat of President Yaradua upon assuming office in May 2007, there was no comparable reduction of prices consequent upon political action from 2003 to 2012.

The struggle of the populace against fuel price increases in Nigeria, however, came to a head in January 1st 2012 when the FGN pursuant to a policy of total deregulation of the downstream sector of Nigeria increased the price of petrol from N65.00 to N142.00 per litre. The FGN had towards the end of 2011 been consulting and interacting with relevant stakeholders and civil society groups to apprise the populace of the deregulation policy of the government. Before the conclusion of consultations, however, the government suddenly aborted the consultation processes, implemented the policy and hiked the price of petrol from N65.00 to N142.00 per litre. This unilateral and rather arbitrary action of the government of

Nigeria prompted mass protests and strikes reminiscent of the Arab spring the likes of which has not hitherto been seen in Nigeria.¹³⁷ The mass protests which lasted for about 15 days took place in most major cities across the length and breadth of Nigeria and grounded all economic and social activities throughout the period of the protests. The strike and protests were finally called off by Nigerian Labour leaders on the 16th of January 2012 after the government deployed soldiers on major streets of Lagos and other parts of the country to break up the protests. The price of petrol was also reduced from N142 .00 to N97.00 after consultation with (or coercion of?) labour leaders.

Apart from the reduction in the price of petrol achieved by the political action of mass protests and strike of January 2012, the action also occasioned renewed anti-corruption efforts and prosecutions in the Nigerian oil and gas sector and kick-started several reform processes. Several civil society groups and public spirited individuals also resorted to constitutional politics to continue the struggle. While many of the cases instituted consequent upon the mass protests is still pending in courts across the country, one of the cases relevant to our discussion here in which a decision has already been given is the case of *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others*.¹³⁸

Bamidele Aturu v Hon. Minister of Petroleum Resources and Others was instituted in 2009 by the applicant as a result of the incessant increase in the price of petroleum products in Nigeria pursuant to the government's policy of deregulation. The applicant had approached the Federal High Court, Abuja contending that the government's policy of deregulation of the downstream sector of Nigeria's oil and gas economy is illegal and unconstitutional. This contention is based on the arguments that by section 6 (1) of the Petroleum Act,¹³⁹ section 4 (1) of the Price Control Act¹⁴⁰ and section 16 (1) (b) of the Nigerian Constitution¹⁴¹ the

¹³⁷ See also National Mirror 'One year after Occupy Nigeria protests' available at <http://nationalmirroronline.net/new/one-year-after-occupy-nigeria-protests/> (accessed on 18 January 2014) where the mass protests was described as unprecedented.

¹³⁸ Suit No: FHC/ABJ/CS/591/09 (delivered on the 19th day of March, 2013).

¹³⁹ Cap P10 LFN 2004. Section 6 (1) of the Petroleum Act provides thus: The Minister may by Order published in the Federal Gazette fix the price at which petroleum products or any particular class or classes thereof may be sold in Nigeria or in any particular part thereof.'

¹⁴⁰ Cap P28 LFN 2004. Section 4 of the Price Control Act provides thus: Price Control shall continue to be imposed in accordance with this Act on any goods which are of the kind specified in the First Schedule to this Act.' Petroleum products are thereafter listed as Item No 7 in the First Schedule to the Act.

government is legally obliged to regulate the petroleum sector of Nigeria so as to secure the maximum welfare, freedom and happiness of every Nigerian and that the government's policy of deregulation is contrary to this obligation. The applicant also contended that the government's policy of deregulation will render illusory applicant's right to freedom of movement in section 41 of the Nigerian Constitution. The defendants opposed the claim of the applicant on the ground that he has no *locus standi* and that the suit discloses no cause of action, among others.

In finding for the applicant and dismissing the objections of the defendants, the Court held, relying on the republican (communitarian) and rights – centred understanding of democracy aspects of *Adesanya v President of Nigeria*¹⁴² and *Fawehinmi v The President*,¹⁴³ that on both the private rights and public interest view of *locus standi* the applicant is properly before the court and has the requisite *locus standi* to maintain the action. According to the Court:

A community reading of the questions for determination in this suit, the reliefs sought and the relevant averments of the Plaintiff as reproduced above reveals that the subject matter of the Plaintiff's case involve (sic) both his private right as a citizens of Nigeria and the right of other Nigerians at large which he perceived are threatened by the decision of the Defendants to deregulate the downstream sector of the petroleum industry. It is clear therefore that under both the narrow interpretation of *locus standi* (sic) as highlighted in the decided cases and the broader interpretation, the Plaintiff is qualified to be accorded *locus standi* (sic) to sue in this matter.¹⁴⁴

The Court also held on the substantive suit that the combined provisions of sections 6 and 4 of the Petroleum Act and the Price Control Act respectively has made justiciable the economic objective of section 16 (1) (b) in Chapter II of the Nigerian Constitution. The government is therefore obliged to regulate and fix, from time to time, the price of petroleum products in Nigeria in such manner as to secure the maximum welfare, freedom and happiness of every citizen of Nigeria. The government's policy of deregulation was therefore held by the Court to violate this constitutional obligation and is for that reason illegal and

¹⁴¹ Section 16 (1) (b) of the Constitution of Nigeria provides that 'The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution - (b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity'.

¹⁴² [1981] 2 NCLR 358.

¹⁴³ (2008) 23 WRN 65.

¹⁴⁴ *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others* Suit No: FHC/ABJ/CS/591/09 (delivered on the 19th day of March, 2013) 14.

unconstitutional.¹⁴⁵ The message seems to be that if the government wants to deregulate it has to change existing laws.

The precise impact and effect of this decision on Nigeria's socio-economic rights regime and transformation is yet to be fully appreciated. Suffice it to say that the decision appears to have created a strong platform for political action to roll back some of the more prejudicial neo-liberal policies and agenda of the Federal Government of Nigeria, at least in Nigeria's petroleum industry. This will be the case as long as the laws forming the basis of this decision remain unchanged. The decision appears also to hold immense potential for political action and socio-economic rights transformation in Nigeria having regard to the role and importance of petroleum to Nigeria's socio-economic and political life. This will be the case in at least three respects.¹⁴⁶

The first is the immediate transformation of the Nigeria's non-justiciable socio-economic rights regime into, at least, a quasi-constitutional one. This argument is based on the fact that the African Charter which has become part and parcel of Nigeria domestic law by virtue of its domestication in Nigeria did not make the traditional distinction between civil and political rights and socio-economic rights. The effect of this is to elevate the socio-economic rights provisions of the Charter onto the same pedestal of justiciability as civil and political rights in Nigeria. This argument is based on the reasoning of the Court in *Bamidele Aturu* on the justiciability of section 16 (1) (b) of the Nigerian Constitution through the combined provisions of sections 6 (1) and 4 (1) of the Petroleum Act and Price Control Act respectively. If that reasoning is followed, it seems to me that the domestication of the African Charter by the government of Nigeria has made justiciable, at least, those socio-economic rights provisions in Chapter II of the Nigerian Constitution which has counterpart in the African Charter. The implication of this for political action will be the provision of a rights enabled platform upon which socio-economic rights related struggle can be furthered comparable to what is obtainable in South Africa.

¹⁴⁵ Id at 18 – 19.

¹⁴⁶ A E Akintayo 'A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights: Lessons from the *Nigerian case of Bamidele Aturu v Minister of Petroleum Resources and Others*' (2014) 15 (2) *Economic and Social Rights Review* 5.

The second potential that the case holds for socio-economic rights related political action in Nigeria is the humanisation of the neo-liberal policies and programmes of the Nigerian government. This is through the subjection of those programmes to the constitutional dictates of maximum welfare, freedom and happiness. As stated by the Court above, the underlying reasons for the government's economic policies and objectives as contained in section 16 (1) (b) of the Nigerian Constitution is to secure maximum welfare, freedom and happiness for all citizens of Nigeria. Consequently, any policy that will negatively impact on these constitutional requirements will be null and void. This is specifically the case with regard to the Nigerian petroleum sector via the combined reading of section 16 (1) (b) of the Nigerian Constitution and sections 6 (1) and 4 (1) of the Petroleum Act and Price Control Act respectively. I argue here that it is also generally the case in all other spheres of Nigeria's economy through the combined reading of section 16 (1) of the Nigerian Constitution and the relevant provisions of the African Charter. The implication of this for political action is the same provisions of a platform around which struggle against economic deprivations can be furthered.

The third and by far the most radical of the likely implications of the decision is the implied outlawing of neo-liberalism, probably the biggest enemy of the realisation of socio-economic rights, in Nigeria. The Court is in this regard unequivocal that the Nigerian Constitution provides for a regulated economy the purpose of which is to secure the maximum welfare, happiness and freedom of the citizens. And a regulated economy the purpose of which is the maximum welfare, happiness and freedom of citizens will appear to me the very anti-thesis of neo-liberalism. This means that either the former or the latter must give way. And since Nigeria is a constitutional democracy with a supreme constitution, it appears it is neo-liberalism that will give way. At least until an appellate court overrule the decision or a more neo-liberal compatible constitution is enacted in Nigeria. The potential of this for political action is the legitimation and enablement of struggle and action against prejudicial neo-liberal policies and programmes.

However, whether the laws forming the basis of the decision will remain unchanged and whether this transformative decision will not subsequently be overturned by Nigerian appellate courts are different matters entirely.

5.3.2 Struggle against opacity, corruption and abuse of office in governance

As stated above, the second terrain of contestation where there are noticeable activities of civil society groups and individuals to use law and politics to engage social issues and where the impact of courts' conception of democracy can again be deduced is in the area of the fight against corruption and unaccountable government. One of the first cases in this area of the law is *Fawehinmi v The President*.¹⁴⁷ In this case, the appellant had approached the court for a declaration that the remuneration of the of the 3rd and 4th respondent, Ministers of the Government of the Federation, who were being paid in US Dollars and far in excess of the amount stipulated by a statute¹⁴⁸ is a violation of the relevant statute and a gross breach of the Nigerian Constitution. The respondents objected to the *locus standi* of the appellant on the ground that it has not been shown that the appellant's civil rights and obligations are in issue pursuant to section 6 (6) (b) of the Constitution, among other arguments. The trial High Court agreed with the respondents and held that the appellant had no *locus standi* to institute the action. On appeal to the Court of Appeal, the latter reversed the High Court and held that the appellant, being a citizen of Nigeria and a tax payer had the *locus standi* to institute the action. The Court pronounced as follows:

In this country, [Nigeria] where we have a written Constitution which establishes a constitutional structure involving tripartite allocation of power to the judiciary, executive and legislature as the co-ordinate organs of government, judicial function must primarily aim at preserving legal order by confining the legislative and executive within their powers in the interest of the public and since the dominant objective of the rule of law is to ensure the observance of the law, it can best be achieved by permitting any person to put the judiciary machinery in motion in Nigeria whereby any citizen could bring an action in respect of a public derelict. Thus, the requirement of *locus-standi* becomes unnecessary in constitutional issues as it will merely impede judicial functions.¹⁴⁹

Thus, the Nigerian Court of Appeal relying on the republican (communitarian) aspects of the Supreme Court of Nigeria conception of democracy in *Adesanya* validated the competence of

¹⁴⁷ (2008) 23 WRN 65.

¹⁴⁸ Certain Political, Public and Judicial Office Holders (Salaries and Allowances, etc) Act 6 of 2002

¹⁴⁹ *Fawehinmi v The President* (2008) 23 WRN 65 at 114.

the appellant to question how Nigeria's common wealth is being expended by those in authority.

The popularity of this decision and its impact in providing a platform for the anti-corruption struggle in Nigeria is clearly evident in the way it has become a rallying point and point of reference and convergence for civil society groups and individuals involved in *actio-popularis* suits in the area of good governance and accountability litigation. Many of the cases that have been instituted in this area of the law have been based on the authority of the decision.¹⁵⁰

Also in *In Re: Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria*,¹⁵¹ the applicant, an NGO whose primary objectives are the protection and promotion of good governance, public accountability and the rule of law in Nigeria, instituted in the Federal High Court, Abuja a suit under Nigeria's Freedom of Information Act, 2011¹⁵² to compel the respondent to furnish it with information regarding the details of the emolument, salary and allowances of members of the Nigerian Senate and House of Representatives of the 6th Assembly.¹⁵³ The same request has earlier been made by the applicant and refused by the respondent. The respondent resisted the claims of the applicant. Three features of the case are important to highlight for the purposes of the contrasts that I make shortly between this case and the ones I discuss thereafter. First, the respondent claimed that the suit was filed out of the statutorily stipulated time of 30 days. Second, the respondent alleged that other litigation on the same subject-matter of the applicant's suit is pending before other courts in Nigeria and to grant the request of the applicant in this case will prejudice the outcome of those cases. Third, the respondent contended that the information been requested by the applicant is within that excepted by the Freedom of Information Act as it consisted of the personnel and personal information of elected officials of public institutions.¹⁵⁴

¹⁵⁰ See for instance, Channels Television 'Oil windfall ruling; a setback in the fight against corruption — SERAP' available at <http://www.channelstv.com/home/2012/11/30/oil-windfall-ruling-a-setback-in-the-fight-against-corruption-serap/> (accessed on 30 November 2012). See also the case *SERAP and Others v Attorney General of the Federation* Suit No: FHC/ABJ/CS/640/10.

¹⁵¹ Suit No: FHC/ABJ/CS/805/2011. Delivered on the 25th of June, 2012.

¹⁵² The Freedom of Information Act 2011 was enacted to operationalise the right to freedom of expression in section 39 of the Constitution of Nigeria.

¹⁵³ That is from 2007 to 2011.

¹⁵⁴ Section 14 (1) of the Freedom of Information Act excepted personnel files and personal information of employees, appointees and elected officials of any public institution, among others.

The Court rejected the contention of the respondent and held that the applicant has a right to the information sought and that section 20 of the Act allows for an extension of time within which an applicant can bring his/her application.¹⁵⁵ The Court also held that there was no evidence before it to show how the disclosure of the information sought by the applicant will prejudice the pending litigation. Finally, the Court held that the information sought by the applicant is not within the exception provided by the Act and that even if that were to be the case, the Act provides that such information can still be disclosed if it touches upon and impinges on the public interest. The Court went further to state that where rights and interests of individuals clash with the collective interest, collective interest must be held paramount. According to the Court, the information being requested by the applicant relates to what was paid to the Honourable Members of the 6th Assembly from public fund while they were in public service. This did not constitute personal information; and if it did, it can be disclosed based on the provision of section 14 (3) of the Act which allows disclosure of protected information if the disclosure will be in the public interest.¹⁵⁶ The Court further held that the disclosure of the requested information will be in the public interest and ordered the respondent to furnish the applicant with the requested information within 14 days of the order.

Also, in this case there is no express articulation of a particular conception of democracy by the Court. Clearly, however, the Court places high premium on collective and public interest in vindicating the legal rights of the applicants to access the information sought. The placing of emphasis on collective interests of citizens to vindicate citizens' participation in public decision making processes is a feature of republican constitutionalism/democracy as articulated by Michelman.¹⁵⁷ Republican constitutionalism privileges the communitarian

¹⁵⁵ Section 20 of the Freedom of Information Act, 2011 provides that: 'Any applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow.'

¹⁵⁶ Section 14 (3) of the Freedom of Information Act, 2011 provides that: 'Where disclosure of any information referred to in this section would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom the request for disclosure is made shall disclose such information subject to section 14 (2) of the Act.'

¹⁵⁷ F Michelman 'Foreword: Traces of self-government' (1986-1987) 100 *Harvard Law Review* 4; F Michelman 'Law's republic' (1987-1988) 97 *Yale Law Journal* 1493; F Michelman 'Conceptions of democracy in American constitutional argument: The case of pornography regulation' (1988 – 1989) 56 *Tennessee Law Review* 291.

interests of the citizens over individual rights of persons as the Court appear to have done in this case. Republican constitutionalism/democracy is a variant of liberal democratic theory.

The likely impact of this decision is of course to validate and enhance the capacity and ability of the citizens to call government to account. The decision, just like *Fawehinmi v The President* above, has the potential of providing a strong platform for public spirited civil society groups and individuals to further an open and accountable government through both curial and non-curial action. Although there are as yet no clear examples of instances where civil society groups/individuals relied on the law created in this judgment to gain access to important corruption-related information, just like its predecessor, *Fawehinmi v The President*, however, the case is potentially a strong platform upon which the war against corruption, opaqueness and abuse of office can be carried forward in Nigeria.

In contrast to *Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria*, the other cases I consider below show that the meaning assigned to the provisions of section 39 of the Nigerian Constitution and the Freedom of Information Act 2011 by the High Court in *Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria* is not a given or inevitable.

The first of the cases I consider here is *Incorporated Trustees of the Citizens Assistance Centre v Hon. S Adeyemi Ikuforiji*.¹⁵⁸ It is a case instituted by the applicant under the same Freedom of Information Act, 2011 at the High Court of Lagos State to compel the respondents to furnish it with the cost of the overheads of the Lagos State House of Assembly between the periods of May 1999 to September 2011. Similar objections as those raised by the respondent in the former case were also raised in the latter. For instance, it was also alleged by the respondents that the applicant filed the suit out of statutorily prescribed time. Also, that the subject-matter of the request is excepted under the Act as it consisted of the personnel and personal information of elected officials and employees of a public institution. Finally, the respondent in this case argued that the Freedom of Information Act is not retrospective, among other arguments.

¹⁵⁸ Suit No: ID/769M/2011 (delivered on the 14th day of March, 2012).

In contradistinction to the decision of the Federal High Court in *Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria*, the High Court of Lagos State agreed with all the arguments of the respondents as set out above. The Court held that the applicants brought the application outside the 30 days prescribed by the Act and that this is fatal to the application. This is despite the clear provisions of section 20 of the Act to the contrary which added the phrase ‘...or within such further time as the Court may either before or after the expiration of the 30 days fix or allow.’ The Court also held that the information concerning the overhead of the Lagos State House of Assembly is excepted by the Act. This is in opposition to the position of the Federal High Court on the issue as discussed above. Finally, the Court held that the Freedom of Information Act only commences on the 28th day of May 2011 and the information being requested by the applicant dated back to 1999 and that since the Act is not meant to be retrospective the request of the applicant cannot be granted.

Also, in *the Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another*,¹⁵⁹ applicants sued the respondents in the Federal High Court, Abuja to account for and publish the statement of account relating to how 12.4 Billion Dollars Nigerian oil windfall between the period of 1988 to 1994 was spent. Applicants’ based their claims upon their right to information under section 39 of the Nigerian Constitution and article 9 of the African Charter and upon the right of Nigerians to their natural wealth and resources under articles 21 and 22 of the African Charter. Several objections were raised by the respondents against the claims of the applicant. One of the primary ones was that applicants lack the *locus standi* to institute the action as they have not shown how their personal rights are prejudiced by the non-disclosure of the information sought. The Court took a classical rights-centred and liberal democratic approach to the suit and held that the applicants have not shown how their civil rights and obligations pursuant to section 6 (6) (b) of the Constitution are prejudiced or are in issue with regard to the issue of the missing/mismanaged fund. According to the Court:

I have no doubt that the Applicants, driven by positive motive to ensure accountability and transparency in the management of the scarce resources of Nigeria, have genuine love and concern for this Country but I find myself unable, by my understanding of the provisions of the Constitution and

¹⁵⁹ Suit No: FHC/ABJ/CS/640/2010 (delivered on the 29th day of November, 2012).

appellate Courts' decisions thereon, to confer on them the *locus standi* which the drafters of the **CFRN, 1999 As Amended** did not vest on them.¹⁶⁰

The Court also declared unconstitutional the preamble of Nigeria's Fundamental Rights Enforcement Procedure Rules, 2009 which for the first time included the rights in the African Charter and in other international human rights instruments as rights that can be enforced via the speedier procedure in Fundamental Rights Enforcement Procedure Rules and conferred *locus standi* on the applicants.

The point should be made here that the position of the Court in the above case runs counter to the position of the Nigerian Court of Appeal in *Fawehinmi v The President*¹⁶¹ (discussed above) which took a republican (communitarian) democratic theory approach to a similar issue and validated the competence of the appellant in the case to challenge the expenditure of public funds. Several decisions of the Supreme Court of Nigeria have also stated that the provisions of the African Charter can be enforced via the Fundamental Rights Enforcement Procedure Rules.¹⁶²

Furthermore, in *Femi Falana v The Senate and 4 Others*,¹⁶³ the plaintiff had also challenged the unilateral increase of the salary and emoluments of members of Nigeria's legislative houses by the legislative houses themselves in the Federal High Court, Abuja as a breach of section 70 of the Nigerian Constitution which vests the function of determining the salary and emoluments of Nigeria's federal lawmakers in the Revenue Mobilisation Allocation and Fiscal Commission.¹⁶⁴ The Court here also toed the rights-centred line and held that the plaintiff lacks the requisite *locus standi* to maintain the action because he has not shown how the salary and emoluments of members of federal legislative houses violated his civil rights and obligations. The Court opined that the only entity that is entitled to complain in this matter is the Revenue Mobilisation Allocation and Fiscal Commission which is a governmental organ.

¹⁶⁰ *The Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* Suit No: FHC/ABJ/CS/640/2010 at 31 (emphasis in original).

¹⁶¹ (2008) 23 WRN 65

¹⁶² See for instance, *Agbakoba v Director of State Security Service & Another* (1999) 1 NWLR (Pt. 625) 129 and *Abacha v Fawehinmi* (2001) 51 WRN 29, among others.

¹⁶³ Suit No: FHC/ABJ/CS/603/10 (delivered on the 22nd day of May, 2012).

¹⁶⁴ Section 70 of the Nigerian Constitution provides that: 'A member of the Senate or of the House of Representatives shall receive such salary and other allowances as Revenue Mobilisation Allocation and Fiscal Commission may determine.'

From the analysis above, *Incorporated Trustees of the Citizens Assistance Centre v Hon. S Adeyemi Ikuforiji, the Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* and *Femi Falana v The Senate and 4 Others* discussed above all have similar threads running through them. The first thread is the courts' rights-centred approach. All three courts based their decisions on the fact that the applicants in the respective cases must show how the non-disclosure of information sought violated their civil rights and obligations as individual citizens before they will be competent to demand for the information sought. This approach in addition to being rights centred reflects, at the same time the public/private dichotomy of liberal democratic theory. Thus, the main difference between the cases of *Fawehinmi v The President and Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria* on the one hand, and *Incorporated Trustees of the Citizens Assistance Centre v Hon. S Adeyemi Ikuforiji, the Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* and *Femi Falana v The Senate and 4 Others* on the other hand is that while the former cases took the communitarian and more participatory republican constitutionalism/democratic approach to the cases, the latter cases took the rights centred and narrower classical liberal democratic approach. And as I have stated when I examined the cases on *locus standi* in Chapter Four, cases like the latter that place a very high premium on rights as the requisite window of citizens' involvement and participation in public decision making processes and keep strictly to the private/public law distinctions are exhibiting features that are peculiar/specific to liberal constitutionalism.¹⁶⁵ It is therefore safe to conclude here also that the latter group of cases are exhibiting classical liberal constitutionalism/democratic traits.

Furthermore, contrasts of the foregoing cases also brought to the fore the problem of the pliability of legal texts highlighted by the CLS scholars. It revealed that the pliable nature of legal texts is a two-edged sword available to both the transformative and the conservative judges to be used according to their respective inclination.¹⁶⁶ Finally, contrasts of the cases

¹⁶⁵ S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 59 - 63; S Liebenberg 'Socio-economic rights beyond the public-private law divide' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 63.

¹⁶⁶ See A E Akintayo 'Pliability of legal texts under a transformative constitution: *Mansingh v President of the Republic of South Africa* 2012 6 BCLR 650 (GNP) in perspective' (2012) 27 (2) *Southern African Public Law* 639 where I elaborate on the problem of pliability of legal texts under a transformative constitution.

also seem to show that the scale is being tilted in favour of conservative judges who through their interpretation are aborting the transformative potentials inherent in the pliability of legal texts and constraining political action and popular democracy. The foregoing revelations only go to underline further the need and importance of an appropriate conception of democracy which will serve as a guide to the courts in their interpretive work in constitutional democracies. This most important need is part of the consideration that informed this thesis.

Having examined selected socio-economic rights related political action in both South Africa and Nigeria and the impact of the courts' conception of democracy thereon, I now turn to the analysis of what the comparison throws up.

5.4 ANALYSIS OF THE COMPARISON BETWEEN SOUTH AFRICA AND NIGERIA

Comparisons of South Africa and Nigeria done in this chapter throw up the following contrasts and similarities. First, evidence from both South Africa and Nigeria suggests that rights are themselves a very important platform for both curial and extra-curial political action, as the cases of *TAC*, *Joe Slovo* from South Africa and *FGN v Oshiomole* in the High Court of the Federal Capital Territory, Abuja, Nigeria, among others show. It does appear that as a result of the more robust socio-economic rights regime in South Africa and the resultant platform for political action, there is more robust socio-economic rights related political action in South Africa relative to Nigeria. South Africans, apparently because of the justiciable socio-economic rights regime, also appear more willing and able to supplement extra-curial political action with constitutional rights politics.

Second, the downside to a rights-provided platform for action as that obtainable in South Africa is that South African courts appear to be more rights-centred and technical in their approach to constitutional rights politics with the attendant rather narrower scope for political action and social transformation. The cases of *Grootboom*, *Mazibuko*, *Joe Slovo*, and even *TAC* were all cases that would have achieved relatively little had they not been supplemented, at some point, by political action as analysis above revealed. As a matter of fact, Langford has in this regard noted the limited impact of *51 Olivia Road* where there appear to have been

sole reliance on rights and decision of the Constitutional Court.¹⁶⁷ This is despite the favourable decision and order of engagement made by the Constitutional Court in the case. Langford notes that there has been little progress in the implementation of agreements reached between parties in the case. Owners of buildings in the area are also noted to have simply developed new eviction strategy to counter the Court's decision which in turn has necessitated development of a new round of strategic litigation strategies from civil society groups.¹⁶⁸

If *51 Olivia Road* is contrasted with how and the quantum of gains/benefits the applicants in *Mazibuko* were able to secure through political action, the obvious limitation of undue reliance on rights becomes glaring. This, of course, is the usual effect of undue reliance on rights as instrument of social change and transformation as has been correctly pointed out by many progressive scholars.¹⁶⁹ Nigerian courts on the other hand, probably because of the absence of a rights enabled platform appear, occasionally, more willing to go beyond the narrow confines of rights to adopt a more political action-friendly conception of popular democracy as in cases like *Fawehinmi v Akilu*, *Fawehinmi v The President* and *Legal Defence & Assistance Project (Gte) Ltd*, among others where Nigerian courts adopted the republican (communitarian) conception of democracy to vindicate citizens' action.

However, in spite of the contrasts pointed out above, and except for the few exceptions mentioned in the foregoing paragraph in relation to occasional adoption of a republican conception of democracy by Nigerian courts, both Nigerian and South African courts have a similar liberal/representative understanding of democracy with its narrow space for citizens' political action and involvement.

¹⁶⁷ M Langford 'Housing rights litigation: *Grootboom* and beyond' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 187 at 217 – 218.

¹⁶⁸ *Ibid.*

¹⁶⁹ See for instance, M Wa Mutua 'Hope and despair for a new South Africa: The limits of rights discourse' (1997) 10 *Harvard Human Rights Journal* 63; M Tushnet 'An essay on rights' (1983 – 1984) 62 *Texas Law Review* 1363; P Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1983-1884) 62 *Texas Law Review* 1563; R West 'Rights, capabilities and the good society' (2001) 69 *Fordham Law Review* 1901; K Van Marle 'Lives of action, thinking and revolt – A feminist call or politics and becoming in post-apartheid South Africa' (2004) 19 *Southern African Public Law* 605.

A close scrutiny of the cases examined from both jurisdictions also show that there may not be sustained political action without the law and neither can there be effective constitutional politics without contemporaneous political action. The contrasts of such cases like *TAC* and *Mazibuko* in South Africa and *Fawehinmi v The President* in Nigeria made this point clear.

Finally, analysis of some of the cases examined also show that as a result of the pliable nature of legal texts, conservative judges are constraining political action and aborting the transformative potentials of popular democracy and human rights. *Incorporated Trustees of the Citizens Assistance Centre v Hon. S Adeyemi Ikuforiji, the Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* and *Femi Falana v The Senate and 4 Others* in Nigeria, and *Mazibuko* in South Africa also makes the foregoing point very clear. This conclusion underscores the need for a more appropriate judicial conception of democracy.

5.5 THE DIFFERENCE THAT THE WABIA MODEL OF DEMOCRACY IS LIKELY TO MAKE

Socio-economic rights transformation is a process that is steeped in both politics and policy as has been pointed out earlier. A conception of democracy that will further the needed political action and make the necessary difference should be one that vindicates the parity of participation and the rights of citizens to be involved in the politics and policy incident to an effective realisation of socio-economic rights. The foregoing analysis has shown that the extant judicial conception of democracy in both South Africa and Nigeria, except in very few of the cases, is not such that enables the requisite invigorations and mutual reinforcements between both law and politics for effective transformation of socio-economic rights. This is because, as the foregoing analysis shows, both courts' conception of democracy negates the parity of participation of the citizens and disavows any meaningful involvement of the citizens in real politics or policy issues. The foregoing observation is compounded by the activities of conservative judges who appear to be having a field day using the inherent pliability of legal texts to constrain political action and abort the transformative potential of

human rights and popular democracy underscoring the all-important need for an appropriate understanding of democracy.

However, the WABIA model/conception of democracy that I theorise in Chapter Three appears to be more likely to open up the political space to empower the poor and vindicate their participatory parity for a more political action friendly jurisprudence. WABIA model of democracy is a conception of democracy that infuses and takes as foundational values African political ideals and principles I identify and discuss in Chapter Three. I argue in that Chapter that if these principles are infused into constitutional adjudication processes they hold the promise for a more substantive participation, action and voice for those at the margins of society in contemporary Africa.

The features/principles of African socio-political thought deduced from pre-colonial African political systems and relevant African philosophical literature in Chapter Three, which underlie the WABIA model of democracy are: harmony and equilibrium; the human centred and welfare focussed authority of African systems (African humanism); communitarianism; equality and equivalence and the requirement of consultation, deliberation and consensus in public decision-making processes. I briefly recapitulate the content and specifics of each of these principles below.

As I discuss in Chapter Three, African socio-political theory is rooted in harmony and equilibrium. This feature abhorred the concentration of resources or power in a few hands. Thus, members of pre-colonial African society were forbidden from hoarding essential goods or resources or depriving other needy members of the society of same.¹⁷⁰ This is because all goods and resources were believed to be owned in common and the privation and poverty of even one member of the society is regarded as the privation and poverty of all.¹⁷¹ This concern for harmony and equilibrium in socio-political thought also underlie the extensive checks and balances noticeable in the political systems as I point out in the chapter.

¹⁷⁰ J K Nyerere *Ujamaa: Essays in socialism* (1968) 1 – 12.

¹⁷¹ See also K Kaunda *A humanist in Africa* (1966) 22 – 25; J I Unah ‘Ontological – epistemological background to authentic African socio-economic and political institutions’ in A F Uduigwomen (ed) *Footmarks on African philosophy* (1995) 107 at 118; K Gyakye ‘Philosophical ideas of the Akans’ (1981) 10 *Second Order* 61 at 77.

This emphasis on harmony and equilibrium also disavowed any rigid private/public distinctions. Thus, while there may have been some kind of dichotomy between the private and the public realms in pre-colonial African societies; this was more or less fluid as pointed out by Elias.¹⁷² And it is not such that will operate to privatise poverty as I point out in the chapter.

The second principle of African political theories is that every exercise of political power and authority is human-centred.¹⁷³ Human welfare was the end of all exercise of public power. Thus, the key factor determining whether a ruler is performing well or not in pre-colonial African societies was the prosperity and welfare of the subjects of the realms.¹⁷⁴

The third principle of African political thought underlying the WABIA model of democracy is communitarianism. As I point out in Chapter Three, the community defined the individual as a person in pre-colonial African socio-political thought. The whole constitutes the parts.¹⁷⁵ And the community itself is the collectivities of the unborn, the living and dead.¹⁷⁶ This, however, is not to say that pre-colonial African societies had no notion of the individual or his/her rights. The better view, as I point out in the chapter, is that African communalism encouraged individuals to put the interests of the community before his/her own. African communitarian principle has three key features viz: mutuality, acceptance and inclusiveness.¹⁷⁷ There were mutual and reciprocal rights and duties and everybody was accepted and given the requisite recognition and space to exist as a person regardless of age, wealth, status or physical condition.

¹⁷² See for instance the discussion of Elias on traditional African ideas of private and public law in T O Elias *The nature of African customary law* (1956) 110 – 129.

¹⁷³ K Kaunda *A humanist in Africa* (1976) 22.

¹⁷⁴ See for instance, M Fortes ‘The political system of the Tallensi of the Northern Territories of the Gold Coast’ in M Fortes and E E Evans – Pritchard (eds) *African political systems* (1940) 239; See A I Richards ‘The political system of the Bemba tribe – North-Eastern Rhodesia’ in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 88 at 104; M Gluckman ‘The kingdom of the Zulu of South Africa’ in M Fortes and E E Evans-Pritchard (eds) *African political systems* (1940) 25 at 34; among others.

¹⁷⁵ Y Mokgoro and S Woolman ‘Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell’s thoughts’ in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 241.

¹⁷⁶ I A Menkiti ‘Person and community in African traditional thought’ in R A Wright (ed) *African philosophy: An introduction* 2nd ed (1979) 157.

¹⁷⁷ K Kaunda *A humanist in Africa* (1966) 24 – 28.

The fourth principle of African political thought I identify and discuss in Chapter Three is the principle of equality and equivalence. Everybody was regarded as equal. Work and rewards were shared equally and all participated as peers in the public realm.¹⁷⁸ Although most noticeable in acephalous societies, it was, however, also an important feature of centralised societies as well.¹⁷⁹

The fifth principle of African socio-political thought deduced from the analysis of pre-colonial African political systems in Chapter Three, is the requirement of consultation, deliberation and consensus in public decision-making processes. This feature of traditional politics I have discussed extensively in Chapter Three. I will only restate here that the principle required that as many people as possible, especially those that are going to be directly affected by the decision in question, are consulted and given the opportunity to participate and contribute to deliberations and public discourses. The principle also required that the view of everybody, even of participants that disagreed, must be reflected in the final decision(s). This was done through ensuring that those who disagreed are persuaded through dialogue and better arguments, and not force or coercion, to see the rationale and good sense behind the ultimate decision(s).¹⁸⁰ Consultation, deliberation and consensus in all public decision making processes were regarded as fundamental human rights in pre-colonial African societies. Any public decision made in violation thereof may not stand.

The foregoing is a recapitulation of the main principles of African socio-political thought as deduced from the examination and analysis of pre-colonial African political systems and relevant African philosophical literature done in Chapter Three. The foregoing principles are the underlying values of the WABIA model of democracy theorised in the chapter.

¹⁷⁸ A E Afigbo 'The indigenous political system of the Igbo' (1973) 4 (2) *Tarikh* 13 at 21

¹⁷⁹ A Ibidapo-Obe 'A discourse on the Yoruba philosophy of law' (2009) 2 *Nigerian Journal of African Law* 23 at 31.

¹⁸⁰ D J Louw 'Ubuntu: An African assessment of the religious order' available at <http://www.bu.edu/wcp/Papers/Afri/AfriLouw.htm> (accessed on 13 July 2013).

I dwell a bit on how taking these features/principles on as foundational values by the courts consistent with the WABIA approach to democratic conception in constitutional adjudication and interpretation could impact the adjudication process to open up the political space and empower those at the periphery of society in Chapter Three. I also state in that chapter that a more precise illustration of how the WABIA conception is likely to make a difference will be done in Chapter Five in relation to some of the cases examined in this work. This promise I fulfil here by examining the democratic deficiencies of some of the cases examined in this work and illustrating how infusing the principles of the WABIA model of democracy is likely to have made a difference in opening up the political space and vindicating the poor's parity of participation for a more effective struggle against material deprivation which socio-economic rights transformation is all about.

For the purposes of the above-mentioned illustration, the cases examined in this work can be grouped into three broad categories. The first are cases dealing with the constitutional obligation of the state to facilitate citizens' involvement in law-making or public decision-making processes. Under this category falls cases decided under section 118 of the South African Constitution and similar provisions of that Constitution. Here also are to be found the *locus standi* decisions of Nigerian courts. The second category of cases is those dealing with fundamental rights facilitating democratic deliberations and citizens' participation in government. Under this group falls all the rights-based decisions in both South Africa and Nigeria examined in this work. The third category of cases is those touching upon socio-economic rights of the citizens. Under this category will fall the socio-economic rights cases in South Africa; the Chapter II cases, cases dealing with struggle against subsidy removal and struggle against corruption and abuse of office from Nigeria.

There are, however, some overlaps between some of the cases. For instance, some of the eviction cases in South Africa considered in this work could be said to be about both participation and access to basic socio-economic rights. Also some of the freedom of assembly and association cases examined in relation to Nigeria, notably the *FGN v Oshiomole* cases could be said to be about both rights essential to democratic deliberation and socio-economic wellbeing of the citizens. I, however, categorise the cases here based on their predominant feature(s).

As regards the first category of cases, those dealing with constitutional obligation of state to facilitate citizens' involvement in law-making or public decision-making processes as explained above; I point out in Chapter Four that the liberal-legal conception of democracy displayed by both South African and Nigerian courts disavows any substantial or concrete involvement of citizens in public decision-making processes. Thus, in spite of the participatory approach of South African Constitutional Court in some earlier cases like *Matatiel II*, *Doctors for Life International*, *Albutt* and *Shilubana* where the Court evince a more robust conception of democracy, the Court have recently made it very clear that the requirement of deliberation or consultation with citizens mandated by section 118 of the South African Constitution and the like is for the purposes of supplementing general elections and majority rule only and not to conflict, overrule or veto these liberal-legal concepts.

In *Merafong* for instance, the Constitutional Court clearly states that participation of citizens envisaged by section 118 of the South African Constitution is meant to supplement general elections and majority rule only and not to conflict or overrule them. In essence, the Court is saying that the governmental decisions need not reflect the views of the governed. This same view is repeated by the Court in *Poverty Alleviation Network* and *Moutse Demarcation Forum and Others*. The implication of this position of the Court is that constitutionally mandated participation has been effectively proceduralised. Once the government has gone through the motions of setting up meetings regardless of whether the decisions of the meeting are already predetermined as alleged by the applicants in *Merafong*, the constitutional obligation of the state is fulfilled.

If the WABIA conception of democracy approach is taken by the Court, however, these cases violate African political principle number four of equality and equivalence and principle number five that requires that public decision-making processes be arrived at through consultation, deliberation and consensus. By principle number four all members of society are entitled to participate equally and as peers in all public decision making processes. By this principle, the state is not entitled to privilege the views of political elites or representatives over that of the ordinary members of society as was done in *Merafong* and other cases.

By principle number five, it is not enough that there be opportunity for consultation and deliberation. The resulting decision(s) must also be as a result of consensus. As I explain in Chapter Three and earlier in this Chapter, this is so that the resulting decision(s) will reflect the views of all participants, even participants that disagreed with the eventual decision. The latter result is achieved by superior force of arguments. Those disagreeing with the eventual decision must be convinced by superior arguments why the result should be what it is. The conviction should not be via legislative or executive fiat as happened in *Merafong* and other cases mentioned.

Thus, had the Court in *Merafong* and others cases taken as foundational value the principle of equality and equivalence and the hallowed requirement of consultation, deliberation and consensus consistent with the WABIA model of democracy therefore, the decision in *Merafong* and other cases to similar effect would have obviously been decided differently. Requiring that government allow participation of every member of society in public decision making processes on equal footing as peers with more politically powerful persons and entities in society and requiring that consensus are to be achieved through force of arguments and not through legislative or executive fiat will appear to be more likely to open up the political space and strengthen the political power and standing of those at the periphery of society by giving them a critical voice in the scheme of things as the case of *Joe Slovo* discussed earlier on in this Chapter shows.

In relation to Nigeria, I point out in Chapter Four that participation of citizens in public decision making processes is mediated through the concept of *locus standi*. I also point out that with the exception of few cases like *Fawehinmi v Akilu*, *Fawehinmi v The President* and *Legal Defence & Assistance Project (Gte) Ltd* where the courts used the republican (communitarian) model of democracy to vindicate citizens participation, other cases like *Adesanya v The President of Nigeria*, *Fawehinmi v I.G.P & Others* and other cases following them restricted the scope of citizens' competence to question or participate in public decision-making processes to issues impinging on their private rights or obligations only. Had the courts in *Adesanya v The President of Nigeria* and similar cases had also had regard

to the principle of equality and equivalence and the requirement of consultation, deliberation and consensus in public decision making processes as explained above, the courts may not have placed issues of governance and public decision making outside of the competence of ordinary citizens and place them in the hands of some experts or select few in the society as they appear to have done in those cases. They would have been more likely to hold consistent with these principles that governance is every citizens business where everybody participate as peers together with everybody else regardless of wealth, status or position in the society. This right to participation may have been more likely to be vindicated as fundamental rights consistent with these principles. The decisions mentioned above may therefore have turned out differently with the likelihood of opening up the political space for empowerment.

The second category of cases, as stated earlier, are those dealing with rights considered essential for democratic deliberations. My examination of the cases in Chapter Four revealed that when the rights in question concerns the periphery of citizens participation and involvement in the political process the courts have no problem in vindicating them. However, the moment these rights impinge on policy or touch upon more substantive involvement/participation of citizens in public decision making processes available evidence is to the effect that the courts are not that forthcoming. A brief recapitulation of some of the cases here bears this assertion out.

One of the most important rights in this regard is the right to vote, as I point out in Chapter Four. This is because elections and the concomitant right to vote lies at the very core of liberal democracy.¹⁸¹ And consistent with South African courts' liberal/representative understanding of democracy, the right to vote pursuant to section 19 (3) of the South African Constitution occupies a central place and enjoys robust recognition in the courts' jurisprudence. Consequently, majority of the cases decided in this area of the law vindicated that right.

¹⁸¹ B Ugochukwu 'Ballot or bullet: Protecting the right to vote in Nigeria' (2012) 12 *African Human Rights Law Journal* 539 at 543 – 544.

Therefore in cases like *August*, *NICRO*, *African Christian Democratic Party*, *Richter*, *AParty* and *Ramakatsa and Others* an inclusive and participatory approach to franchise legislation and issues was taken by the South African Constitutional Court. The same is noticeable in Nigeria where an inclusive and participatory approach is deducible from the courts' jurisprudence in political rights cases, although the right to vote has not specifically come before the courts. Thus, in *INEC v Musa*, *Ugwu v Ararume*, *Amechi v I.N.E.C. and Others* and *Abubakar v Attorney General of the Federation*, Nigerian courts like their South African counterparts easily vindicate political participation rights.

However, even with regard to the right of political participation which is regarded as preservative of other civil and political rights in bourgeois liberal regimes, judicial vindication is not always forthcoming. This appears to be the case anytime the right touches upon policy or will substantively impinge on the political process as I already point out. Thus, in *New National Party* for instance, the South African Constitutional Court was minded to sanction the disenfranchisement of five million South African voters, about 20 per cent of qualified voters, just because that is government policy and the legislature had made a law to that effect. The Court held in that case that it is not competent of the judiciary to second guess the parliament who has the sole authority to determine the appropriate means of identification for the exercise of franchise right. Also *United Democratic Movement*, the Constitutional Court rejected arguments that floor crossing by elected officials undermined multi-party democracy. The Court held that electorates have no control over elected representatives in between elections. As I point out in Chapter Four, this decision is premised on the principles of separation of powers which precludes the courts from questioning the way parliament have through laws decided that the political process be carried on. In essence, save during periods of elections when electorates may vote to change erring representatives, electorates have no control whatsoever over erring and non-performing representatives and therefore cannot hold them to account.

In Nigeria also, similar deference to the political organs in political rights cases is noticed in the Nigerian courts jurisprudence. Thus, notably in *Dalhatu v Turaki* and *Onuoha v Okafor*, among others, the Supreme Court of Nigeria could be seen denying relief to persons whose

political participation rights were violated on the ground that the issues were political questions which courts are incompetent to entertain.

Had the South African and Nigerian courts have regard to the communitarian principle number three of the WABIA model of democracy, however, they would have known that African society is an inclusive society pursuant to the communitarian tilt of the society. Thus, everybody counts and nobody is thus to be excluded as I recapitulate earlier. Had the communitarian principle been taken as a foundational value by the South African Constitutional Court in *New National Party* therefore, the Court would more likely have invalidated the law and policy of the South African government which disenfranchised about 20 per cent of its otherwise eligible voters. Had courts also had regard to principle number five and the hallowed requirement of consultation, deliberation and consensus which regards political participation as a fundamental right, the claims of the applicants in *United Democratic Movement* would also most likely have been vindicated.

Same goes for the courts reluctance to vindicate political rights that impinge on governmental policy or substantively affects the political or public decision making processes as noticeable in *New National Party* and *United Democratic Movement* in South Africa and *Dalhatu v Turaki* and *Onuoha v Okafor*, among others in Nigeria. Had the courts in these cases imbibe the WABIA principle of equality and equivalence and the principle of consultation, deliberation and consensus, the courts would most likely have held that no area of governance or policy is beyond the ken, competence and participation of the citizens. This is because it is the fundamental right of citizens in pre-colonial African societies to be afforded avenues to participate substantively in governance.

The narrow province allowed for citizens participation noted in relation to political participation rights above is also a feature of other rights essential to democratic participation that I discuss in Chapter Four. As I show in that Chapter, the few cases where the courts' approach appears to have been expansive and participatory has nothing to do with the government at all. And when it does, it does not impinge upon policy. Thus in the freedom of expression case of *Islamic Unity Convention*, for instance, where the issue concerns the right

of the appellant to air an interview that may offend or alienate South African Jewish population, the Constitutional Court had no trouble in holding that broadmindedness and pluralism is central to an open and democratic society. Also in *Laugh It Off Promotions CC* where the issue is whether the appellant therein is entitled to criticise the racial labour practices of the respondent, a multi-national company in South Africa, through a parody printed on T-shirts, the Constitutional Court also had no difficulty to hold that diversity of views and ideas are the basis of a democratic society.

However, in *S v Mamabolo* where the right of the appellant to criticise the court was in issue, the Constitutional Court held that while public scrutiny of the judiciary constitutes democratic check, it is outweighed by the need to protect the integrity of the judiciary in a young democracy. The Court therefore upheld a law criminalising such criticisms. Also, in *Khumalo v Holomisa* where the issue concerned expression which called the fitness of a politician to occupy public office into question, the Court upheld a rule of law which the Court itself acknowledged will have a chilling effect on free flow of information and ideas. The foregoing exclusionary posture in governmental or political or policy matters was again displayed by the Constitutional Court in *M & G Media Ltd*. This case concerned the issue of whether the respondent media house can compel the disclosure of a public document containing confidential information that relates to the policy of government in its international intercourse. The Constitutional Court declined to grant relief.

This exclusionary and deference posture of the courts in interpreting democratic rights that impinges on governmental processes and policies is not a feature of South African courts alone. Analysis in Chapter Four revealed that the same is the case in Nigeria. Thus, except for *FGN v Oshiomole* in the High Court of Abuja which held that section 40 right of persons to freely associate and assemble for the protection of their interests in the Nigerian Constitution confers a right on all Nigerians to meet and discuss all matters of common interest which include gathering to protest against increases in the prices of PMS, other cases examined under section 40 of the Nigerian Constitution in Chapter Four foreshadow a narrow scope for the participation of citizens as I show in that Chapter. Same is true for cases dealing with the right to freedom of expression that I examine in Chapter Four.

Thus apart from the charge of delegitimitisation of politics levelled against over-reliance on constitutional rights politics by progressive scholars, courts from both South Africa and Nigeria have so far, from my analysis in Chapter Four, charted a very narrow scope for rights as instruments of participation in the politics and policies of their respective governments. I think the position of both courts in this regard is well illustrated by the Nigerian Court of Appeal in *Oshiomole and Another v FGN and Another*¹⁸² where the Court held that citizens cannot hide behind the constitutionally guaranteed rights of expression, association and assembly to challenge or question considered policies of government.

Had the courts in the above mentioned cases imbibed the principle of equality and equivalence and the hallowed principle of consultation, deliberation and consensus of the WABIA model of democracy, they most probably would have been minded to hold that citizens are entitled to participate in the public realm equally as peers with everybody else in the society regardless of wealth, status or position. The courts may also have held that democratic participation, scrutiny and holding government to account are the fundamental rights of all citizens. And that no area of governance or policy is beyond the ken, competence and participation of the citizens. Those cases would have probably turned out differently with the potential that that hold for opening up of the political space.

The third category of cases, those touching upon the provision or access of the citizens to basic socio-economic rights, appear to me to be the category where the impact and effects of African socio-political theories as represented by the WABIA model of democracy is likely to be most profound. In fact, the continued relevance and germane nature of these principles of African political theories for contemporary Africa is, I think, echoed by Sachs J's profound statement in *Port Elizabeth Municipality v Various Occupiers*.¹⁸³ In his characteristically profound manner, Sachs J, in a way, re-echoed the applicability and relevance of African political thought for socio-economic rights transformation in South Africa. The learned Justice says as follows: 'It is not only the dignity of the poor that is assailed when homeless

¹⁸² [2007] 8 NWLR (Pt. 1035) 58 at 74 – 80.

¹⁸³ 2004 (12) BCLR 1268 (CC).

people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.¹⁸⁴ Although, the learned Justice did not say as much, this is a restatement of African political principles of communitarianism and humanism which ties the well-being of the community to the individual and vice versa as I explain in Chapter Three and recapitulate earlier in this Chapter.

As a matter of fact, my argument in this section of the thesis is that it is only in those socio-economic rights/socio-economic rights related cases, specifically for those examined in this Chapter (and it will appear generally also), where African socio-political ideals/principles or concepts similar to these are taken on board by the courts happened to have been favourably adjudicated by the courts. In other words, my point is that despite some of those cases having been decided in accordance with liberal-democratic conception or something similar to it as analysis have shown, the reason they have turned out differently from the others appear to have been the presence of African political ideals or something similar to it operating on the minds of the courts.

In *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁸⁵ for instance, the Constitutional Court emphasised the ideals of human dignity, freedom and equality as foundational values of South African constitutional democracy and the impact of homelessness on these foundational values. Thus, the Court pronounces as follows:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.¹⁸⁶

The above notion of the Court runs throughout the whole gamut of the judgment and apparently informed the ultimate decision of the Court. Thus, although the applicants and

¹⁸⁴ Id at para 18.

¹⁸⁵ 2000 (11) BCLR 1169 (CC).

¹⁸⁶ Id at para 23.

civil society groups in this case did not leverage on this decision to further political action, it was not a defect or inability flowing from the decision itself.

Human dignity, freedom and equality are ideals that resemble African concepts of communitarianism, humanism and freedom as is clear from my explanation of those concepts in Chapter Three and earlier in this Chapter. Cornell has therefore correctly argues in my view that the western notion of human dignity bears a very close resemblance to African humanism and South African *ubuntu* concept.¹⁸⁷ She is however of the view that *ubuntu* is a better ideal upon which to ground dignity in South Africa.

*Minister of Health and Others v Treatment Action Campaign and Others*¹⁸⁸ is another case that appears to confirm the argument I make above. Thus, although decided based on liberal-legal understanding of democracy as I point out earlier, the Constitutional Court was apparently very much concerned about the vulnerability and powerlessness of the would be beneficiaries of nevirapine and worried about the impact of the government's unreasonable restriction of the drug upon them. According to the Court:

The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are “most urgent” and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are “most in peril” as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.¹⁸⁹

This concern apparently formed the basis of the Court's decision to declare the government's restriction of the nevirapine unreasonable and unconstitutional.

The above concern of the Court is consistent with the WABIA model of democracy (African) principles of harmony and equilibrium, African humanism and communitarianism which as I

¹⁸⁷ D Cornell ‘Is there a difference that makes a difference between Ubuntu and dignity?’ in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 221.

¹⁸⁸ 2002 (10) BCLR 1033 (CC).

¹⁸⁹ *Id* at 78.

point out earlier eschew such powerlessness and vulnerability as was to be occasioned if the Constitutional Court had sanctioned the government's unreasonable policy in *TAC*.

Another case that goes to confirm my argument here is *Abahlali BaseMjondolo Movement SA and Others v Premier of the Province of Kwazulu and Others*.¹⁹⁰ This is because the same concern for harmony and equilibrium in the society, the welfare of the less privileged and *ubuntu* (communitarianism) appear also as important values in the decision. Though not explicitly stated by the Court, these ideals can be gathered from several pronouncements of the Court in the case. For instance, while striking down section 16 of the Slums Act as unconstitutional, the Court pronounces as follows:

There is indeed a dignified framework that has been developed for the eviction of unlawful occupiers and I cannot find that section 16 is capable of an interpretation that does not violate this framework. Section 26(2) of the Constitution, the national Housing Act and the PIE Act all contain protections for unlawful occupiers. They ensure that their housing rights are not violated without proper notice and consideration of other alternatives. The compulsory nature of section 16 disturbs this carefully established legal framework by introducing the coercive institution of eviction proceedings in disregard of these protections.¹⁹¹

The above statement forms the principal basis of the Court's decision.

These same concerns for societal harmony and equilibrium and citizens' welfare, among others, appear also to inform one of the very few decisions in this regard in Nigeria. In *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others*¹⁹² the Court declared the neo-liberal policy of deregulation of the downstream sector of the Nigerian economy unconstitutional. In striking down Nigerian government incessant increases in the prices of petroleum products as unconstitutional, the Court held that the government of Nigeria is constitutionally obliged to regulate and fix, from time to time, the price of petroleum products in Nigeria in such manner as to secure the maximum welfare, freedom and happiness of every citizen of Nigeria. The Court held that government's policy of deregulation violated this constitutional obligation and is for that reason illegal and unconstitutional.¹⁹³ Here again, we

¹⁹⁰ 2010 (2) BCLR 99.

¹⁹¹ Id at para 122.

¹⁹² Suit No: FHC/ABJ/CS/591/09 (delivered on the 19th day of March, 2013).

¹⁹³ Id at 18 – 19.

see the Court making maximum welfare, freedom and happiness of every citizen of Nigeria as grounds for decision.

However, while the ideals of harmony and equilibrium, humanism and communitarianism and similar concepts appear to be major factors accounting for the decisions examined above, the absence of such concerns appear to be features of those cases that come out unfavourably. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Joe Slovo 1)*¹⁹⁴ for instance, the Constitutional Court took an institutional and rather legalistic approach to the case. As pointed out above, the Court held that the decision whether or not upgrade the community *in situ* or relocate the applicants is for the executive arm of government to take and the court will not interfere. This is despite the protestations of the applicant that their mass relocation to far-off Delft will prejudice their access to means of livelihood as Delft is too far away from their respective working places. The Constitutional Court paid no heed to these arguments.

In *Mazibuko and Others v City of Johannesburg and Others*¹⁹⁵ also, the absence of humanist concern is apparent from the decision of the Constitutional Court. Thus, despite the indignity and inhumane condition that the government's *Gcin'Amanzi* scheme is going to subject the poor residents to, indignity and conditions well-articulated before the Court, the Court instead was focussed on the difficulty and inconvenience that was going to result to the government's commercialisation efforts if the scheme is struck down. The latter considerations were given a higher priority over people's dignity, humanity and socio-economic well-being.

Also, in the Nigerian cases of *A J A Adewole & Ors v Alhaji L. Jakande & Ors, Archbishop Okogie v The Attorney-General of Lagos State* and *Oshiomole and Another v FGN and Another*, the same legalistic approach and lack of concern for the dignity and socio-economic well-being of the citizens is also noticeable from the approach and decision of the Nigerian courts. In *A J A Adewole & Ors v Alhaji L. Jakande & Ors* and *Archbishop Okogie v The Attorney-General of Lagos State*, especially the latter case, the courts pursuant to an undue

¹⁹⁴ 2009 (9) BCLR 847 (CC).

¹⁹⁵ 2010 (3) BCLR 239 (CC).

deference to society's political organs premised on liberal-legal notion of separation of powers declined to sanction the justiciability of socio-economic rights in Nigeria. The courts apparently were not concerned with nor did they pay attention to the dignity, welfare or freedom of the citizens. Neither did the courts pay heed to the prejudicial impact that a declaration of non-justiciability of Chapter II of the Nigerian Constitution and the privileging of civil and political rights over socio-economic rights is likely to have on the socio-economic wellbeing of the citizens. If *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others* is placed side by side with the two cases above the legalistic and narrow approaches of the courts in the former cases become more glaring.

In *Oshiomole and Another v FGN and Another* also, the Nigerian Court of Appeal did not pay any heed or attention to the prejudicial impact the incessant increases in the prices of petroleum products is going to have on Nigerian workers and citizens as contended by the appellant in that case. The courts in the cases mentioned above among other similar ones preferred instead to follow a legalistic private/public dichotomy reminiscent of bourgeois liberal democracy and consequently privatised hardships.

A further validation of my arguments that where the courts take on board the African political principles as represented by the WABIA model of democracy or principles similar to these ones positive differences are noticeable in the decisions of the courts as opposed to where these principles are absent is once again confirmed by the two groups of cases I examine in relation to Nigeria in section 5.3.2 above. In that section, I point out that the main difference between the cases of *Fawehinmi v The President and Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria* (which vindicated applicants' rights to use the law courts to promote openness and accountability and curb corruption and opaqueness in Nigeria) on the one hand, and *Incorporated Trustees of the Citizens Assistance Centre v Hon. S Adeyemi Ikuforiji, the Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another and Femi Falana v The Senate and 4 Others* (which denied such rights and competence to applicants) on the other hand, is that while the former cases took the communitarian and more participatory republican constitutionalism/democratic approach to the cases, the latter cases took the rights centred and narrower classical liberal democratic approach. Thus, here again

we see the positive impact and difference that principles similar to the WABIA model of democracy's made in the outcome of these cases in the courts.

Thus, had the courts in *Joe Slovo and Mazibuko* in South Africa and *A J A Adewole and Others v Alhaji L. Jakande and Others, Archbishop Okogie v The Attorney-General of Lagos State* and *Oshiomole and Another v FGN and Another* in Nigeria paid heed to or imbibe the WABIA democratic principles of harmony and equilibrium, African humanism and communitarianism which place premium on the connection between citizens' well-being and dignity and societal harmony, equilibrium and well-being, the courts may not have privilege legality and profits over socio-economic well-being, dignity and freedom of the applicants in the cases. The cases may have therefore come out differently with the potential that positive result and vindication of socio-economic rights may have for further political action.

The same goes for the cases of *Incorporated Trustees of the Citizens Assistance Centre v Hon. S Adeyemi Ikuforiji, the Reg. Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another* and *Femi Falana v The Senate and 4 Others*. Had Nigerian courts in these cases imbibe the WABIA principles of harmony and equilibrium, they are likely to have held that corruption and abuse of office violate the ideal that members of society were not permitted to acquire or hoard goods or resources beyond their basic needs while other members of society were lacking. And that corruption and abuse of office disrupt societal harmony and equilibrium. Had the courts imbibe the communitarian principle, they are likely to have held that public issues and concern is every citizens issues and concern as well and that every citizen is therefore entitled to demand to know how public finances is managed or public businesses conducted. Had the courts take the hallowed principles of consultation, deliberation and consensus to heart, they are most likely to have vindicated applicants rights to participate in public decision making processes in those cases because participation in African political theories and practice is a fundamental right.

From the foregoing, it is clear that when courts are motivated by some of the African political principles or principles similar to these they impact positively on the ultimate decisions of the

courts in the adjudication process. There is in fact evidence that many of the truly transformative decisions of the Constitutional Court of South Africa have been those based on African political principles as identified in this work or underpinned by principles similar to those. The ubuntu based jurisprudence of the Constitutional Court in *S v Makwanyane*¹⁹⁶ and the ubuntu infused thinking case of *Khosa and Others v Minister of Social Development and Others*¹⁹⁷ readily comes to mind. The former case declared the death penalty unconstitutional in South Africa and the latter declared a law that discriminated against permanent residents in access to social security unconstitutional. There is also the dignity based sexual orientation case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*¹⁹⁸ where the Constitutional Court struck down laws criminalising gays and lesbian in South Africa.

Thus, the African principles or principles similar to these are capable of making transformative difference in the decisions of the courts if taken on board. As I have argued in Chapter Three, however, African principles are better taken on board because of cultural and contextual peculiarities, among other reasons I present in Chapter Three. This position is also supported by eminent scholars of African political theories.¹⁹⁹ The foregoing accounts for the pride of place African political principles as represented by the WABIA model of democracy occupy in this endeavour.

From the foregoing analysis, therefore, one can deduce that the underlying principles of the WABIA model of democracy are more suited and more likely to have positive and transformative impact on constitutional adjudication and open up the political space for a more political action friendly jurisprudence from the courts. The WABIA conception of democracy appear from discussion above to be better suited in enhancing the poor's parity of participation by enabling the requisite platform for mutual reinforcement and invigoration

¹⁹⁶ 1995 (6) BCLR 665 (CC).

¹⁹⁷ 2004 (6) BCLR 569 (CC).

¹⁹⁸ 1998 (12) BCLR 1517 (CC).

¹⁹⁹ See for instance, A An-Naim 'The legal protection of human rights in Africa: How to do more with less' in A Sarat and T R Kearns (eds) *Human rights: Concepts, contests and contingencies* (2001) 89; D Cornell 'Is there a difference that makes a difference between Ubuntu and dignity?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 221.

between law and political action for effective transformation of socio-economic rights in South Africa and Nigeria and African countries sharing requisite similarities with these two.

The foregoing is not, however, to disregard or downplay the place and importance of constitutional texts in the ability of and the opportunity available to the courts to imbibe transformative concepts like the WABIA model/conception of democracy. As Roux rightly points out in a recent paper, courts, although possessed of some measure of agency, are often-times influenced and constrained by the institutional and political (and I dare add the textual) contexts in which the courts are working just as the courts also influence and constrain these contexts.²⁰⁰ The values of dignity, liberty and freedom in addition to that of democracy are foundational to the South African Constitution and the jurisprudence of the South African Constitutional Court as can be gathered from previous discussions.²⁰¹ Same can, however, hardly be said about the provisions of the Nigerian Constitution or the jurisprudence of the Nigerian Supreme Court. The implication of this is that South African courts may in fact be better able to infuse the WABIA model of democracy into their socio-economic rights jurisprudence than Nigerian courts. This is because courts should, and hopefully would, aim to promote values foundational to the constitution they are interpreting. However, absence of these foundational values in the Nigerian Constitution notwithstanding, *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others* and similar cases examined in this thesis is a pointer to the fact that all hope may not be lost for the Nigerian judiciary.

How constitutional texts may constrain the work of the courts is also inferable from the tardy development of socio-economic rights in Nigeria, a situation which may not be unrelated to the structure of the Supreme Court of Nigeria. Thus, quite apart from the prohibitive provisions of section 6 (6) (c) of the Nigerian Constitution which forbids judicial enforcement of Chapter II of the Nigerian Constitution, the socio-economic rights in the Chapter inclusive; the lack of a direct access to the Supreme Court of Nigeria on constitutional matters/issues unlike what is obtainable in the South African Constitution in

²⁰⁰ T Roux 'The South African Constitutional Court's democratic rights jurisprudence: A response to Samuel Issacharoff' available at <http://ssrn.com/abstract=2497777> (accessed on 31 October 2014).

²⁰¹ These foundational values are expressly provided for in the various provisions of the South African Constitution. See for instance, the Preamble, sections 1 (d) and 36 (1) of the South African Constitution.

relation to the South African Constitutional Court²⁰² may in fact be partly responsible for the parlous state and tardy development of socio-economic rights jurisprudence in Nigeria.

The Supreme Court of Nigeria has two types of jurisdiction: original and appellate jurisdiction. The Court has exclusive original (first instance) jurisdiction to adjudicate disputes between the Federation and a State or between the component states of the Federation of Nigeria.²⁰³ In addition to this, the Nigerian Constitution also empowers the National Assembly to confer additional original jurisdiction on the Supreme Court.²⁰⁴ In the exercise of this power, the National Assembly enacted in 2002 the Supreme Court (Additional Original Jurisdiction) Act.²⁰⁵ The Act conferred additional original jurisdiction on the Supreme Court of Nigeria in respect of three additional matters: one, disputes between the National Assembly and the President of Nigeria;²⁰⁶ two, disputes between the National Assembly and a State House of Assembly;²⁰⁷ and three, disputes between the National Assembly and a State of the Federation.²⁰⁸

The Supreme Court of Nigeria also exercises appellate jurisdiction over the decisions of the Nigerian Court of Appeal in civil and criminal matters and on election petition matters emanating from the Court of Appeal at first instance.²⁰⁹ In addition to the above, the Constitution also authorises references of questions of substantial law arising out of the interpretation or application of the Constitution in the Court of Appeal to the Supreme Court of Nigeria.²¹⁰ The foregoing constitutes the whole structure of the Supreme Court of Nigeria in terms of jurisdiction. In essence, there is no concept of leap-frogging or direct access to the Supreme Court of Nigeria under the provisions of the Nigerian Constitution. Apart from cases that fall within the ambit of the original jurisdiction of the Supreme Court of Nigeria,

²⁰² By the provisions of section 167 (6) and (7) of the South African Constitution, the Constitutional Court is obliged to allow a person, with the leave of the Court to bring a case or appeal directly to the Constitutional Court on issues bordering on the interpretation, protection or enforcement of the Constitution from any other court in South Africa when it is in the interest of justice to do so.

²⁰³ Section 232 (1) of the Nigerian Constitution.

²⁰⁴ Section 232 (2) of the Nigerian Constitution.

²⁰⁵ Cap S16 LFN 2004.

²⁰⁶ Section 1 (1) (a) of the Supreme Court (Additional Original Jurisdiction) Act.

²⁰⁷ Section 1 (1) (b) of the Supreme Court (Additional Original Jurisdiction) Act.

²⁰⁸ Section 1 (1) (c) of the Supreme Court (Additional Original Jurisdiction) Act.

²⁰⁹ Section 233 of the Nigerian Constitution.

²¹⁰ Section 295 (3) of the Nigerian Constitution.

all other cases must first pass through the Court of Appeal before getting to the Supreme Court.

It does appear that this absence of direct access to the Supreme Court of Nigeria in constitutional matters unlike the case under the South African Constitution is a serious impediment to the due development of socio-economic rights jurisprudence in Nigeria. There may be two reasons for this. First, the very long period of time it takes for a case to get from the High Court to the Supreme Court of Nigeria is likely to put a very serious damper on socio-economic rights related litigation.²¹¹ Second, there is also the issue of the prohibitive cost of appellate litigations in Nigeria. Thus, indigent persons, even where supported by public interest litigators and NGOs hardly ever have the requisite funds to take socio-economic rights related cases through the lower courts up to the Supreme Court of Nigeria. That this may be the case is inferable from the fact that none of the socio-economic rights cases that have arisen in Nigeria has reached the Supreme Court of Nigeria. Most of the cases have terminated at the High Court where they were commenced. This termination at the court of first instance could not have been because all of those cases were bad; the contrary may in fact have been the case. A plausible explanation is most probably the reasons adduced above.

The features of constitutional litigation that would assist the Nigerian judiciary to further the goals of political action and transformation in this regard are therefore participation, deliberation (dialogue) and the concomitant right of access to the courts. The importance of access to the courts for participation, action and transformation has been highlighted by several theorists.²¹² As I point out earlier, Pieterse has opined that access to the courts is central to enabling the participation and dialogic deliberation of materially disadvantaged individuals and groups in the determination of the meaning and the contours of socio-economic rights in South Africa.²¹³ Raz also has opined that access to the courts provide the main avenue for the political participation and action of disadvantaged individuals and

²¹¹ It takes a decade or more on average for a case to proceed from the High Courts through the Court of Appeal to the Supreme Court of Nigeria.

²¹² See for instance, M Pieterse 'On 'dialogue', 'translation' and 'voice': A reply to Sandra Liebenberg in SC Woolman & M Bishop (eds) *Constitutional conversations* (2008) 331; Raz J 'Rights and politics' (1995) 71 *Indiana Law Journal* 27.

²¹³ M Pieterse 'On 'dialogue', 'translation' and 'voice': A reply to Sandra Liebenberg in SC Woolman & M Bishop (eds) *Constitutional conversations* (2008) 331 at 336 – 337.

groups.²¹⁴ Thus, participation, dialogic deliberation and access to the courts are key features of constitutional politics that would assist the Nigerian judiciary in furthering the goals of political action and transformation. This feature is readily found in the fifth principle of the WABIA model of democracy discussed in this thesis.

Despite not having explicit mandate in the text of the Nigerian Constitution to grant direct access, the Supreme Court of Nigeria can still grant direct access through the rules of the court in deserving socio-economic rights cases. I recommend that the Supreme Court of Nigeria follow the examples of the Indian Supreme Court²¹⁵ and the Colombian Constitutional Court²¹⁶ in this regard who though they have no explicit constitutional mandate identical to that in the South African Constitution to grant direct access have nevertheless done so through special writs and rules of courts to give the poor and the vulnerable the requisite institutional voice. I suggest that the Supreme Court of Nigeria borrow a leave from these jurisdictions in order to ensure the robust development of socio-economic rights jurisprudence and further the goals of political action and transformation in Nigeria.

In the same vein, these same features of participation, deliberation (dialogue) and improved access are the features most likely to improve the reach and impact of the Constitutional Court in mobilising political action in South Africa. Recognition of the nexus between transformation of the society and access to the courts by the poor and the indigent in South Africa may have in fact informed the decision of the South African government through its Department of Justice and Constitutional Development to make the issue of access to the courts, especially direct access to the Constitutional Court, by the poor and vulnerable one of the principal terms of reference in the on-going review of the works and impact of the South African Supreme Court of Appeal and the Constitutional Court.²¹⁷ Initial report of the on-

²¹⁴ Raz J 'Rights and politics' (1995) 71 *Indiana Law Journal* 27.

²¹⁵ See for instance, S Muralidhar 'The expectations and challenges of judicial enforcement of social rights' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 102.

²¹⁶ See for instance, M Sepulveda 'The Constitutional Court's role in addressing social injustice' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 144.

²¹⁷ Other terms of reference in the on-going review of the work and impact of the courts on South African society includes: analysis of the nature and impact of transformative constitutionalism on South African society; assessment of the constitutional transformation of the common law and customary law; assessment of the pro-

going review indicates that despite constitutional obligation of the Constitutional Court to facilitate direct access, the Constitutional Court have generally interpreted its direct access mandate in a very restricted manner, especially in relation to the poor and the vulnerable.²¹⁸ Dugard has rightly in my view argued in 2006 that the practice of the Constitutional Court in relation to direct access applications denies the poor an institutional and critical voice in the scheme of things.²¹⁹ By failing to utilise its direct access mechanisms to enable the poor to bring cases directly to it as the Indian Supreme Court and the Colombian Constitutional Court have done, the South African Constitutional Court may have foreclosed participation and action by a critical mass of the South African populace. From the foregoing, it is clear that it is through improved access to the courts, participation and dialogic deliberation that the South African Constitutional Court will improve its reach and impact in mobilising political action in South Africa.

Finally, the comparison and analysis done in this thesis show that there are lessons that South African and Nigerian judiciaries can learn from each other in order to ensure a more effective operationalisation of the WABIA model of democracy and further the goals of political action and socio-economic rights transformation. As argued in more detail elsewhere,²²⁰ despite the transformative bent of the South African Constitution, South African courts have not interpreted the South African Constitution to achieve the transformative ends and ideals of the Constitution in many of the cases that have come before them. However, as pointed out elsewhere,²²¹ the conservative result achieved by South African courts in this regard is not inevitable as the Nigerian case of *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others* from a supposedly weaker socio-economic rights regime show. Thus, flowing from *Bamidele Aturu v Hon. Minister of Petroleum Resources and Others* and similar cases

poor orientation of the courts and the interrogation of complexities involved in the implementation of decisions of courts by other organs of government in South Africa. See HSRC ‘Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society’ available at <http://www.hsrc.ac.za/en/research-data/view/6895> (accessed on 14 November 2014).

²¹⁸ Id at 95.

²¹⁹ J Dugard ‘Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 *South African Journal on Human Rights* 261.

²²⁰ A E Akintayo ‘A good thing from Nazareth? Stemming the tide of neo-liberalism against socio-economic rights: Lessons from the Nigerian case of *Bamidele Aturu v Minister of Petroleum Resources and Others*’ (2014) 15 (2) *Economic and Social Rights Review* 5.

²²¹ Ibid.

examined in this thesis, there are at least three lessons that the South African judiciary can learn from its Nigerian counterpart.²²²

The first is that South African courts should take socio-economic well-being, welfare and happiness of the citizens as a foundational value on the same footing as other foundational values of the South African Constitution as was done by some Nigerian courts in some of the cases examined here. Second, South African courts should humanise neo-liberal policies and laws in their interpretation of the neo-liberal policies and laws of the South African government. This will go a long way in transforming the socio-economic rights of the poor through enabling them for action. Lastly, South African courts should be bold in the exercise of its constitutional authority to police the government's adherence to its constitutionally imposed socio-economic rights obligations for a more accountable and responsive governance.

There are at least two lessons Nigerian judiciary can learn from its South African counterpart. The first is the facilitation of direct access of the poor to the Supreme Court of Nigeria, especially in socio-economic rights related cases. Although, as I point out above, the South African Constitutional Court is not there yet in terms of facilitating direct access of the poor. It should however be noted that many of the socio-economic rights cases that have actually come before the Court have gotten there via direct access. Some of the cases may not have gotten to the Constitutional Court if not for direct access because of the time and cost of normal appeals. The point may however be raised that there is constitutional authority for the Constitutional Court's direct access practice, an authority that is absent in the Nigerian Constitution. However, as I point out earlier in this section, the lack of explicit mandate in the constitution for direct access in terms similar to the South African Constitution is not necessarily an insurmountable barrier or bar to such transformative step as the Indian Supreme Court and the Colombian Constitutional Court have shown.

²²² Id at 8 – 9.

The meaningful engagement concept is another lesson Nigerian courts can learn from its South African counterparts to further the goals of political action and transformation. As I point out earlier in this Chapter, this is a concept that the South African Constitutional Court has used in some instances to further political action and transformation of the socio-economic rights of the poor. The same can happen in Nigeria if the Nigerian judiciary borrow the concept. Although there is also no explicit provision in the Nigerian Constitution to support this concept, I am, however, of the firm view that the provisions of section 46 (2) of the Nigerian Constitution which empowers the courts to make such orders, issue such writs and give such directions as the courts consider appropriate for the purpose of enforcing or securing the enforcement of any right to which a person may be entitled under the Nigerian Bill of Rights is wide enough to cover the invocation of the meaningful engagement concept in Nigeria.

5.6 CONCLUSION

I have in this chapter tried to validate my supposition in Chapter Four that the liberal/representative judicial conception of democracy of Nigerian and South African courts will constrain rather than enlarge the space for the necessary political action for socio-economic rights transformation. This I have done in this chapter through the comparative examination and analysis of South African and Nigerian courts' conception of democracy in selected socio-economic rights related cases and the impact of such a conception on socio-economic rights related political action. I also examined the difference(s) that the WABIA model/understanding of democracy is likely to make to the cases examined in this work.

The following conclusion flows from the analysis in this chapter: One, that rights can indeed serve as a platform for political action. This fact will appear to explain the more robust socio-economic rights related political action found in South Africa in this study. Two, it also appears that the down-side of over-reliance on rights-enabled platform is that the courts are likely to take a rights-centred and restricted approach to citizens' participation. Three, it appears that both Nigerian and South African courts have similar liberal-legal conceptions of democracy with regard to socio-economic rights related cases like the ones they displayed in

Chapter Four with regard to other subject-matters. Four, it also appears that the likely effect of these conceptions of democracy in spite of occasional enlargement of the political space is to constrain the space for political action. Five, it was additionally noted that the inherent limitation of a liberal legal conception of democracy for political action is compounded by the activities of conservative judges who are using the pliable nature of legal texts to constrain political action and abort the transformative potentials of human rights and popular democracy. This fact underscores the need for an appropriate model/understanding of democracy by the courts.

Finally, the analysis appear to reveal that African principles or principles similar to these have made and are capable of making transformative difference in the decisions of the courts if taken on board. It is, however, argued that African political principles are better taken on board because of cultural and contextual peculiarities, among other reasons already adduced in Chapter Three. The conclusion is reached therefore that the WABIA conception of democracy being rooted as it were in African theories of politics is more likely to be better suited for the enlargement of space for requisite political action and transformation of socio-economic rights in South Africa and Nigeria and in African countries sharing requisite similarities with these two.

CHAPTER SIX

CONCLUSION

6. INTRODUCTION

As I state in Chapter One of this thesis, several studies exist linking poverty to lack of political power and voice. I also make the point there that it does appear that the failure by several existing poverty reduction strategies to bridge this power gap is the Achilles heels of these strategies and attempts. I argue also that in spite of the empowering potential of rights based approaches to poverty reduction of which socio-economic rights regime is a very important component, the failure of the rights based strategy also to directly come to terms with the political aspect of poverty has resulted in it having a less than effective impact. This, the experience of South Africa, which has a justiciable constitutional socio-economic rights regime shows. I therefore argue that a political approach to human rights which regards politics/political action as counterparts of socio-economic rights in poverty related struggle and resistance holds the best promise for effective poverty reduction strategies and political empowerment of the poor.

However, having regard to the potential impact of judicial conceptions of democracy and the consequent understanding of the courts of their role and place in the scheme of government in constitutional democracies in either constraining or expanding political action, it becomes important to identify existing conceptions of democracy operating in the courts and examine the impact of such conception(s) on socio-economic rights related political action. This I do in this thesis in a comparative examination and analysis of South Africa and Nigeria through the examination of selected socio-economic rights related cases from both jurisdictions. And because analysis shows that the existing judicial conceptions in both South Africa and Nigeria are not likely to further politics, I have also, in fulfilment of the promise I made at the beginning of the thesis, theorised a judicial conception of democracy which I called the WABIA model of democracy that is based on African political theories and practice as

deduced from the examination and analysis of pre-colonial African political systems and relevant African philosophical literature. This conception of democracy, so I argue, is more likely to enlarge the political space for action and empowerment of the poor.

6.1 SYNOPSIS OF CONCLUSIONS

Consistent with the focus of this thesis on politics/political action as essential component of a socio-economic rights regime, in Chapter Two I interrogate and try to answer the question, which of the constitutional frameworks for socio-economic rights protection of South Africa and Nigeria, the countries under examination, from the texts alone is more likely to further politics better. Is it the constitutionally justiciable socio-economic rights framework in South Africa or the directive principles of state policy of its Nigerian counterpart? Chapter Two in this regard serves as a building block for the subsequent examination of the impact of dominant ideology in the form of judicial conceptions of democracy on the interpretation of the frameworks and on the enlargement or constriction of political space for citizens' action in South Africa and Nigeria in Chapters Four and Five of the thesis. The chapter also serves as a building block for the theorisation of an appropriate conception of democracy in Chapter Three. In Chapter Two, therefore, I examine the pertinent features of each framework that may further or restrict politics/political action.

From my analysis in Chapter Two, I conclude that South Africa's constitutionally justiciable socio-economic rights regime has at least three features flowing therefrom.¹ The first is that the regime is enforceable in court; the second is that the regime imposes positive obligations on the state to provide basic socio-economic entitlements to citizens who lack same; the third feature of the regime is that the framework constitutes a limitation on laws, policies and governmental exercise of power and a limitation on majoritarian politics. The first feature of the regime is found to implicate politics/political action in at least three ways:² first, it provides a forum and discourses for materially disadvantaged groups and individuals; second, it serves as an accountability and justification mechanisms through which the government is

¹ Pp 60 – 71.

² Pp 61 – 67.

required to justify its laws and policies to the people and be held to account by the citizens before an impartial arbiter (the courts); and third, it provides a platform for and forum in which activists can organise for both curial and extra curial action.

The second feature of South Africa's constitutional regime for socio-economic rights protection which is the positive obligation of the state to provide material and basic economic sustenance to those lacking it, is found to implicate politics in at least two ways.³ The first is the enablement of civic equality and the enhancement of the autonomy and dignity of the citizens. The second likely implication is that by bridging the material or economic gap between citizens, the obligation of the state to provide basic socio-economic wherewithal to the needy equalises the material base of the citizens which in turn enhances the ability of citizens to participate as peers in society and politics.

The third feature of South Africa's regime, as I state earlier, is that it is a limitation on laws, policies and governmental exercise of power and thereby limits majoritarian politics. This is because socio-economic rights *qua* rights, like other fundamental human rights are a limitation upon governmental exercises of power. The legal implication of this is to take socio-economic rights outside the scope of deprivations of the majority. I argue that the likely effect of this is to preserve space for the participation and involvement of materially disadvantaged persons and groups as material minorities (this even though they may constitute numerical majorities in fact).⁴

Analysis in Chapter Two reveals that Nigeria's directive principles framework have at least two features: first, it is unenforceable, and; two, its implementation is left to the discretion of a benevolent government or majority.⁵ The implication of the first feature for political action is that since no person can complain about breach(es) or threatened breach(es) of the provisions of the framework in courts, the benefits of the courts as forum for political participation is obliterated. Also, except through doubtful periodic elections, there is no

³ Pp 67 – 70.

⁴ P 71.

⁵ Pp 72 – 74.

mechanism to hold government to account for constitutional obligations imposed by the framework; and finally there is no platform around which poverty-related struggle and resistance can be furthered.⁶ The implication of the second feature for political action is that, since there is no enforceable obligation on the government to do anything and since there is no mechanism to question or call government to account, the poor in a directive principles regime are likely to continue to be poorer with the effect this may have on the poor's parity of participation in society and politics as I explained in Chapter Two.⁷

The following conclusions are therefore reached in Chapter Two: South Africa's constitutionally entrenched socio-economic rights framework has the potential to enable politics/political action for vulnerable and materially disadvantaged individuals and groups in at least five main ways: (1) by providing a forum for political action for the materially disadvantaged which mainstream institutions may not have provided for them; (2) by providing mechanisms through which the materially disadvantaged may call government to account; (3) by providing a platform around which curial and extra-curial poverty-related struggle may be furthered; (4) by its likelihood to empower the poor to participate as peers in society; and (5) by taking socio-economic entitlements outside the depredations of electoral majorities. Nigeria's directive principles framework on the other hand disables politics by doing the exact opposite. From the foregoing analysis therefore, entrenched frameworks appear to be better suited to and to further political action better than directive principles frameworks, weighty objections of democratic illegitimacy and, from some progressive scholars to rights discourse vis-a-vis politics notwithstanding.⁸

In Chapter Three of the thesis, I seek to answer the question as regards the most appropriate understanding of democracy for political action in Africa from an African perspective. I examine there some of the models or conceptions of democracy that appear to have become recurring features in contemporary discourses on democratic theory.⁹ Analysis done in the Chapter reveals that apart from direct democracy deriving from the Athenian form of pure democracy, none of the other types or models of democracy appear particularly suitable for

⁶ Pp 72 – 73.

⁷ Pp 73 – 74.

⁸ P 75.

⁹ Pp 81 – 108.

political action. I also examine the perspectives of some African political theorists, some of whom have argued for an African conception of democracy. Although I determine that the prescriptions of some of these theorists are self-serving and not particularly suitable for furthering political action, I conclude that this did not in any way detract from the legitimacy and relevance of African political theories and approaches latent in their prescriptions.¹⁰ Furthermore, in order to justify the prescription or theorisation of an alternative form or model of democracy for Africa, in section 3.3 of the Chapter I examine what exactly is wrong with the contemporary form of democracy in Africa. My analysis reveals that bourgeois liberal democracy, which is the principal form of democracy in Africa is characterised by crises of representation, exclusion, authoritarianism, corruption and illegitimacy in contemporary Africa.¹¹ I also identify in the Chapter factors that appear to be responsible for the parlous state of democracy in Africa.¹²

I examine also in Chapter Three, relevant African philosophical literature as well as traditional African political systems that appear from studies to be representative of the systems in Africa. This is in order to deduce from the systems and the relevant philosophical literature African political theories. The political systems examined are the chiefly and centralised political systems and the acephalous political systems in Africa. The Yoruba political systems are used as an example with regard to the former while the acephalous political systems of the Igbo of Eastern Nigeria are used as an example of the latter.¹³

From the examination and analysis of these political systems as well as relevant African philosophical literature, I identify five features or principles of the systems as a whole from which I develop the WABIA model or conception of democracy, which takes these African principles of politics as foundational values. I briefly explain how taking the principles of the WABIA model as foundational values in constitutional interpretation by the courts is likely to promote participation and empower the poor for action. I consequently argue that the WABIA model of democracy, which is undergirded by these principles, is potentially a more appropriate judicial conception of democracy, which is culturally and contextually more

¹⁰ Pp 108 – 119.

¹¹ Pp 123 – 125.

¹² Pp 125 – 132.

¹³ Pp 132 – 154.

suiting for the liberalisation of space for participation, action and voice for those materially disadvantaged.¹⁴

In Chapter Four of the thesis, I investigate the question of what the extant judicial conception of democracy in South African and Nigerian courts is. This is done through the analysis and examination of three species of cases from South Africa and six species of cases from Nigeria.¹⁵ The reason for the more expanded analysis and examination of cases in relation to Nigeria is the relative paucity of constitutional provisions dealing with democracy and participation in Nigeria, with the relative absence of explicit judicial pronouncements of the courts on conceptions of democracy.

The first species of cases examined in relation to South Africa is those dealing with the obligation of the state to facilitate participation of citizens in public decision making processes under section 118 of the South African Constitution and other ancillary cases. The second is those cases dealing with the rights to political participation and to vote under section 19 (3) of the South African Constitution. The third class of cases is those dealing with the right to freedom of expression. The latter two form part of rights regarded as essential to democratic participation and deliberations.¹⁶ This consideration informed my focus on these rights.

The six classes of cases examined in relation to Nigeria are first, cases dealing with *locus standi* in Nigeria. This is because these cases are directly concerned with the competence of citizens to question or participate in public decision-making processes. This competence is mediated in Nigeria via the law of *locus standi*. The second group of cases is those concerned with the right of political participation. The third group is those dealing with the rights to freedom of association and assembly. The fourth group concerns those dealing with the right to freedom of expression. The fifth group concerns cases dealing with the impeachment/removal of certain political office holders. The last group of cases is those on

¹⁴ Pp 156 – 168.

¹⁵ Pp 174 – 245.

¹⁶ Pp 174 – 213.

the interpretation of socio-economic rights related provisions of Chapter II of the Nigerian Constitution.¹⁷

My comparison of these South African and Nigerian cases reveals that South African courts appear to be more explicit about their conceptions of democracy than their Nigerian counterparts. This is probably due to the more robust provisions on democracy and participation present in the South African Constitution relative to that of Nigeria. There appears also to be more cases that directly implicate democracy and participation in South Africa relative to that of Nigeria, which gives the South African courts the opportunity to deal with and pronounce directly on democracy. This is also more probably as a result of the existence of robust provisions on democracy in the South African Constitution. The analysis also reveals that Nigerian courts appear to be more conservative and show a higher level of deference to other organs of government than their South African counterparts.¹⁸

I argue in the chapter that the foregoing differences are, however, more apparent than real for effective political action. This is because the analysis in the chapter reveals that South African and Nigerian courts share a similar conception of democracy, one that restricts citizens' involvement and participation to the narrow confines of rights or the periphery of politics and disavows such involvement and participation in politics, policy issues and public decision-making processes. I argue that this position of the courts is hardly suitable for politics/political action as conceived in Chapter One of this thesis. I therefore conclude that South African and Nigerian courts' conception of politics will tend to constrain rather than expand the opportunities and space for political action through the exclusion of the citizens as necessary stakeholders. I also argue that this conclusion will be much more the case in relation to political action in socio-economic rights related cases than others.¹⁹

In Chapter Five, in an attempt to validate my conclusion in Chapter Four, I investigate the question of what the likely impact of South African and Nigerian courts' conception of

¹⁷ Pp 213 – 245.

¹⁸ P 245.

¹⁹ Pp 246 – 247.

democracy on effective political action and socio-economic rights transformation in South Africa and Nigeria is likely to be and what difference(s) would an African understanding of democracy of the WABIA model likely to make in this regard. I do this through the examination and analysis of the impact of the courts' conception of democracy on political action in selected socio-economic rights related cases from both South Africa and Nigeria. Section 5.1 of the Chapter thus sets the tone for the discussion in the chapter by interrogating again the complementary role of law/rights and political action in social transformation processes.²⁰

In Section 5.2, through selected socio-economic rights cases, I analyse the impact of South African courts' conception of democracy on political action. Analysis reveals there that South African courts display the liberal/representative conception of democracy like that found in Chapter Four. It also appears that those cases where significant benefits or gains accrued to litigants are those where the litigants were able to effectively combine law and politics and/or where the litigants were able to exert effective leverage on the gains made from litigation to further political action.²¹

In Section 5.3 of the chapter, I note that although there appears to be much less socio-economic rights related action in Nigeria relative to South Africa, there are two major terrains of contestation with significant connections to socio-economic well-being of Nigerians where Nigerian civil society groups and public spirited individuals appear to have been very active. The first relates to the struggle against removal of the fuel subsidy in Nigeria. The second relates to the struggle against opacity, corruption and abuse of office in governance. Selected cases from these areas of contestation are examined and analysed. Analysis in the section reveals that except for very few cases where Nigerian courts displayed the republican constitutionalist-understanding of democracy and vindicated citizens' participation through a communitarian approach, the courts mainly displayed the liberal/representative conception of democracy. It also appears to be the case that except in cases where the courts adopted a

²⁰ Pp 248 – 252.

²¹ Pp 252 – 280.

communitarian approach, the likely impact of the cases where the courts adopted the liberal/representative approach will be to constrain political action.²²

In section 5.4,²³ I note that a comparison of the cases from both jurisdictions throws up the following contrasts and similarities. First, evidence from both South Africa and Nigeria suggests that rights are themselves a very important platform for both curial and extra-curial political action. Second, it also seems from available evidence that the downside of a rights-provided platform is that courts are likely to be more rights-centred and technical in their approach to constitutional interpretation and politics with the rather narrower scope this implies for political action and social transformation. Nigerian courts on the other hand, probably because of the absence of a rights enabled platform appear, occasionally, more willing to go beyond the narrow confines of rights to adopt a more political action-friendly conception of popular democracy.

In spite of the contrasts, however, I note that both Nigerian and South African courts appear to share, again, a similar liberal/representative conception of democracy with its narrow space for citizens' political action and involvement. I also note that there may not be sustained political action without the law and neither can there be effective constitutional rights politics without contemporaneous political action. I also note that as a result of the pliable nature of legal texts, conservative judges appear to be constraining political action and aborting the transformative potentials of popular democracy and human rights which underscores the need for an appropriate conception of democracy.

In section 5.5²⁴ I illustrate/demonstrate the difference(s) that the WABIA conception of democracy and the adoption of its principles by the courts would likely have made to the outcome of some of cases examined in the thesis. This is done through the identification of defects of some of the cases and the illustration of the difference(s) that the principles of the WABIA conception are likely to have made had the courts taken the principles aboard. I

²² Pp 280 – 298.

²³ Pp 298 – 300.

²⁴ Pp 300 – 325.

argue that it appears that only in those socio-economic rights related cases examined in the chapter where African socio-political ideals/principles or concepts similar to these are taken on board by the courts are the cases favourably adjudicated by the courts. That is, despite the fact that most of the cases examined were decided based on a liberal-democratic conception of democracy or something similar, analysis appear to show that those that happened to turn out favourably were those where African political principles or something similar to it were operating on the minds of the courts. Thus, the cases where these principles were absent from the reasoning processes of the courts tends to be legalistic and technical. I also argue that available evidence suggests that many of the truly transformative decisions of the Constitutional Court of South Africa have been those based on African political principles as identified in this work or underpinned by principles similar to those. Finally, I tease out and discuss the particular features of the comparison undertaken in the thesis that would help the better operationalisation of the WABIA conception of democracy in the courts of the countries under examination.

6.2 CONCLUDING REMARKS

As I point out above, African political thought or similar principles appear to have been the basis of some transformative decisions of the courts. Evidence from this thesis also suggests that the absence of such principles is more likely to bring about decisions and outcomes that are legalistic, technical and devoid of humanity. If this is indeed the case as evidence here seems to suggest, then the suggestion that courts infuse their reasoning, approaches and interpretation with African political principles or some other similar principles is a legitimate and potentially fruitful proposal, as available evidence suggests that this approach indeed has a positive impact on the outcome of cases.

There is, however, a stronger argument why African political principles as opposed to any other should be imbibed by African courts. First, as my analysis suggests, while there may be a thousand systems and belief systems in Africa, there are not a thousand theories about the

world, man and society.²⁵ ‘Indeed, short of their conceptual semantic differences, the seemingly disparate belief systems can be reduced to a comprehensible whole.’²⁶ This statement applies with equal force to Africa political thought systems.²⁷

Second, while the foregoing argument is not meant to show that African political thought systems are fundamentally different from that of the rest of the world (apparent differences in worldview and philosophy of different people of the world in this regard appear to me to be majorly differences of stages of development and epochs), there is no denying the fact that there is a distinctly African political thought. This point is correctly and aptly captured by Osaghae thus: ‘...even if the themes in traditional African thought coincide with those outside Africa, there is still African political thought in so far as the thought system and institutions grew inside Africa and not outside of it.’²⁸ Evidence suggests that this fact could make a whole lot of difference between the legitimacy and acceptance of concepts and their capacity to be operationalised, as I argue in Chapter Three.

Third, it is my view also that African political principles in fact appear to be much better suited to the transformation of socio-economic rights. This is because most of the principles underlying the WABIA model of democracy in this thesis appear to lay stress upon and place humans at the centre of all things. This point is confirmed by several studies, some of which I examine in relation to these principles in Chapters Three and Five. For instance, as I argue in Chapter Three, the concept of citizenship was tied to economic obligation of those exercising public power in pre-colonial African societies.²⁹ Thus ‘[t]he concept of a “citizen” starving and living under the terror of poverty while the ruling classes enjoy economic surplus, security and well-being is clearly alien to this [African] constitutional framework.’³⁰ A political thought that ties the exercise of political power to the socio-economic well-being of

²⁵ F Otubanjo ‘Themes in African traditional political thought’ in J Ayoade and A Agbaje (eds) *African traditional political thought and institutions* (1989) 3 at 6.

²⁶ Ibid.

²⁷ Ibid.

²⁸ E E Osaghae ‘The passage from the past to the present in African political thought: The question of relevance’ in J Ayoade and A Agbaje (eds) *African traditional political thought and institutions* (1989) 53 at 54.

²⁹ O Oculi ‘The limits of power: Lessons from Egyptology’ in J Ayoade and A Agbaje (eds) *African traditional political thought and institutions* (1989) 45 at 48.

³⁰ Ibid.

citizens or followers is in my view clearly to be preferred in contemporary Africa where poverty and material deprivation has reached calamitous proportions.

However, the change of practice of courts regarding democracy/politics requires a full-blown change of legal culture, training and attitudes, something that does not happen in a concrete, straightforward fashion. Therefore, the taking on board of the principles articulated in this thesis is not something that is likely to happen overnight or easily. However, a tentative proposal for a progressive and maybe incremental change in the desired direction of change is set out below.

6.3 TENTATIVE PROPOSALS

One, that socio-economic rights be constitutionalised in jurisdictions in Africa where that is currently not the case. This is because evidence in this thesis suggests that a constitutionalised socio-economic rights regime is a tool to promote both curial and extra-curial action. Hesitant steps towards this have already been taken, as the case of Kenya, which recently included some socio-economic rights in its Bill of Rights in the country's new 2010 Constitution, shows. Two, in order to at least put into motion the recognition and perhaps incremental use of the principles articulated here by South African and Nigerian courts and African courts in general; the following further tentative proposals are made. First, that there should be an inter-disciplinary approach to the study and practice of law. Specifically, since there is in actual fact overlap and mutual invigorations between law and politics, the study of law should be accompanied by the study of politics and vice-versa. This will expose law students who are going to be occupying places of influence in the practice of law in the future to the dynamics of the interaction between law and politics. In the area of the practice of law as well, judges who are saddled with the interpretation of laws should also be exposed through continuing education and training to the law and politics phenomenon.

Second, there is need to aggressively pursue continuing study and research of African socio-political theories and practice generally, and in the area of law and politics particularly. This

is in order to continue to understand the social and political underpinnings of African laws and custom and to continue to tease out principles of African thought that could be adapted to fit contemporary times and to interrogate and weed out obsolete and pejorative ones. This will make for a more legitimate, culturally compatible and context suitable legal and political climate.

Third, there should be very close collaboration between the academy, the bar and the bench where this is not currently the case. This is in order to ensure that the products of the research and studies mentioned above could be disseminated among the other two branches of the legal fraternity. This will also ensure mutual invigorations and influences among the branches for a more robust legal climate.

Fourth, consistent with the growing recognition and tendency at the African regional level to invoke African values as basis for action, as foreshadowed in instruments and documents like the African Charter, Charter for African Cultural Renaissance and the African Charter on Democracy, among others discussed in Chapter Three, all of which contains provisions obliging state parties to protect and promote the moral and traditional values recognised by the communities in Africa, national constitutions in Africa should contain provisions to similar effect. Specifically, national constitutions of African states should contain mandatory provisions obliging the courts to have regard to African socio-political theories which are not inconsistent with universal norms of human rights, freedom and dignity in the courts' interpretive works. This is likely to ensure that the principles of African socio-political thought are not lost to time and that these infuse our law and politics for a more culturally compatible and context specific jurisprudence, which is suitable to legal and political climates in Africa.

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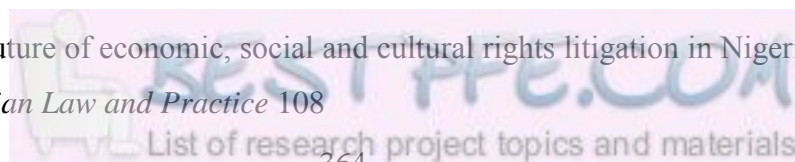
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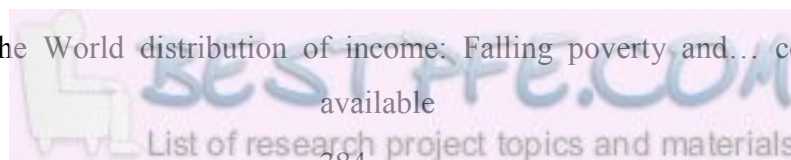
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