SOCIO-ECONOMIC RIGHTS FOR SUSTAINABLE DEVELOPMENT IN MALAYSIA: LESSONS FROM SELECTED AFRICAN COUNTRIES' CONSTITUTIONS

Abdulfatai O. Sambo [a] , Abdulkadir B. Abdulkadir [b]
[a, b] Ahmad Ibrahim Faculty of Law, International Islamic University Malaysia, Post Graduate Unit, AIKOL,Gombak,53100 Kuala Lumpur, Malaysia
[a] Corresponding author: fataisambo@yahoo.com

© Ontario International Development Agency. ISSN 1923-6654 (print)
ISSN 1923-6662 (online). Available at http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html

Abstract: Malaysia has made considerable impacts in nation-building, in developing its economy and in improving the quality of life of its people. Since Independence, real gross domestic product (GDP) has grown by an average of 6.5 per cent per annum during 1957 to 2009, one of the highest growth rates achieved by sovereign nations of similar age and size. Within the same period, GDP per capita in current prices grew by 7.0 per cent per annum, which has translated into substantial improvements in the people's quality of life. Extensive advances were made in education, health, infrastructure and industry. Sustaining socio-economic development in Malaysia requires the inclusion of adequate socio-economic rights in its Constitution and the justiciablity of those rights. The socio economic rights provided in the Malaysian Constitution are grossly inadequate and Malaysia needs to learn more from Selected African Countries' Constitutions such as South Africa, Nigeria and Ghana. The paper is therefore divided into five parts. The first part introduces the topic and sets the tone of the paper. The second part examines the meaning of socio-economic rights and sustainable development. The third part examines the inadequacy of socio economic rights provided for under the Malaysian Constitution and the issue of justiciablity, the fourth part examines socio-economic rights in South Africa, Nigeria and Ghana and the issue of justiciablity. The last part concludes the paper and makes a number of recommendations stating the lessons to be learnt from the selected African Countries Constitutions and stressing the need for adequate inclusion of socio-economic rights in the Malaysian Constitution.

Keywords: Constitution, Human rights, Justifiability, Socio economic rights, Sustainable development

INTRODUCTION

There has been an increasing concern for the recognition of socio-economic rights which of course raise the issue of effective machinery of enforcement.[1]This machinery needs to be not only in place, it must also be accessible, credible and effective.[2] Recognition of these rights in the nation's constitutions therefore becomes the first step before any discourse can be made on its enforcement.

The aim of including socio-economic rights in a nation's constitution is not only to advance the socio-economic needs of the people but also to sustain the existing development thereby enhancing the dignity of human persons.[3] It shows that the constitution's transformative agenda
anticipate beyond merely guaranteeing abstract equality.[4] It indicates the constitution's commitment

[1] Gomez, Mario, "Social Economic Rights and Human Rights Commissions" (1995) *Human Rights Quarterly*, vol. 17, No. 1, February, 155-169.
[2] Ibid.
[3] Liebenberg, S., 'South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool to Challenging Poverty?' (2002) 2 *Law, Democracy & Development*, 159– 191.
[4] See generally Klare, K., "Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* pp 147 – 188; and Van der Walt, AJ., 'A South African Reading of

to transform and sustain the society's socio-economic needs.[5] It also guides the law makers in policy formulations and enables the court to intervene where the policy are not implemented satisfactorily.[6] It is against this backdrop that the concept has been described as constitutional essentials.[7] Discourse on the accessibility, content and sustainability of socio-economic rights assume great urgency in Malaysia.

It must be pointed out from the outset that many academic papers have tended to ignore comparative constitutional discourse on socio-economic rights.[8] Some have focused on a criticism of court decisions on socio-economic rights for not recognizing an immediate, direct and individual entitlement to a specific socio-economic right and its reluctance to provide normative clarity to the content of the different socio-economic rights.[9] Some also focused on the methodology to be

Frank Michelman's Theory of Social Justice' (2004) 19 *SA Public Law,* 253 – 307, at 255.

[5] Langa, P., 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* pp 351 – 360, at 352; Constitutionally entrenched socio-economic rights have the potential to transform a nation's socioeconomic values and establish a society based on democratic values, social justice and fundamental human rights, and improving the quality of life of all citizens in the country. Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, (2006) 17 *Stellenbosh L. Rev. 5*

[6] Monty J. Roodt, Impediments to the Delivery of Socio-economic Rights in South Africa, being Paper delivered at SASA Conference, Stellenbosch, 2008.

[7] L Sager, 'The Why of Constitutional Essentials', (2003-2004) 72 *Fordham Law Review* 1421; Virginia Mantouvalou, The Case for Social Rights in Debating Social Rights, (Conor Gearty and Virginia Mantouvalou, Oxford: Hart Publishing (2010) available at http://scholarship.law.georgetown.edu/facpub/331/ accessed on 13th September, 2011.He used social and socio-economic rights interchangeably.

[8] Linda Stewart, "Adjudicating Socio-economic Rights Under a Transformative Constitution" (2010) vol.28:3, *Penn State International Law Review*, 488-512.; Virginia Mantouvalou, The Case for Social Rights, in Conor Gearty and Virginia Mantouvalou, Debating Social Rights (Oxford: Hart Publishing 2010) 1-32; Mariette Brennan, "To Adjudicate and Enforce Socio-economic Rights: South Africa Proves That Domestic Courts Are A Viable Option" (2009) vol.9 no.1 *QUTLJJ*, 64-84; Emeka P. Amechi, "Enhancing Environmental Protection and Socio-economic Development in Africa: A Fresh Look at the Right to general Satisfactory Environment Under the African Charter on Human and Peoples' Right" (2009) *LEAD* vol.1/5, 60-71; Monty J. Roodt, " Impediments to the Delivery of Socio-economic Rights in South Africa" paper delivered as SASA Conference, Stellenbosch, 2008; Emma C. Neff, "From Equal Protection to the Right to Health: Social and Economic Rights, Public law Litigation, and How an Old Framework Informs a New Generation Advocacy" (2009) 43, *Columbia Journal of Law and Social Problems*, 151- 181 Holger P. Hestermeyer, "Access to Medication as Human Rights", (2004) 8 *Max Planck UNYB* 102- 180; Wayne MacKay and Natasha Kim, Adding Social Condition to Canadian Human Rights Act, 2009, Canadian Human Rights Commission; Karin Lehmann, "In Defence of Constitutional Court: Litigating Socio-economic Rights and the Myth of Minimum," (2006) *Am. U. Int'l L. Rev.*, 163-196; Marius Oliver, "Constitutional perspectives on the Enforcement of Socio-economic Rights: Recent South African Experiences" (2002) 33 *VUWLR* 117-156; Gwen Brosky and Shelagh Day, " Beyond the Social and Economic Rights Debate" (2002) vol .14 *CJWL/RFD* 184-219; Gomez Mario, "Socio-economic Rights and Human Rights Commissions," vol. 17, no., 1, *Human Rights Quarterly*, 1995.

[9] Craig Scott & Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney Legacy and Grootboom's Promise" (2000) 16 *S. Afr. J. Hum. Rts*. 206, 260; David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance", (2002) 119 *S. African L.J.* 484, 496; David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 *S. Afr. J. Hum. Rts*. 1; 7 Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *S. Afr. J. Hum. Rts*. 383, 387; Kevin Iles, "Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses" (2004) 20 *S. Afr. J. Hum. Rts.* 448, 453; Jiain Currie & Johan De Waal, *The Bill Of Rights Handbook* 166 (5th ed. Juta 2005); Anashri Pillay, "Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction" (2005) 122 *S. African L.J.* 419, 419; I. M. Rautenbach, "The Limitation of Rights and Reasonableness in the Right to Just Administrative Action and the Right to Access to Adequate Housing, Health Services and Social Securit" (2005) J. *S. Afr. L*. 627, 628; Stu Woolman & Henk Botha, "Limitations", *in Constitutional Law Of South Africa* 1, 3-4 (Stu Woolman et al. eds., 2nd ed. Juta 2006); Carol Steinberg, "Can Reasonableness Protect the Poor?- A Review of South Africa's Socio-Economic Rights Jurisprudence" 123 *S. African L.J.* 264, 267 (2006); D.M. Davis, "Adjudicating the Socio-Economic

employed where the courts are called upon to interpret a specific socio-economic right.[10]

The paper argues for adequate inclusion of socio-economic rights in the Malaysian Federal Constitutions in order to sustain the present socio-economic development in Malaysia. This is done by dividing the paper into five parts. The first part examines the meaning of socio economic rights as it relates to sustainable development. The second part examines major international instruments on socio-economic rights. The third part examines the existence or otherwise of socio-economic rights in the Malaysian Federal Constitution. The fourth part examines socio-economic rights in selected African countries' constitutions. Finally, the paper makes a number of recommendations as lessons from the selected African countries' constitution.

It must be stated from the outset that the need for comparative analysis of the selected African countries especially between Nigeria and Malaysia therefore arises for obvious reasons. Firstly, Nigeria like Malaysia operates the doctrine of separation of powers.[11] Secondly, both countries share similar colonial heritage by operating on the doctrine of common law where judicial precedent plays a crucial role in the administration of justice.[12] Also, both countries operate the concept of constitutional supremacy where the Constitution is seen as the supreme law of the land.[13] Moreover, the two systems operate under a Federal system of government[14] and are based on the concept of democracy.[15]

Rights in the South African Constitution: Towards 'Deference Lite'?," 22 *S. Afr. J. Hum. Rts*. 301, 312 (2006).

[10] See Linda Stewart, Adjudicating Socio-Economic Rights Under a Transformative Constitution, (2010) vol. 28:3 *Penn State International Law Review* 487-512 where it was said "I suggest that the courts employ a comprehensive methodology in the interpretation of socio-economic rights which includes grammatical, contextual, teleological, historical and comparative interpretation methods."

[11] See sections 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria for the operation of the doctrine of separation of powers in Nigeria. Section 4 provides that the legislative powers of the Federation shall be vested in the National Assembly which consists of the Senate and the House of Representatives. The sections goes ahead to state the legislative powers of the Federation of Nigeria, Section 5 vests the executive powers of the Federation in the President of the Federal Republic of Nigeria who may exercise such powers in person or through the Vice President or the Ministers appointed by him. Section 6 vests the judicial powers of the Federation in the Courts established for the Federation and states some other powers of the courts in Nigeria. In Malaysia, Article 39 reads, 'The executive authority of the Federation shall be vested in the Yang di Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.' Also, Article 44 reads, 'The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di-Pertuan Agong and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).' More still, Article 121(1), whose marginal note reads 'Judicial Power of the Federation' now reads, inter alia, 'There shall be two High Courts of coordinate jurisdiction and status namely...'. Unlike arts 39 and 44, which mentions executive and legislative powers, art 121(1), following the 1988 amendment, no longer contains the term 'judicial power', which was previously mentioned by the original version of the provision. See also Abdul Aziz Bari, "The Doctrine of Separation of Power and the Ghost of Keram Singh" (2001) 1, *MLJA*, 1 where he argued that the foundation of the entire constitutional structure of Malaysia rests on the principle of separation of powers.

[12] See Ashgar Ali Ali Muhammed, "Recent Decisions Offending Stare Decisis in Malaysia" (2008) 3 *MLJA* 97. See also the Nigerian case of *Dalhatu v Turaki* (2003) FWLR (Pt. 174) 247.

[13] See section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria which provides that the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria and that if any law is inconsistent with the provision of the Constitution, the Constitution shall prevail and such other law shall to the extent of its inconsistency be void. Similarly, Article 4 (1) of the Malaysia Federal Constitution provides that the Constitution is the Supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of its inconsistency be void.

[14] See section 2 (1) and (2) of the Constitution of the Federal Republic of Nigeria which provides that Nigeria is one indivisible and dissoluble Sovereign State to be known by the name Federal Republic of Nigeria and that Nigeria shall be a Federation consisting of States and a Federal Capital Territory. Section 3 lists all the States of the Federation and described it in the first column of Part1and second column in that schedule. The position is similar in Malaysia. See Article 1 of the Malaysian Federal

SOCIO-ECONOMIC RIGHTS AND SUSTAINABLE DEVELOPMENT

Socio-economic rights have been seen as rights relating to the meeting of basic needs that are essential for human welfare.[16] They are entitlements to the avoidance of severe deprivation, not rights to the satisfaction of individual preferences more generally. They incorporate a safeguard against poverty, not the provision of a life in luxury. They are urgent claims representing vital interests of the individual to avoid harm. They do not guarantee access to the goods that we might desire to possess, so as to live a fulfilling life; they are preconditions for the pursuance of a good life. They include but not limited to right to housing; a right to basic nutrition, including a right to water; a right to basic healthcare, because ill-health can lead to severe human suffering; a right to education; a right to social security and social assistance; a right to work and decent working conditions; a right to form and join a trade union, including a right to collective bargaining and a right to strike.

It must be said that realizing socio-economic rights entails amelioration of the conditions of the needy and the commencement of a generation that is free from socio-economic need. In this vein, parties in socio-economic rights litigation would want their victories to be followed by immediate amelioration of their socio-economic conditions.

Socio-economic rights have been described as vague and therefore not capable of definite definition in terms of its obligation.[17] Some also argue that they lack essential features of rights per se because of its lack of universality and are not available on the basis of one being a human being and that realizing it is subject to certain conditions.[18] Some also see it as what constitutes rights are not what is contained in any human rights instruments but determined by the local cultural tradition of every society. However, from whichever way it is looked at, there is an international standard with some inter cultural agreements as to what constitutes the essential features of socio-economic rights. These include the right to an environment not harmful to health and wellbeing, rights of access to land, access to adequate housing, access to health care services, sufficient food and water, and social security. This is in addition to the children's rights to basic nutrition, shelter, basic health care services and social services, and the right of everyone to education. It is therefore apposite at this juncture to make an overview of some international instruments that provide for socio-economic rights. All these where properly implemented will lead to sustainable development which is the development that takes place without compromising the rights of the future generation to meet their own needs.

AN OVERVIEW OF INTERNATIONAL INSTRUMENTS ON SOCIO-ECONOMIC RIGHTS

International Covenant on Economic, Social and Cultural Rights (ECOSOC) is the major international instrument on socio-economic rights.[19] The

---

Constitution which provides that the Federation shall be known as Malaysia while subsection (2) lists all the States of the Federation. There are also provisions in the Constitutions of both Countries sharing powers between the Federation and the States. In Nigeria, see the Constitution for instance in the second Schedule, Part1 for the exclusive legislative list for the Federal government and Part II of the same schedule for the concurrent legislative lists for both the States and the Federal Government. The third schedule also contains Federal Executive Bodies and the States Executive Bodies. In Malaysia, see for instance the Federal Constitution in its 8th Schedule, Article 71 stating provisions to be inserted in the States Constitutions. See also 9th Schedule Articles 74, 77 containing the Federal List, Article 95B(1) contains the State List while Article 95B(1)(b) contains the Concurrent Lists. See also Article 80 for the distribution of executive powers between the Federation and the States.

[15] See section 14(1) and (2) of the Constitution of the Federal Republic of Nigeria which provides that the Federation shall be based on the principles of democracy and social justice and declares that sovereignty belongs to the people from whom the governments through the Constitution derives its powers and authorities and ensured the participation of the people in their government in accordance with the provision of the Constitution. In Malaysia, see Article 113 for the conduct of elections and Articles 114 to 120 of the Federal Constitution for various issues relating to elections.

[16] F Michelman, "On Protecting the Poor through the Fourteenth Amendment" (1969-1970) 83 *Harvard Law Review at* 7.

[17] See Neier, A., 'Social and economic Rights: A critique' (2006) 13 *Human Rights Brief* 1 – 3 at 3.

[18] See generally Bossuyt, M., "International Human rights Systems: Strengths and weaknesses," in Mahoney, K., and Mahoney, P., (eds.) *Human Rights in the twentieth century* (1993) Martinus Nijhoff; Cranston, M., "Human rights real and supposed" in Raphael D, (ed.) *Political theory and rights of man* (1967) Macmillan; and Cranston, M., *What are human rights* (1973) Bodley Head.

[19] It was adopted and opened for signature, ratification and accession by the General Assembly

Convention gives all peoples whose States are parties to the Convention, the right to freely determine their social and economic development.[20] In no case therefore should a people be deprived of their legal means of subsistence.[21] However, the convention allow the developing states to determine with due regard to human rights and national economy to what extent it is to guarantee economic rights.[22]States are also enjoined to recognize the right to work; to gain his living by work which he free chooses and accepts and state shall take appropriate measures to safeguard this right.[23] It is also to ensure steady economic and social development.[24] There is also the right to workers' remuneration with fair wages and equal remuneration for equal work;[25] safe and healthy working condition;[26]equal opportunity of promotion;[27]rest, leisure and reasonable working hours and periodic holidays;[28] right to form and join trade unions of choice;[29]social security;[30] protection of family,[31] special protection for mothers during and after birth[32] and children;[33] adequate standard of living which includes good food, clothing and housing.[34]The right to accessible and to some extent free education is guaranteed by the Convention.[35]

Apart from ECOSOC, some other international instruments also provide for a number of socio-economic rights for instance, American Declaration of the Rights and Duties of man[36] provides for rights to equality of all persons before the law[37] and inviolability of home.[38] It further provides for the right to education;[39] right to work and for a fair remuneration;[40] the right to leisure time,[41] social security[42] and property.[43]

Another international human rights instrument that provides for socio-economic rights is the Universal Declaration of Human Rights.[44] It provides for the rights to recognition and equality of all persons before the law.[45] It further makes provision for property rights;[46] social security;[47] right to work and free choice of employment and to just and favourable condition of work and protection against unemployment[48]. It provides for the right to leisure and limitation of work hours.[49] A person also has the right to adequate standard of living, health and wellbeing of himself and the family.[50]The right to education is also guaranteed.[51]

Universal Islamic Declaration of Human Rights is also worth mentioning as it has a number of provisions relating to socio-economic rights.[52] It provides for the equality of all persons before the law and right against any form of discrimination.[53] All persons are entitled in their economic pursuit to the full benefit of nature and its natural resources.[54] The right to own property is also guaranteed and the poor has the right to a prescribed share of the rich according to law.[55] The means of production shall be utilized in the interest of the community.[56] It forbids monopolies and restriction of trade, usury etc in order to promote the development of balanced government and prevent the society from exploitations.[57] It permits economic activities provided that they do not conflict with the interest of the community, Islamic laws and values.[58] It further provides for right against

---

resolution2200A(XX1) of 16 December 1966 and entered into force on the 3rd January, 1976.

[20] See article 1(1) of the Convention.

[21] Ibid. See article 1(2).

[22] Ibid. See article 2(3).

[23] Ibid. See article 6(1).

[24] Ibid. See article 6(2).

[25] Ibid. See article 7(a).

[26] Ibid. See article 7(b).

[27] bid. See article 7(c).

[28] bid. See article 7(d).

[29] bid. See article 8.

[30] bid. See article 9.

[31] bid. See article 10(1)(a).

[32] bid. See article 10(b).

[33] bid. See article 10(c).

[34] bid. See article 11.

[35] bid. See article 13.

[36] It was adopted by the ninth International Conference of American States (1948) reprinted as basic documents pertaining to human rights in Inter-American system, OEA/Ser.L.V./II.82 doc.6 rev.1 at 17 (1992).

[37] See article II.

[38] See article IX.

[39] See article XII.

[40] See article XIV.

[41] See article XV.

[42] See article XVI.

[43] See article XXIII.

[44] 10th December 1948.

[45] Articles 6 and 7.

[46] See article 17

[47] See article 22.

[48] See article 23.

[49] See article 24.

[50] See article 25.

[51] See article 26.

[52] It was made 19th September, 1981. This was a declaration for mankind and a guidance and instruction for those with the fear of God.

[53] See article 3.

[54] See article 15(a).

[55] See article 15(c).

[56] See article 15(e).

[57] See article 15(f).

[58] See article 15(g)

expropriation of document except for public interest and on payment of fair and adequate compensation;[59] status and dignity of workers;[60] the right to social security[61] and adequate education.[62]

Furthermore, The Cairo Human Rights Declaration in Islam also contains some provisions relating to socio-economic rights.[63] It provides for the right of every person to live in security for himself, religion and family and the equality of all persons before the law shall be guaranteed without any distinction between the ruler and the ruled.[64] The right to a clean environment,[65] medical and social care is guaranteed.[66] A right to decent living; including food. Clothing, shalter, education, medical care and all other basic needs.[67] It also provides for the right to property acquired in a legitimate way and prohibits expropriation except for public interest and upon immediate and adequate compensation.[68]

Also, International Convention on the Elimination of all forms of Racial Discrimination has provisions relating to socio-economic rights.[69] It provides for the right to work and free choice of employment.[70] It further provides for the right to form and join trade unions of one's choice;[71] the right to housing;[72] the right to medical care; the right to social security, education and training.[73]

Convention on the Rights of Child is equally relevant as it makes provisions for socio-economic rights.[74] A child has a right to protection against all forms of discrimination,[75]and attack[76] He has a right to preventive health care, guidance and family planning.[77] He has a right to education[78] and to a protection against sexual exploitation.[79]

Convention on the Elimination of all forms of Discrimination against Women also has a number of provisions dealing with socio-economic rights.[80] It provides that the state shall take all necessary measures, social and economic, to ensure full development and advancement of women.[81] The state is to eliminate all forms of discrimination against women in employment.[82] It further provides for the right to equality of men and women;[83] right to work;[84] same job opportunities;[85] free choice of profession, right to promotion and job security; [86] right to equal remuneration;[87] social security;[88] and health and safety working conditions.[89] It also provides for right to family benefits,[90] bank loans and mortgages;[91] health care facilities;[92] social security;[93] training and education;[94] equal access to economic opportunities[95] and adequate living conditions.[96]

SOCIO-ECONOMIC RIGHTS IN SELECTED AFRICAN COUNTRIES' CONSTITUTIONS

The Constitution of the Federal Republic of Nigeria provides for socio-economic rights in form of fundamental objectives and directive principles of state policy. From the perspective of socio-economic rights, sections 16, 17, 18 and 20 appear to be most relevant. This it is submitted guarantees socio-economic rights in Nigeria notwithstanding the way it

[59] See article 16.
[60] See article 17.
[61] See article 18.
[62] See article 21.
[63] This was adopted and issued at the Nineteenth Islamic Conference of Foreign Ministers in Cairo on 5th of August 1990.
[64] See article 19(a).
[65] See article 17(a).
[66] See article 17(b).
[67] See article 17(c).
[68] See article 15.
[69] It was adopted and opened for signature and ratification by the General Assembly Resolution 2106(XX) of 21 December 1965 and entered into force on the 4th of January, 1969 in accordance with article 19.
[70] See article 5(e)(1).
[71] See article 5(e) (II).
[72] See article 5(e) (III).
[73] See article 5(e) (IV).
[74] It was adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November, 1989. It was entered into force on 2nd September 1990 in accordance with article 49.
[75] See article 2.
[76] See article 16(2).
[77] See article 24(2)(f).
[78] See article 28 and 29.
[79] See article 34.
[80] It was adopted on 18 December 1979, entered into force as an international treaty on 3rd September, 1981.
[81] See article 3.
[82] See article 11(1).
[83] Ibid. see also article 15.
[84] See article 11(1)(a).
[85] See article 11(1)(b).
[86] See article 11(1)(c).
[87] See article 11(1)(d).
[88] See article 11(1)(e).
[89] See article 11(1)(f).
[90] See article 13(a).
[91] See article 13(b).
[92] See article 14(2)(b).
[93] See article 14(2) (c).
[94] See article 14(2) (d).
[95] See article 14(2) (e).
[96] See article 14(2) (h).

was couched.[97] It provides for social objectives by stating that the state social order is founded on the ideals of freedom, equality and social justice[98] and that every citizen of Nigeria has equal rights and opportunity before the law;[99] and that sanctity and dignity of human persons shall be recognized;[100] the governmental actions shall be humane;[101] exploitation of natural resources shall be for common good[102] and that the independence and impartiality of the courts shall be secured and maintained.[103] The state is also enjoined to shun all forms of discrimination, cater for peoples' health and welfare.[104] The State is also required to provide a self-reliant economy[105] and control the national economy in such a way as to secure maximum welfare, freedom and happiness of the citizen[106] and direct its policy towards promotion of balanced and planned economy.[107] The security and welfare of the people shall be the primary purpose of governance.[108] The State is to strive where applicable to eradicate illiteracy by providing free and compulsory education.[109] The State is also to protect its environment and safeguard water, air, land, forest and wild life in Nigeria.[110] The Constitution further requires the three organs of government namely executive, legislature and judiciary to conform observe and apply these rights.[111] These are in addition to fundamental rights guaranteed under the Constitution.[112] However, while the fundamental objectives and directive principles are not justiciable, fundamental rights are justiciable.[113] The government is also enjoined to establish and regulate authorities to promote and enforce these rights.[114]

One must therefore observe that the courts in Nigeria have not done much in upholding the justiciability of these rights. There are a number of cases in Nigeria where courts have rendered opinions on socio-economic rights. In the School Seizure Cases, suits were filed to challenge the abolition of private primary education by the Lagos State Government. The Courts in those cases upheld the non-justiciability of these socio-economic rights. Thus, the Court in *Okogie v AG Lagos State*,[115] *Adewole v Jakande*[116], *Ehinmare v Governor, Lagos State*[117] held that the courts did not have the judicial power to make any declaration as to whether any organ of government has acted in conformity with the directive principles which are the socio-economic rights.

The Bill of Rights contained in the South African Constitution in no particular order or sequence

[97] See Olisa Agbakoba & Emelonge U., "Test of Progressive Realization of Social. Economic and Cultural Rights in Nigeria" (1990-1999 Budget Analysis) (2001) Hurrilaws, Lagos,1-2; Ibe S., Beyond Justiciability: Realizing the Promise of Socio-economic Rights in Nigeria (2007) *African Human Rights Law Journal*, 225; J.O. Akande, Introduction to the Constitution of the Federal Republic of Nigeria, 1999, M.J. Professional Publishers, 2000) at 52.

[98] See section 17(1) Constitution of the Federal Republic of Nigeria, 1999.

[99] Ibid. See section 17(2)(a).

[100] Ibid. See section 17(2)(b).

[101] Ibid. See section 17(2)(c).

[102] Ibid. See section 17(2)(d).

[103] Ibid. See section 17(2)(e).

[104] Ibid. See section 17(3)(a).

[105] Ibid. See section 16(1)(a).

[106] Ibid. See section 16(1)(b).

[107] Ibid. See section 16(2)(a).

[108] Ibid, See section 14(2) (b).

[109] Ibid, See section 18(3) (a).

[110] Ibid, See section 20.

[111] Ibid, See section 13 of the Constitution of the Federal Republic of Nigeria, 1999.

[112] Ibid, See chapter IV.

[113] See section 6(6)(c) limiting the power of the court in thin regard stating that judicial powers shall not except as otherwise provided by the Constitution extend to any question or issue as whether any act or omission of any person or authority is in compliance with Fundamental Objectives and Directive Principles of State Policy contained in chapter II of the Constitution. See also B.O. Nwabueze, *The Presidential Constitution of Nigeria*, C. Hurst & Company in association with Nwamife Publishers, Enugu and Lagos, Nigeria, 1982) at 534.

[114] See Item 60 of the Exclusive legislative List contained in second schedule, part 1 of the Constitution of the Federal Republic of Nigeria, 1999.

[115] (1981) 2 NCLR 337. The Court in this case observed that the arbiter of, and guardian of fundamental objectives and directive principles of state policy is the legislature itself ot the electorates. However, the court also added that directive principles must run subsidiary to fundamental rights provision of the Constitution, and that therefore any social function of legislation implementing these fundamental objectives shall not be declared void unless the rights of individual or any other provision of the Constitution is infringed. In coming to this conclusion, the Court of Appeal in Okogie's case relied on the Indian case of *State of Madras v Champakan* (1951) SCR 252 for further eading, see B.O. Okere, Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution, (1983) 32 ICLQ, 214.

[116] (1981) 1 NCLR 262.

[117] (1981) NCLR 166. See also the case of *Okaegbu v AG Imo State* SC/83/1983 of 30/03/83. SC.

provides for a number of socio-economic rights. These include rights dealing with labour relations,[118] environmental rights,[119] property rights,[120] right of access to adequate housing[121]; right of access to health care, sufficient food and water;[122] the right to social security,[123] basic and on-going education.[124]

It has been submitted that the purpose of a constitution is not merely to protect extant right but also to empower the disadvantaged persons and contribute to the amelioration of social evils of such like poverty, illiteracy and homelessness. It is therefore important to note that most of the socio-economic rights included in the South African Bill of rights have important social and economic ramifications as most of them reflect specific areas of basic needs or delivery of particular goods and services. Furthermore, they tend to create entitlement to material conditions of human welfare.

It is also for this reason that sections 26 and 27 are seen as the most significant of all the socio-economic rights in the South African Bill of rights. This has to been seen in the context of the preamble to the Constitution which envisions the adoption of the constitution as the supreme law of the Republic in order to, inter alia, improve the quality of life of all citizens and to free the potentials of each person.
It is therefore not amazing that almost all cases involving socio-economic rights that have come before the South African Courts, particularly the Constitutional Courts have been based on the rights under section 26 and 27. A brief discussion of the decisions in this area of law in Nigeria and South Africa shall now be examined.

Thus, in *Soobramoney v Minister of Health, KwaZulu-Natal*[125] was the first case concerning socio-economic rights to be taken to the Constitutional Court. The case involved an application for an order directing a state hospital to provide the appellant with on going dialysis treatment and interdicting the respondent from refusing him admission to the renal unit. The Constitutional Court held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach section 27(1) right of everyone to have access to health care services, and the section 27(3) right to emergency medical treatment. This decision represents the low water-mark in relation to the application of socio-economic rights by the court.[126]

In The Government of the Republic of *South Africa v Grootboom*,[127] a group of adults and children had been rendered homeless as a result of eviction from their informal dwellings situated on private land ear-marked for low cost housing. They applied for an order directing the local government to private them with temporary shelter, adequate basic nutrition, health care and other social services. The Constitutional Court held that the measures of provincial government to provide systematic housing over a period of time were unreasonable, since no contingent plans were for the temporary shelter of the homeless and destitute people. The Court also held that the state had failed to meet the obligation placed on it by section 26 and declared that the state housing programme was inconsistent with section 26(1) of the Constitution.

In *Van Biljon v Minister of Correctional Services*,[128] the appellants were HIV infected prisoners who sought, inter alia, that their right to adequate medical treatment entitled them to the provision of expensive anti-retroviral medication. The applicant contended that because the right to adequate medical treatment was guaranteed in the Bill of rights, the prison authorities could not on the basis of lack of funds, refuse to provide treatment which was medically indicted. This court was of the view that lack of funds could not be an answer to a prisoner's constitutional claim to adequate treatment. He had a constitutional right to adequate medical treatment. The applicant order was granted and the respondents were ordered to supply them with the combination of anti retro viral medication which had been prescribed for them for as long as such medication continued to be prescribed.[129]

---

[118] See section 23 of South African Constitution.
[119] Ibid, see section 24.
[120] Ibid, see section 25.
[121] Ibid, see section 26.
[122] Ibid, see section 27.
[123] Ibid, see section 27.
[124] Ibid, see section 29.
[125] (1998) 1 SA 765 (CC); (1997) (12) BCLR 1696.

[126] G. Devenish " The nature, Evolution and Operation of Socio-economic Rights in South African Constitution" (2007) 70 (1) *THRH* 92. Indeed, a lot of criticisms has been made at the judicial reasoning and approach of the court with some opining that from the perspective of judicial precedent, Soobramoney did not contribute much to the understanding of the socio-economic rights nor did it really lay down any principles that could be followed when interpreting socio-economic rights so as to illuminate and indigenize jurisprudence on socio-economic rights. See C. Ngwena and R. Cook " Rights Concerning Health in D. Brand and C.Heyns (eds) 135 and 137.
[127] (2000) (11) BCLR 789 (c).
[128] (1997) (6) BCLR 789 (c).
[129] Although the Van Biljon case was decided in the context of prisoners and their constitutional rights to

The case of Residents of *Bon Vista Mansions v Southern Metropolitant Local Council* concerned the disconnection of water supply based on arears in payment. The applicant brough an action for an urgent interdict as a member and in the interest on Bon Vista residents, alleging that the disconnection of residents water was an infringement of sention 27(1)(a) of the Constitution. In coming to the conclusion that the interdict should be granted, the court noted that as the disconnection deprived the applicant of an existing right, the action was *pri ma facie* in breach of constitutional duty to respect the and the onus accordingly fell right to access to water on the respondents to justify such breach. As the respondent had failed to discharge this onus, the court held that the applicant's right of access to water had been infringed and the respondent were ordered to restore the water supplied.

In *Manquele v Durban transitional Metropolitan* Council, [130] the applicant water supply had been disconnected by the respondents on the basis of noon payment. The applicant sought a declaratory order that the disconnection was unlawful and invalid on the ground that the bye-law in terms of which the disconnection took place was *ultra vires* the water service Act,[131] and that the disconnection resulted into the denial of access to water for the reason of non-payment due to being unable to pay contrary to section 4 (3) (c) of the Act. Although the applicant did not rely directly on the constitutional guarantee to access to sufficient water but rather on the rights protected in section 3 of the Water Services Act,[132] the Court nevertheless confirmed that this right was in turn rooted in section 27 of the Constitution, however, the applicant was unsuccessful in her case as the Court found that she had exceeded the 6 kiloliters of Water per month provided free of charge as a basic service by the respondent.[133]

Lastly in *Khosa v Minister of Social Development*, legislation that excluded permanent residents and their children from access to social assistance was successfully challenged and found to be inconsistent with section 27(1) which provides for the right of everyone to have access to social security and assistance and also section 9(3) which prohibits unfair discrimination.

Ghana Constitution provides for the traditional civil and political rights (first generation rights) and some social, economic and cultural rights (second generation rights). These are contained in chapter 5 entitled Fundamental Human Rights and Freedoms. These constitutional bill of rights provide the fundamental legal framework for the protection of human rights in Ghana. Although the Ghanaian Constitution does not provide for socio-economic rights as extensively as the Nigerian and the South African Constitution do. The similarity with the South African Constitution however is that most of the socio-economic rights protected are contained within the body of the bills of rights and not as policies and principles as in the case of the Nigerian Constitution.

As far as socio-economic rights are concerned, article 20 of the Ghanaian Constitution provides for freedom from deprivation of private property. It protects the right to adequate compensation where property is compulsorily acquired and such acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning.[134] The right of workers is provided for under article 24. This include the right to work

---

adequate medical treatment (under section 35 (2)(e)), it has important ramification for everyone's right to heath care services (under section 27(1)). This ramifications were reflected in the constitutional court's decision in Minister of health v Treatment Action Campaign and others. (2002) 5 SA 703 (CC). in that case, the treatment action campaign (TAC), a non-governmental organization, in a bid to force government to provide anti- retroviral drugs under the public health system, specifically demanded that Nevirapine, adrug that could reduce by half the rate of HIV transmission from mother to babies, be freely distributed to women infected with the virus. The court held that government's policy and measures to prevent mother-child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme.

[130] (2002) (6) BCLR 625 (w).

[131] See section 4(3) of the Act lays down measures to be complied with when discontinuing water services.

[132] The section gives everybody the right of access to basic water supply and basic sanitation. Every water services institution must take reasonable measures to realize this right. Every water services authority must, its water services development plan, provide for measures to realize this right.

[133] Although, the fact in the above cases were substantially similar, the outcomes were clearly different. It appears that the willingness of the courts to protect the rights of access to water in the *Bona Vista case* was due to the fact that, unlike the *manqele case*, which was based on the Water Services Act, *Bona Vista* was grounded on the constitutionally guaranteed rights protected in section 27. It is submitted that the real test will come when the right is untimely challenged in the Constitutional Court.

[134] Article 20(1)(a).

under satisfactory, safe and healthy condition; the right to equal pay for equal work; the right to a reasonable number of working hours and holidays as well as remuneration for public holidays.[135] Workers also have the right to form or join trade unions of their choice.[136] The only justifiable restriction on the rights to join trade unions are those imposed by law in the interest of national security, public order and the protection of the rights of others.[137] Comparatively speaking, Ghana's constitutional position on the rights of worker is close to that of South Africa.

Article 25 of the Ghanaian Constitution provides for the right to equal educational opportunities and facilities with the view of achieving full realization of that right.[138] Article 25 also provides for the availability of free and compulsory basic educational and general availability and accessibility of secondary and higher education.[139] The right of individuals to establish and maintain private schools is also guaranteed. In many respects, this constitutional provision is similar to that of South Africa in that both provisions attempt to explain what is included in the right to education.[140] Unlike South Africa, the Ghanaian bill of rights does not provide for the right to health. In that respect, the Ghanaian Constitution is similar to other African Constitutions as it only acknowledges the right to health as one of the goals and objectives includes a bill of rights and in drafting its constitution, objectives of the government as laid down in the directive principles of state policy.[141]

SOCIO-ECONOMIC RIGHTS IN MALAYSIAN FEDERAL CONSTITUTION AND LESSONS FROM SELECTED AFRICAN COUNTRIES' CONSTITUTIONS

The Federal Constitution of Malaysia contains in its Part II has what is referred to as fundamental liberties. These rights are in the form of bill of rights or fundamental human rights as contained in some constitutions. What appears to be socio-economic rights in the Malaysian Constitution is inadequate. The few ones will be briefly examined. Firstly, it makes provisions for equality of all persons before the law and that everybody is entitled to equal protection of the law.[142] It prohibits discrimination against citizens on the ground of religion, race, decent, place of birth and gender in any law or in appointment into any office.[143] The Constitution also provides for some rights with respect to education. It prohibits discrimination with respect to admission of pupils in any public institution[144] or with respect of funds of a public authority.[145] All religious groups also have the right to establish and maintain institutions.[146] It further provides for the right to against deprivation of property except according to law and that no property shall be compulsorily acquired without adequate compensation.[147]

One should also state that the Malaysian Federal Constitution contains what is terms national development plan which gives the Yang di-pertuan Agong the power, after publishing the plan, to proclaim an area as a development area while the Parliament gives effect to the development plan or any part thereof.[148] This could lead to the development of the area so proclaimed. This however cannot be strictly regarded as making provisions for socio-economic rights.[149]

We therefore venture to submit that the Malaysian Federal Constitution lacks what can strictly be regarded as socio-economic rights of its citizens. Or at best, the ones in the Constitution as stated above i.e equality before the law, right to property, right against discrimination and rights in respect of education are grossly inadequate. This is more so when compared with the provisions in the constitutions of the countries under review namely Nigeria, South Africa and Ghana. The effect of this omission is that it portrays the nation's constitution as one that does not advance the socio-economic needs of the people. It does not strive to sustain the existing development thereby enhancing the dignity of human persons.[150] It shows that the constitution's

[135] Article 24(1) and (2).
[136] Article 24(3).
[137] Article 24(4).
[138] Article 25(1).
[139] Article 25(1) (a) (b) and (c).
[140] See section 18 of Nigeria's Constitution which provides education as one of its fundamental objectives.
[141] See Article 34(2).
[142] See article 8(1) of the Federal Constitution.
[143] Ibid. See article 8(2).
[144] Ibid. See article 12(a).
[145] Ibid. see article 12(b).
[146] Ibid. see article 12(2).
[147] Ibid. see article 13(1)(2).
[148] See article 92(1) of the Federal Constitution of Malaysia.
[149] Ibid. See article (92)(2), which defines the term 'the development plan' as " a plan for the development, improvement, improvement, or conservation of the natural resources of a development area or the exploitation if such resources, or the increase of the means of employment in the area."
[150] Liebenberg, S., 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty?' (2002) 2 *Law, Democracy & Development*, 159– 191.

transformative agenda does not anticipate beyond merely guaranteeing abstract equality.[151] It indicates that there is no constitution's commitment to transform and sustain the society's socio-economic needs.[152] The constitution does not also guide the law makers in policy formulations and enables the court to intervene where the policy are not implemented satisfactorily.[153] It is against this backdrop one can submit that the Constitution lacks constitutional essentials as socio-economic rights have been so described.[154]

We are not unaware of the fact that Malaysia has made considerable impacts in nation-building, in developing its economy and in improving the quality of life of its people. Since Independence, real gross domestic product (GDP) has grown by an average of 6.5 per cent per annum during 1957 to 2009, one of the highest growth rates achieved by sovereign nations of similar age and size. Within the same period, GDP per capita in current prices grew by 7.0 per cent per annum, which has translated into substantial improvements in the people's quality of life. Extensive advances were made in education, health, infrastructure and industry.

We are however of the strong view that sustaining socio-economic development in Malaysia requires the inclusion of adequate socio-economic rights in its Constitution and the justiciablity of those rights. The reason perhaps for the present socio-economic development in Malaysia is the quality of good leaders that have ruled the country with vision to develop the country and realize her socio-economic development. The reason, it is submitted, not because of the adequacy of legal frameworks on socio-economic rights to development of the country. God forbid a situation where a leader having no interest in socio-economic development in Malaysia assumes leadership position. He might be found difficult to caution because these rights are not provided for in the Constitution or at best, grossly inadequate. This is the reason why the Constitution is in dire need for socio-economic rights to sustain the present socio-economic development in Malaysia.

As earlier stated, and at the risk of appearing repetitive, the purpose of a constitution is not merely to protect extant right but also to empower the disadvantaged persons and contribute to the amelioration of social evils of such like poverty, illiteracy and homelessness. It is therefore important to note that most of the socio-economic rights included in the constitutions of selected African countries have important social and economic ramifications as most of them reflect specific areas of basic needs or delivery of particular goods and services. Furthermore, they tend to create entitlement to material conditions of human welfare.

The above therefore leads us to the lessons that Malaysia has to learn from the constitutions of the selected African countries constitutions. Firstly, the Malaysian Federal Constitution must recognize and make adequate provisions for socio-economic rights. It is only after recognition that the issue of enforcement of rights come into place. The ways and manners of doing it can be that: as in the case of Nigeria, the Malaysian Constitution could contain provisions for fundamental objectives and directive principles of state policy. These are the policy objectives and goals which every government in power must seek to achieve and upon which the failures and successes of each government is rated. It would serve as blue-prints for good governance and social justice for all thereby safeguarding and sustaining the present socio-economic development in Malaysia. However, unlike the Nigerian Constitution, it should be made justiciable so that citizens could approach the court which is not only the last hope of common man but a place of justice for all and sundry.

Secondly, Malaysia could adopt the approach of Ghana and South Africa by including socio-economic rights adequately in the provisions of fundamental liberties contained the Malaysian Federal

---

[151] See generally Klare, K., 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* pp 147 – 188; and Van der Walt, AJ., 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* pp 253 – 307, at p 255.

[152] Langa, P., 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* pp 351 – 360, at p 352; Constitutionally entrenched socio-economic rights have the potential to transform a nation's socioeconomic values and establish a society based on democratic values, social justice and fundamental human rights, and improving the quality of life of all citizens in the country. Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, 17 STELLENBOSH L. REV. 5 (2006)

[153] Monty J. Roodt, Impediments to the Delivery of Socio-economic Rights in South Africa, being Paper delivered at SASA Conference, Stellenbosch, 2008.

[154] L Sager, 'The Why of Constitutional Essentials', (2003-2004) 72 *Fordham Law Review* 1421; Virginia Mantouvalou, The Case for Social Rights in Debating Social Rights, (Conor Gearty and Virginia Mantouvalou, Oxford: Hart Publishing (2010) available at http://scholarship.law.georgetown.edu/facpub/331/ accessed on 13th September, 2011.He used social and socio-economic rights interchangeably.

Constitution.[155] This approach considers socio-economic rights as human rights and therefore deserves to be given adequate if not equal protection with human rights as they are made justiciable as provisions relating to human rights. This is because the protection of socio-economic rights is *sine nor quanon* to the protection of human rights. Violation of socio-economic rights may lead to the violations of human rights.

We are not unaware of issues that may be raised that how come Malaysia is more socio-economically developed than the African countries we have selected in this paper despites the provisions of these socio-economic rights in the selected countries constitutions. The reason is not farfetched. This is due to the peculiarity of the problems facing African nations and thereby constituting challenges to the full realization of the socio-economic objectives of these rights. This, we have argued elsewhere which is beyond the scope of this paper.[156]

CONCLUSION

The paper has argued that the Malaysian Constitution is in dire need of adequate socio-economic rights and the justiciability of those rights. However, steps for the recognition of these rights in the Constitution need to be taken into consideration first before any talk can be made on the enforcement mechanism that needs to be put in place before these rights can be realized. This will not only advance the socio-economic needs of the country but will sustain the existing development. It would also serve as guide for policy formulations by the policy makers; with the court's powers to intervene where the policy is not satisfactorily implemented. It would also show the Constitution's commitment to transform and sustain Malaysia's socio-economic development.

The paper has also seen socio-economic rights as rights relating to the meeting of basic needs of human welfare. Where these are properly implemented, it would lead to sustainable development of the nation. It therefore made references to international instruments that have been put in place having relation to socio-economic rights. It considers International Covenant on Economic, Social and Cultural Rights, American Declaration of the Rights and Duties of man, Universal Declaration of Human Rights, Universal Islamic Declaration of Human Rights, The Cairo Human Rights Declaration in Islam, International Convention on the Elimination of all forms of Racial Discrimination, Convention on the Rights of Child and Convention on the Elimination of all forms of Discrimination against Women.

Furthermore, the paper makes references to the constitutional provisions of the selected African countries namely Nigeria, South Africa and Ghana on socio-economic rights and the lessons to be leant from these countries in order to sustain socio-economic development in Malaysia. Judicial attitudes towards the constitutional provisions on socio-economic rights especially in Nigeria and South were also revealed. There appears to be paucity of judicial authorities in Ghana in this area of law. The paper therefore submits that Malaysian Federal Constitution lacks socio-economic rights which has been termed 'constitution essentials' or at best, the ones provided for are grossly inadequate when compared with the constitution of the selected African countries. We therefore submit adequate inclusion of these rights in the Malaysian Federal Constitution will ensure sustainable development.

ABOUT THE AUTHORS

Abdulfatai O. Sambo
LLB, BL, LL.M, Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Ilorin-Nigeria and PhD in Law Candidate, International Islamic University Malaysia. He can be contacted by email at: fataisambo@yahoo.com.

Abdulkadir B. Abdulkadir
LLB, BL, LL.M, Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Ilorin-Nigeria and PhD in Law Candidate, International Islamic University Malaysia. He can be contacted by email at: barristeraba01@yahoo.com.

[155] See Part II, articles 5-13 of the Malaysian Federal Constitution.

[156] For more information on this See Monty J. Roodt, Impediments to the Delivery of Socio-economic Rights in South Africa, being Paper delivered at SASA Conference, Stellenbosch, 2008.