

Incorporation of Fundamental Objectives and Directive Principles of State Policy in the Constitutions of Emerging Democracies: A Beneficial Wrongdoing or a Democratic Demagoguery?

Eje Adakole Odike, Hemen Philip Faga, Iruka Wilfred Nwakpu

Faculty of Law, Ebonyi State University, Abakaliki, Nigeria

Email: hemenfaga@gmail.com

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Abstract

It is trite that sovereignty belongs to the people. Thus, the realization that the donors of power: The people or the citizens have some rights against the state, and the need to respond to their desires and demands by satisfying them, ensured the enshrinement of citizens' rights in the constitution as either fundamental rights or fundamental objectives and directive principles of state policy. This paper examined the incorporation of the second class of rights in the constitutions of developing democracies such as Nigeria, Ghana and Sierra Leone with a view of searching the rationale and jurisprudence of their incorporation in view of their non-enforceable status. It found that the continuous non-enforceability of fundamental objectives and directive principles of state policy in the constitutions of these countries render them more of a democratic demagoguery incapable of furthering the aims of good governance and sustainable development anchored on the social contract between the government and the governed. The paper however recommended that Nigerian court should adopt the posture of judicial activism in interpreting the rights contained in Chapter two of the constitution to bring them in consonance with the civil and political rights, which are enforceable.

Keywords

Human Rights, Fundamental Objectives, Emerging Democracies, Constitution, Democratic Demagoguery

1. Introduction

The modern idea of incorporating citizens' rights in national constitutions dates back to the *United State of America Independence Constitution of 1776*. The preamble to that constitution speaks volume of human rights, as inalienable rights, at that pristine period of the kick-off of modern democracy when it eloquently and astonishingly declared:

We hold these truths to be self-evident that all men are created equal. That all men are endowed by their creator with certain inalienable rights. That among these are life, liberty and the pursue of happiness. That whenever any form of government becomes destructive of those aims, it is the right of the people to alter it, or abolish it and constitute a new government, and organizing its power in such form as to them most likely to affect their safety and happiness¹.

Both the French *Declaration of the Rights of Man*², which was drawn up following the French Revolution of 1789 and the British *Bill of Rights*, commonly called the *Magna-Charta*, also contain an array of a distil form of human rights. The impact of these instruments was so profound and lasting that it invoked the attention of emerging states and become the anchorage for systematic efforts by national governments to take positive measure aimed at removing anti-social practices that undermine the fulfillment of civil, political and cultural conditions which threatened the legitimate aspirations and dignity of man (Bhalla, 1988: p. 75). This also led to the incorporation of both enforceable and non-enforceable human rights in national constitutions of emerging democratic states, such as the Spanish Constitution of 1931, which became the first constitution of the 20th century to incorporate human rights provisions. This remarkable example influenced the Constitution of the Republic of Ireland, 1934 and the Constitution of Republic of India 1949.

Unfortunately, the practice of incorporating political and civil rights as enforceable rights by individuals gradually pushed these species of rights to the pinnacle of claims of rights of man, neglecting the corresponding social, economic and cultural rights, which were relegated to the background. The resurgence of this second class of rights only began after WWII, but by then these were considered only as aspirations for the state to strive towards. This paper examines the now endemic practice of incorporating this second class of rights in the constitutions of developing countries with a view of searching the rationale and jurisprudence of their incorporation. In view of their non-enforceable status and their inherent relationship with the enforceable civil and political rights, the paper questions the practicability of guarantees enshrined in civil

¹This is a classic example of a national constitution with enshrined aims or objectives that are enforceable. This is unlike the provisions of fundamental objectives and directive principles of state policy in the constitutions of Nigeria, Ghana and Sierra Leone, which shares affinity with inalienable rights provided for in the *United States Constitution* and the *French Declaration of the Rights of Man*.

²The French revolution trumped up civil rights and freedoms for all human beings as inalienable human rights.

and political rights, especially in the 21st century. For instance, what is the rationale of guaranteeing the right to life without the corresponding right to a clean and uncontaminated environment, and right to food? The paper examines this paradox and contemplates the need for a purposeful guarantee of rights of man, especially in developing countries and emerging democracies.

2. Human Rights Guarantees

The idea of human rights should transcend the ordinary notion of rights as liberties guaranteed or enforced by law. Human rights are broader than that: They embrace all conceivable rights to which a person can lay a just and valid claim not totally on the basis of law but on the fact that the claimant is a human being. The term human right is a post-Second World War creation. It emerged in the public domain for the first time in 1942 and became a public parlance shortly after the Second World War when it received recognition by comity of nations, as the principle on which the post-war organization called the United Nations should be based.

After the founding of United Nations Organization in 1945, human rights replaced the phrase “natural rights” which fell into disuse partly because of religious sentiment and the fact that the concept of natural law to which it was passionately and intimately linked had become a subject of great controversy. Allied to the above, the later phrase, “the rights of man” was not universally understood to include the right of women because of its perceived gender insensitivity³. The internalization of human rights took a positive and progressive dimension with the codification of internationally recognized human rights in a document called the *Universal Declaration of Human Rights in 1948*. This formal declaration of inherent human rights in a document, although not legally binding, was swiftly followed by two binding treaties called the *United Nations Convention on Civil and Political Rights* and the *United Nations Convention on Economic, Social and Cultural Rights*. These conventions were originally conceived as one document embodying human rights, but somehow, due to political reasons they were split and ratified as separate conventions in 1966.

The classification of human right as civil and political rights or economic, social and cultural rights gave rise to further classification of human rights into generations, positive and negative rights. This differentiation gave impetus to discrimination for instance, enforceable human rights and non-enforceable human rights under some legal jurisdiction⁴. Thus, in jurisdictions such as Nigeria, Ghana and Sierra Leone, the enforceable political and civil rights provisions are enshrined in the fundamental human rights chapter of the constitution while the non-enforceable human rights provisions, which are largely social, environmental, cultural, educational and economic rights, are housed as a chapter under the fundamental objectives and directive principles of state

³The sexiest inclination or interpretation of the rights of man deprived it of universality and hence, its abandonment.

⁴Originally, the idea of human rights as alienable rights was not to categorize them but to outline them as rights which a human being is entitled to under the law.

policy⁵.

Strictly speaking, fundamental objectives are sections of a national constitution, which prescribed the ultimate social, environmental, educational, and economic cum cultural goals of the government. These are identified aims, goals or objectives a state hopes to achieve in order to uplift the living standard of its citizens. Directive principles of state policy on the other hand are the presumed strategies for achieving the fundamental objectives.

3. Fundamental Objectives and Directive Principles

The art of governance that directs government to ensure as a matter of state policy the fulfilment of identified fundamental objectives is a culture that pervades the constitutions of most emerging democracies. An examination of the constitutions of Nigeria, Ghana and Sierra Leone shows arrays fundamental objectives as a common feature. For instance, *chapter 2 of the 1999 Constitution of Nigeria*⁶ contain series of provisions bearing on fundamental objectives such as political objectives⁷ economic objectives⁸, social objective⁹, educational objectives¹⁰, foreign policy objectives¹¹, and environmental objective¹² of the Nigerian government.

Similar fundamental objective provision can be found in the constitution of Sierra Leone, 1991. For example, *Article 11* of that constitution incorporates political objectives in its *section 6*, economic objectives in *section 7*, social objectives in *section 8*, educational objectives in *section 9* and foreign policy objectives in *section 10*. Equally, *Section 34 (1)* of the constitution of the Federal Republic of Ghana, 1992 incorporates similar provisions as its fundamental objectives. Political participation of the people in the governance of their country is important because it ensures that the conduct of government is carried out in a manner that reflects the character of the state in question. Moreover, it guarantees the security and welfare of the people, promotes national unity, discourage the pre-dominance of persons from a particular group from dominating government, its agencies or the political space¹³.

⁵Fundamental rights provisions such as right to life, freedom of religion and thought, right to personal liberty, association, movement, fair hearing etc are enforceable rights guaranteed in national constitutions of independent states. This is unlike fundamental objectives and directive principles of state policy that are not enforceable in some legal jurisdictions. See section 6(6) (c) of the 1999 constitution of Nigeria, which renders unenforceable the whole of Chapter 2 of the constitution dealing with fundamental objectives and directive principles of state policy.

⁶As amended in 2011.

⁷See, section 15 of the 1999 constitution of Nigeria.

⁸See, section 16, *ibid.*

⁹See, section 17, *ibid.*

¹⁰See section 18, *ibid.*

¹¹See, section 19, *ibid.*

¹²See, section 20, *ibid.*

¹³Political objectives can only be achieved through concerted efforts of the government to eliminate disharmony. Indeed, it is only a determined government effort in this regard that can promote the much needed harmony and spirit of brotherhood required to achieve progress in a democratic state. Guaranteeing security and welfare and ensuring qualification of all citizens to the rights provided by the constitution is the second political purpose of government. See *section 14 (2) (b)* of the 1999 constitution of Nigeria.

The social objectives are contained in section 17 of the 1999 constitution. They are anchored on a social order based on the idea of freedom, unity and justice. The objectives recognize the sanctity of human person and his dignity hence, they urge government to imbibe humane governmental action, which exploit human and natural resources for the good of the citizens as a fundamental objectives and directives principles of state policy. Thus, *section 17 (3)* of the constitution obliges the state to ensure that:

- 1) All citizens, without discrimination, or any group whosever, have the opportunity for securing adequate means of livelihood, as well as, adequate opportunity to secure suitable employment;
- 2) Conditions of work are just and humane and that there are adequate facilities for leisure and for social, religious and cultural life;
- 3) The health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;
- 4) There are adequate medical and health facilities for all persons;
- 5) There is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;
- 6) Children, young person and the aged are protected against any exploitation whatsoever, and against moral and material neglect;
- 7) Provision is made for public assistance in deserving cases or other condition of needs; and
- 8) The evolution and promotion of family life is encouraged.

In furtherance of these social objectives, the 1999 constitution further states that:

- 1) Every citizen shall have equality of rights, obligations and opportunities before the law.
- 2) The sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;
- 3) Government actions shall be humane;
- 4) Exploitation of human and natural resources, in any form, for whatsoever reasons, other than the good of the community shall be prevented; and
- 5) The independence, impartiality and integrity of courts of law and easy accessibility thereto shall be secured and maintained¹⁴.

The right to health (as a social objective of government) is an important component of the right to life. This is because the right to life is measured by the individual's right to health. Thus, the right to life is meaningless if there is no meaningful right to health. An Indian court explicitly stated in *Olga Tellis & 20 Ors. v. Bombay Municipal Corporations & 14 Ors.*¹⁵ that the right to life is illusory without the corresponding right to protection of the means by which life can be meaningfully lived. This is of vital importance. Thus, the right to health should be treated as part of the right to life and the right to health should be regarded as enforceable right.

The right to health includes rights to freedoms and entitlements such as the right to

¹⁴Section 17 (2) of the 1999 Constitution. The Constitution of the Republic of Sierra-Leone 1991 itemized similar provisions as its social objectives.

¹⁵(1987) LRC (Con.), p. 381. See also (2003) CHR 236.

control one's health and body, including sexual and reproductive organs and the right to be free from interference in the area of non-consensual medical treatment and experimentation. Similarly, true right to health should also include a right to system of health protection with equality of opportunity to enjoy the highest sustainable level of health.

Leaving aside social rights, including the right to health, the 1999 constitution of Nigeria in section 16 provides for economic rights. These same rights are also contained in the Sierra Leonean constitution. Thus, in furtherance of the economic objectives of government, the Sierra-Leonean state is required to direct its policy towards ensuring:

- 1) The promotion of a planned and balanced economic development;
- 2) That the material resources of the nation are harnessed and distributed, as best as possible, to serve the common good;
- 3) That the economic system is not operated in such a manner or to permit concentration of wealth or the means of production and exchange in the hands of few individuals or a group; and
- 4) That suitable and adequate shelter, food, reasonable national living wage, and age-care, pensions, unemployment, sick benefits and welfare of the disabled are provided for all citizens¹⁶.

Effective harnessing and management of resources as envisaged in the above provisions can reduce poverty, improve living standard and infrastructure such as road, housing, hospitals, schools and electricity. It can also reduce unemployment. However, these economic objectives can be achieved only by making full use of technical and scientific knowledge, development or reforming agrarian production and exploitation. This is possible considering the vast natural and human resources some of these developing democracies, especially Nigeria, is endowed with.

On the educational objectives, section 18 of the 1999 constitution of Nigeria requires the state to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. This includes the promotion of science and technology and eradication of illiteracy. There is no doubt that education is an important vehicle of transformation. This powerful tool of social engineering empowers one by enabling him to network or positively interface with others. It also helps one to understand his rights and acquire a better outlook of life, which is more progressive.

As for the foreign policy objectives enshrined in the constitutions of developing democracies, the government is enjoined to promote and protect national's interests, international co-operation and consolidate universal peace and mutual respect among nations. The foreign policy objectives of the constitution of the Republic of Sierra-Leone for instance, provides for:

- 1) The promotion and protection of national interest;
- 2) The promotion of sub-regional, regional and inter-African co-operation and unity;

¹⁶See *section 7* of the 1991 Constitution of Sierra-Leone. Similar provision can be seen in *section 16* of the 1999 constitution of Nigeria.

3) The promotion of international co-operation for the consolidation of international peace and security and mutual respect among all nations; and

4) Respect for international law and treaty obligations; as well as the seeking of settlement of international disputes by negotiation, conciliation, arbitration or adjudication¹⁷.

Surprisingly, the lofty aims of these fundamental objectives are not enforceable. For instance, *section* 6 (6) (c) of the constitution of Nigeria 1999 prohibits the enforceability of any provision of fundamental objectives contained in the constitution by providing that the judicial power vested in accordance with the foregoing provision of this section:

(c) Shall not, except as otherwise provided by this constitution extent to any issue or question by any authority 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.

Similarly, *section* 34 (2) of the constitution of the Federal Republic of Ghana 1992 ousts the jurisdiction of the court from entertaining matters relating to fundamental objectives by technically placing the onerous obligation of securing its enforcement solely on the competence, capacity and fidelity of the President and the Parliament of the Federation of Ghana. Accordingly, the said section provides that:

The president shall report to parliament, at least once a year, all the steps taken to ensure the realization of the policy objectives contained in this chapter and in particular, the actualization of basic human rights, a healthy economy, the right to work, the right to good health-care and the right to education.

4. Non-Enforceability of Fundamental Objectives: A Beneficial Wrongdoing or a Democratic Demagoguery?

Non-enforceability simply means deprivation of the power of the court to make a ruling and enforce violation of the rights. This was judicially confirmed in the Nigerian case of *Attorney General of Borno State & Ors. v. Rev. JJ Adamu & Ors*¹⁸. In that case, the court held that by virtue of section 6(6) (c) of the 1979 constitution (which is *impari materia* with *section* 6(6) (c) of the 1999 constitution of Nigeria), the determination of whether or not any authority or person is in breach of the provision of Chapter II dealing with fundamental objectives has been excluded. This calls for concern and raises the question whether non-enforceability of fundamental objectives is a beneficial wrongdoing or a democratic demagoguery? It is tantamount to a beneficial wrongdoing to base the continuous non-enforceability of fundamental objectives on an assumption that enforceability of it is not to be insisted upon as the only sentinel that can keep eternal vigilance over the sanctity of fundamental objectives and directive principles of

¹⁷See *section* 10 of the Constitution of Serra-Leone 1991. This provision is similar to *section* 19 of the constitution of Nigeria 1999.

¹⁸(1998) 1 NWLR (pt. 427) 681-687.

state policy. This argument holds no waters because the non-enforceability character of fundamental objectives sometimes makes them a dicey and tricky instrument of state policy¹⁹.

On the other hand, the argument that dismisses individual enforcement of fundamental objectives in the court of law in favour of their realization through governmental policies, engendered by the positive obligation on the government to do so, is in fact, an argument too far. If not so, how can one assume that the obligation of government such as the declaration that “the security and welfare of the people shall be the primary purpose of government” be regarded as a non-enforceable right? Again, how can the right to health, a right that is subsumed under the right to life not treated as part of enforceable right to life but left to the goodwill of those in power. It is baseless to contend that non-enforceability of fundamental objectives is due to an assumed professional incompetence of the judiciary to engage effectively in matters of policy, which is assumed to be the exclusively preserve of the executive organ of government.

Another point usually pondered by proponents of non-enforceability of fundamental objectives is that their contents are difficult to achieve, especially in developing economies that are already burden with the actualization of the guaranteed civil and political rights coined as fundamental rights. Governments of developing or emerging democracies are considered to be ill-equipped to compound the actualization of fundamental human rights with the more complex and rigorous economics, social and cultural components of fundamental objectives. Proponents of this argument thus, believe that the economic, social and cultural components of directive principles embodied in the constitution as fundamental objectives should be kept unenforceable, until an auspicious times in the future, when they will become enforceable, if economic, social and cultural conditions warrants. In this regard, fundamental objectives provisions in the constitution are merely seen by human rights adherents of the non-enforceability slant as mere national aspirations which are to be achieved in the future depending on the availability of resources²⁰.

To us, this argument is without merit because the constitution is first and foremost a legal document of fundamental importance and not a moral code. Thus, the constitution should contain nothing less than rule of law, which as much as possible must be few, general, fundamental and enforceable. In the words of a Nigerian Constituent Assembly member:

What is the need for having something you cannot enforce? What is the need for deceiving your countrymen about what they are entitled to...? Therefore, I feel that probably the best thing to do is to have it somewhere else and not in the constitution²¹.

¹⁹R. S Bhulla, *Op. cit.*, p. 83.

²⁰It is the contention of this group that economic conditions in emerging democracies is not conducive for enforceability of the fundamental objectives because of scarce resources, and that such objectives should be enforceable at a later date.

²¹Proceeding of the Constituent Assembly, 1978 vol. 1 (Lagos! Federal Ministry of Information), p. 62.

This is an apt observation. The matchless truth is that by making fundamental objectives a non-enforceable component of the constitution of developing democracies, the framers of those constitutions have taken from the people with the left hand what they have given to them with the right hand. This renders fundamental objectives a democratic demagoguery since the objectives incorporated in them are not enforceable by individuals who are supposed to enjoy their fruits. Indeed, the non-enforceability of the laudable contents of fundamental objectives renders them mere homilies and manifestoes of intentions. At best, they remain a beneficial wrongdoing and at worst a democratic demagoguery.

The continuous non-enforceability of fundamental objectives is particularly sad considering the fact that political leadership of most developing or emerging democracies, lack the much taunted political fidelity and integrity, which citizens are enjoined to bank on. The so called “steps”, legislative or other measures, which the government is supposed to take for the realization of fundamental objectives cannot keep eternal vigilance over the sanctity of fundamental objectives. The good thinking is, if fundamental objectives are to be made a permanent feature of the law ostensibly for the guidance of successive governments, they should be promulgated by the legislature as part of the ordinary laws of the land. This is preferable, for when such laws are breached with wanton abandonment, as most leaders in emerging democracies would likely do, the sanctity attached to the constitution will at least be preserved. Moreover, it is less reprehensible to breach inorganic or ordinary laws without judicial sanctions than to discrete the sanctity of the constitution, which is the grundnorm, basic or organic law of the land.

It is tantamount to legal naivety or political demagoguery to assume that while the agents of the state may not be answerable to a court of law for the breach of fundamental objectives, they cannot escape facing a higher or more powerful “court of public opinion”, which at regular period will do the reckoning (electorate, during elections). Unfortunately, this assumption takes for granted too many factors involved in the election process in emerging democracies. For instance, the assumption presupposes a free and fair election where enlightened and articulate electorates are allowed to vote according to the dictates of their conscience among others. This assumption clearly ignores the electoral behavior in emerging democracies, where majority of electorates cast their votes, not according to their conviction but in blind response to the material trapping of a corrupt electoral system, overbearing intimidation, mass illiteracy, election rigging, ethnic jingoism, hero worshipping, regional or religious intolerance, bias and undue glorification of mediocrity.

According to a report of electoral campaigns even during the colonial era in Nigeria:

Electoral campaigns in Nigeria are often fraught with endemic problems, which are compounded by poor communication systems. They featured high affectivity fashioned on ethnic sentiment. This emotionalism is radiated through newspapers in urban areas by radio and at open-air rallies in rural areas. (*Daily Times Newspaper, 1959*)

As it was in the colonial days when that report was made, so it is in the emerging Nigerian democracy and other emerging democracies. For instance, the 2007 general elections in Nigeria were described by the former president of Nigeria Chief Olusegun Obasanjo as a “do or die affairs” (Tenuche, 2009)²². Election rigging undermines the cardinal principle of democracy, which upholds the welfare of the people as the object of government. This entails that victory at election must relate to government’s ability to secure and promotes citizens or peoples’ welfare. This equally means that a government, which does not perform well, forfeits its claims to have its mandate renewed in an election (Nwabueze, 1993: p. 4). Therefore, the needful thing to do in this regard is to enforce fundamental objectives and boost good governance. This is because to reverse the years of election rigging, extreme poverty, unimaginable corruption and inequality in emerging democracies requires enforcing fundamental objectives incorporated in national constitution.

Constitutional amendment takes time to effect because of the rigorous nature of its alteration. Hence, there is a need to find a way to enforce the rights contained in the constitution as it is. Not doing so is capable of stultifying individual rights and aspirations. It is a beneficial wrongdoing or a political demagoguery to incorporate in the constitution fundamental objectives that are unenforceable; this is because of the trite principle of law that where there is a wrong, there is a remedy (*ubi jus, ibi remedium*). Therefore, it is legally wrong to set out in the constitution rights without correlative enforcement power. If the right to freedom of thought, conscience and religion is enforceable, why would the crucial right to education, decent housing, work and health, which are important precursors to enjoyment of the right to life non-enforceable?

5. Conclusion

From the foregoing, it is our argument that notwithstanding the provisions of section 6(6) (c) of the 1999 constitution, which renders the fundamental objective and directive principles of state policy non-justiciable, the courts of law must adopt a posture of judicial activism in interpreting the social, economic and cultural obligations of the government vis-à-vis the civil and political rights. The courts in Nigeria must borrow a leaf from the Indian Supreme Court case of *Subhash Kumar v. State of Bihar*²³, which held that the right to life included the right to the enjoyment of pollution free water and air. Indeed, the Nigerian case of *Gbemre v. Shell Petroleum Dev. Corp & the Nigerian National Petroleum Corporation*²⁴ is a welcome development in the bid to enforce social, economic and cultural rights in Nigeria. The Federal High Court in a rare show of judicial activism, interpreted the fundamental right to life under section 33 of the 1999

²²See M. Tenuche, “The Language of Politics and Political Behaviours: Rhetoric of President Olusegun Obasanjo and the 2007 General Elections in Nigeria” (2009) 1(3) *Journal of Public Administration and Policy Research* 43 at 47 - 54 (noting the statement of the incumbent president Olusegun Obasanjo declaring that: “this election is a do-or-die affair for me and the PDP. This election is a matter of life and death for the PDP and Nigeria”).

²³A. I. R. 1991 S.C. 420, 424.

²⁴(2005) 6 AHRLR 152 (Nigeria).

Constitution to include the right to a clean and healthy environment. The court further reasoned that Article 24 of the African Charter (ratification and enforcement) Act, a subsisting legislation in Nigeria, which guarantees the right to a “healthy environment” is applicable outside the provision of section 6(6) (c) of the constitution. If Nigerian courts maintain the tempo of interpreting Chapter two of the 1999 constitution in consonance with the enforceable obligation of the government in civil and political rights, then in the long run the rights contained in the chapter would have achieved the status of positive rights and therefore, the demagoguery of the politicians would have been rendered futile. In this way, the courts would succeed to act as the sentinel that can keep eternal vigilance on the sanctity of the fundamental objectives.

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