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A Socio-Economic Rights Analysis of the Nigerian Electricity Reform Proposal

by

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "A Socio-Economic Rights Analysis of the Nigerian Electricity Reform Proposal" submitted by Nazeef Muhammad in partial fulfillment of the requirements for the degree of Master of Laws.

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Abstract

The Nigerian government proposes an electricity reform program, which relies on privatization and free market competition to transform the country's electricity supply industry into one that meets Nigeria's electric power needs in the twenty-first century and beyond. The constitution of the Federal Republic of Nigeria, however, mandates the government to ensure that its economic policies maximize the welfare of every citizen and to provide public assistance in that respect where necessary.

This thesis assesses the extent to which the electricity reform program meets these constitutional requirements. The thesis finds that these requirements are not met for a variety of reasons, chief among which is the failure to situate electricity reform within the Nigerian socio-economic and legal landscape. The thesis argues that a right to the judicial review of measures designed to promote access to affordable electricity is one way of ensuring that the constitutional requirements are met.

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Dedication

For Amina and Rayhan

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1.0 INTRODUCTION

1.1 BACKGROUND

The present work is set against the background of a general policy move towards liberalization and free market competition in the electricity industry and, in particular, the Nigerian electricity industry. Nigeria is a West African country with an estimated population of 130 million people.[1] Official government figures show that only 36 percent of these people have access to electricity.[2] Nigeria's landmass is about 923,770 square kilometers and it shares borders with Cameroon to the South, Chad to the east, and Benin Republic to the west. The Republic of Niger is Nigeria's northern neighbor. To Nigeria's southwest is the Atlantic Ocean.[3] Much of this geographical space, especially in rural and other sparsely populated areas, has no electricity infrastructure in place.[4]

Central station power generation, transmission and distribution was, by law, the exclusive preserve of the National Electric Power Authority (NEPA), Nigeria's public and sole electricity utility.[5] Coal, hydro and natural gas are the three fuel sources for public electricity generation in Nigeria in an ascending order of overall contribution to national capacity. Nigeria's total recoverable coal reserves stand at 209 million short tons

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[1] See United States Energy Information Administration, "Nigeria: Country Analysis Brief," August 2004 online: <www.eia.doe.gov/emeu/cabs/nigeria.html> (date accessed: September 1, 2004).
[2] National Council on Privatization, *National Electric Power Policy* (Abuja: Presidency, 2001) at 3.
[3] See United States Energy Information Administration, *supra* note 1.
[4] *Ibid.*
[5] National Electric Power Authority Decree (No. 24) of 1972 (now National Electric Power Authority Act [NEPA Act]), Chapter 256, Laws of the Federation of Nigeria, 1990, s. 7. See also Lekan Salami and Afolabi Elejibu, "Investment Incentives for the Electricity Business in Nigeria," (2004) 22:1 Journal of Energy and Natural Resources Law 94 at 94.

(Mmst),[6] with coal generation capacity at less than 1 percent of the national total.[7] Two major rivers, the River Niger and the River Benue flow through the country to the Atlantic Ocean. Hydro electricity generation stations are cited on these and other smaller rivers, with overall hydro generation at a little over 20 percent of national power generation.[8] Nigeria's 2004 natural gas reserve estimate stands at 159 trillion cubic feet (Tcf), with an annual production of 501 billion cubic feet (Bcf).[9] Two hundred twenty-five Bcf of annual production is consumed locally with the rest being exported.[10] Seventy percent of local consumption of gas goes into electricity generation[11] with natural gas accounting for a little less than 80 percent of national electricity generation.[12]

The Nigerian electricity infrastructure is grossly inadequate and in a serious state of disrepair.[13] NEPA's inability to maintain the country's electricity infrastructure and to fix the problem of ever-increasing power supply shortages is evident both in the shortfall of generation relative to demand and in the wasteful supply chain that allows substantial technical and other losses.[14] In fact, the state of the Nigerian electricity industry has

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[6] See United States Energy Information Administration, *supra* note 1.
[7] In fact, the only coal generating station in Nigeria, which is located at Orji River in the Southeastern part of the country, is now dormant and there has been no financial commitment, public or private, to revive it. See National Council on Privatization, *supra* note 2 at 46.
[8] *Ibid.* at 45.
[9] See United States Energy Information Administration, *supra* note 1.
[10] *Ibid.*
[11] See Mike Oduniyi, "NEPA Owes N6bn on Gas Supply, Says El-Rufai" *This Day* (August 7, 2003) <www.thisdayonline.com/news/20030807news03.html> (date accessed: August 7, 2003). Please note that "N" in the news title stands for the Nigerian naira which exchanges for about 134 to the US Dollar at the time of writing. Interestingly, Nigeria is the world's 7th largest exporter of crude oil and a substantial proportion of the gas extracted in the process of oil production is flared with the country losing million of Dollars in the process. See Olushola Yusuff, "Nigeria Loses N1.7 trillion to Gas Flaring, Says Presidential Aide," *The Guardian* (Lagos) (April 15, 2003) online: <www.guardiannewsngr.com/news/article14> (April 15, 2003).
[12] See National Council on Privatization, *supra* note 2 at 45.
[13] *Ibid.* See Salami & Elejibu, *supra* note 5 at 94.
[14] See National Council on Privatization, *supra* note 2 at 3.

become a matter of grave economic concern. To cite but one example, industrial capacity utilization is plummeting on account of the acute adequacy and reliability problems associated with power supply.[15] The political implications of the Nigerian electricity crisis are not lost on politicians. In fact, public rating of the political leadership is increasingly reflective of the public perception of NEPA's performance. Nigerians, as voters and potential voters, are not likely to forget prolonged power outages easily, especially if the government is not seen to have done something about it.[16]

It is against this background that the Nigerian electricity reform proposal is set. The proposal is centered on the privatization of public electricity assets and the creation of a free, competitive electricity market.[17] The reasoning behind the reform policy appears to be that, given the failure of public ownership and management in the electricity industry, government should simply take its hands off electricity supply and allow private initiatives to take over. The problems created by public ownership and operation of the

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[15] Most manufacturers in Nigeria generate their own electricity. This substantially increases their overhead costs and reduces the competitiveness of their products thereby leaving them with a substantial stock of unsold inventories. This situation effectively limits the extent to which they can optimize their installed production capacity. See Adeola F. Adenikinju, "Electricity Infrastructure Failures in Nigeria: A Survey-based Analysis of the Costs and Adjustment Responses," (2003) 31 Energy Policy 1519 at 1519.

[16] Nigerian political leaders, therefore, want to do just anything in order to be seen as addressing the incessant problem of power blackouts, which can last for weeks in most parts of the country. Ever in search of higher popularity ratings, the appeal for them is always to short-term populist measures such as firing either the Management or the Board of the publicly owned National Electric Power Authority (NEPA), Nigeria's sole national electricity utility. See, for instance, Onyebuchi Ezigbo, "Again, FG Sacks NEPA Board" *This Day* (November 21, 2003) <www.thisdayonline.com/news/20031121news03.html> (date accessed: November 21, 2003). Needless to say, such an approach leaves the problems unsolved and, in some cases, even compounds them.

[17] See National Council on Privatization, *supra* note 2 at i. This is the most radical transformation that the Nigerian electricity industry is undergoing in its entire history and it comes at a time when the unemployment and the inflation rates, as we shall see in notes 22 and 24, *infra,* are quite high. There are no studies on the extent to which the poor state of public power supply in Nigeria is responsible for high unemployment and inflation rates but, as noted in note 15, *supra,* goods manufactured in Nigeria cannot be competitively priced in view of the heavy infrastructural costs, including the costs of self-generating electricity that Nigerian manufacturers bear. It is thus in the interest of Nigeria's economic recovery that the government gets electricity reform right.

Nigerian electricity industry over several decades are, however, not that easily solved. Electricity market liberalization in Nigeria will take place within the context of acute infrastructural and institutional capacity limitations.[18] In addition, the limitations of free market competition are increasingly coming to light with the growing pervasiveness of the market mechanism in national life.[19]

The market mechanism, as we shall see, is not quite sensitive to equity considerations.[20] Given the growing indispensability of electricity to *functional* life in contemporary human societies, insensitivity to equity in electricity supply is of serious concern to the financially challenged. Such people would require some form of public assistance to participate in and enjoy the benefits of the resulting electricity market. "The far-reaching powers of the market mechanism," it has been urged, "have to be supplemented by the creation of basic social opportunities for social equity and justice."[21] Otherwise, a substantial segment of the population will remain excluded from the market, in this case the electricity market, and it will be bad both for the excluded and for the market.[22]

This is more so the case with the Nigerian electricity reform proposal, given that Nigeria is a country with a high poverty rate[23] and high inflationary trends.[24] In addition,

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[18] See National Council on Privatization, *supra* note 2 at 3. See also Salami & Elejibu, *supra* note 5 at 94.
[19] See Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf, 2001) at 7, 119-120. See also Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002) at 55.
[20] See Sen, *supra* note 19 at 7.
[21] *Ibid.* at 143.
[22] *Ibid.* at 17. In this respect, one may note that if the market thrives on consumer confidence, as represented by high business turnover in both the goods and services sector, the resulting Nigerian electricity market will do well to expand its reach as widely as the demography of the Nigerian population can take.
[23] See Prisca Egede, "89m Nigerians Live Below Poverty Level, Says Minister," *The Guardian* (Lagos) (September 7, 2004) online: <www.guardiannewsngr.com/news/article03/070904> (September 7, 2004).

Nigeria's human development index does not inspire confidence as the country is almost at the bottom of the United Nations Human Development ranking.[25] Consequently, remedial measures for the promotion of access to and affordability of electricity need to be devised and factored into the reform equation. Otherwise, it will be difficult, if not impossible, for low-income earners to meet their basic electricity needs. Such a situation will only serve to worsen the level of fuel poverty in a country generously endowed with energy resources.[26] Fuel poverty refers to the inability of the affected to meet their basic heating, cooking and other energy related needs.[27]

The pervasiveness of electric power in both individual and societal day-to-day energy needs[28] is instructive in this respect as is the position of central station supply as the most effective means of meeting these needs.[29] As Fleming Notes,

> "One important step in any society's advance to modernization is the moment at which it secures a reliable and *affordable* supply of electrical energy. No society, regardless of its other political, economic or technological attainments, can be deemed fully modern without possessing this essential service"[30]

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[24] See Bukky Olajide & Mathias Okwe, "Inflation Rate Rises to 17.8 Percent, Says CBN," *The Guardian* (Lagos) (June 2, 2004) online: <www.guardiannewsngr.com/news/article29>

[25] See Cletus Akwaya, "Nigeria Ranks 151st on Human Development Index," *This Day* (July 21, 2004) <www.thisdayonline.com/news/20040721news05.html> (date accessed: July 21, 2004).

[26] See pages 1 and 2, *supra.*

[27] See David M. Newbery, *Privatization, Restructuring, and Regulation of Network Utilities* (*Cambridge*, Massachusetts: MIT Press, 1999) at 200.

[28] See James C. Bonbright, *Principles of Public Utility Rates* (New York: Columbia University Press, 1961) (arguing that "electric power is a necessity of modern living") at 8.

[29] See John Saunders, J. Michael Davis, Gelen C. Moses & James E. Ross, *Rural Electrification and Development: Social and Economic Impact in Costa Rica* (Boulder, Colorado: Westview Press, 1978) at 163.

[30] Keith R. Fleming, *Power at Cost: Ontario Hydro and Rural Electrification, 1911 – 1958* (Montreal & Kingston: McGill Queen's University Press, 1992) at 249.

The importance of electric power to national economic, social and technological development is not lost on the Nigerian government. It notes in its electricity reform policy paper that "[T]he power sector is very critical to the economic, industrial, technological, and social development of the country. Electricity consumption has become one of the indices for measuring the standard of living of a country."[31] One can, therefore, hardly over emphasize the need for getting the Nigerian electricity reform right.

1.2 THESIS OBJECTIVE

In the face of a near-total collapse of the Nigerian electricity industry,[32] the Nigerian government proposes an electricity reform program, the central tenets of which are "...total liberalization, competition and private sector led growth."[33] A consideration of the reform program, however, suggests that government simply wants to retreat from an industry it has failed to manage properly and which, as a result, is costing it heavily in terms of financial resources and political capital. Thus, the program seeks to ensure that the Nigerian electricity industry meets "all current and prospective *economically justifiable* demand for electricity throughout Nigeria."[34] In other words, the government

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[31] National Council on Privatization, *supra* note 2 at 1.
[32] The state of the Nigerian electricity industry is discussed at chapter four, *infra.*
[33] National Council on Privatization, *supra* note 2 at i
[34] *Ibid.* at 4. (Emphasis mine.) This is one of several specific objectives set for the Nigerian electricity reform program, some of which do not appear to be in harmony with each other. The government, for instance, also declares that "the overwhelming objective of the Electric Power Policy Statement is to ensure that Nigeria has an ESI (electricity supply industry) that can meet the needs of its citizens in the 21st Century." One of the long-term objectives of electricity reform, the government states, is "to provide universal access to electricity." *Ibid.* It does not fall within the scope of this study to assess the consistency of such policy statements. Suffice it to say, however, that, irrespective of such inconsistencies, the

intends to abdicate its traditional responsibility for central station power supply. Instead, private investors will operate the Nigerian electricity industry under free market conditions.

A direct consequence of this is the limited attention that the Nigerian electricity reform program pays to certain aspects of the 'Nigerian Social Contract'[35] as contained in the Nigeria constitution. I will return to this briefly. First, though, I wish to highlight certain general aspects of electricity industry privatization that have some bearing on this social contract. The possibility of price spikes as an immediate consequence of electricity industry privatization is real, as private investors seek increases in the efficient allocation of the resources used to generate and supply electricity.[36] Where industry privatization is preceded by public ownership and control, private investors usually inherit a legacy of inefficiency stemming from the government's inability to invest in a manner that classical economics would recommend. The government, for instance, has to balance efficiency and reasonable returns with the interests of workers, voters, consumers and other vested interest groups. More often than not, the balance of governmental decision will be in favor of the latter.[37]

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substance of the reform program (discussed at chapter four, *infra*) is the introduction of privatization and free market competition in the Nigerian electricity industry.

[35] The social contract theory holds that the citizens' relationship with the state is founded on certain basic expectations, which they have of the government to which they substantially surrender their independence. As Alan Gewirth argues, "[T]he main justification of the state (and hence of political obligation) is, indeed, that it serves to secure a person's generic rights to freedom and well-being." See Alan Gewirth, "Economic Rights" in George R. Lucas, ed. *Poverty, Justice and the Law: New Essays on Needs, Rights and Obligations* (Lanham, MD: University Press of America, Inc., 1986) 7 at 23. See also Stiglitz, *supra* note 19 (noting that "[W]e recognize today that there is a "social contract" that binds citizens together and with their government") at 78.

[36] The quest for efficient allocation of resources within the electricity industry is the major driving force behind electricity reform. See Douglas N. Jones, "Regulatory Concepts, Propositions, and Doctrines: Casualties, Survivors, Additions" (2001) 22:1 Energy Law Journal 41 at 43.

[37] See Newbery, *supra* note 27 at 29.

Such an approach to investments in the electricity sub-sector usually leads to inefficient allocation of resources. Over-staffing, the protection of certain allied industries, over-investment or misplacement of priorities in industry design are some of the manifestations of this approach. An immediate consequence of these shortcomings is represented by price spikes post-reform, as private operators institute cost-cutting measures and cost-reflective electricity tariffs.[38] Efficient resource allocation is not, in itself, a bad thing. It is, in fact, necessary. The limited view taken of efficiency by private operators, however, means that they cannot factor social equity considerations into their efficiency improvement calculations.[39] Instead, they would rightly consider such considerations as lying outside their duties and falling within the purview of governmental responsibility.[40]

Another problem that accompanies privatization, and which is prominent in developing economies, is the shrinking of access to electricity. This is due to an existing limitation of access to electricity that in Nigeria, at least, public ownership created, fostered and,

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[38] Electricity reform in England and Wales, Alberta, Ontario, and California each highlighted some or all of these problems with the result that deregulation led to price spikes in the short to mid-term, at least. See Francis N. Botchway, "The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends" (200) 21 U. Pa. J. Int'l Econ. L. 781 at 818-21; Bryan Avery, "Price Spikes Fear among Alberta Power Users" *Edmonton Journal,* (April 25, 2002) online: <www.iasa.ca/ED_news_EdmontonJournal/114.html (date accessed January, 13, 2003); Peter Navarro & Michael Shames, "Electricity Deregulation: Lessons Learned from California" (2003) 24:1 Energy Law Journal 33 at 33; and Satish Saini, "Deregulation in Ontario, Another Price Cap" Energy Pulse, online: <www.energy pulse.net/centers/article/article_print.cfm?a_id=613> (date accessed: February 10, 2004). In fact, electricity tariffs are set to rise in Nigeria preparatory to industry reform. See Oghogho Obayuwana, "NEPA Tariffs to Rise Soon, Says Minister" *The Guardian* (Lagos, Nigeria) (September 17, 2004) online: <www.guardiannewsngr.com/news/article03/270904> (date accessed: September 17, 2004).

[39] Under classical economic considerations private investors are, for instance, not likely to invest in unprofitable ventures merely because jobs will thereby be created or because social welfare will otherwise be thereby enhanced. See Sen, *supra* note 19 at 7.

[40] See Newbery, *supra* note 27 (noting that only a secure title to future returns backed by clear private property rights would "persuade investors to sink their money into an asset that cannot be moved and may not pay for itself for many years") at 29.

ultimately, failed to solve.[41] Consequently, privatization makes it less likely that people without access to electricity will have that access in the foreseeable future, as private investors scramble to develop the most secure and lucrative places, usually urban centers, first.[42] Access limitation is usually more pronounced in rural areas where the cost of supplying electricity is usually higher than rates that rural dwellers will consider reasonable, or can even afford. This is a consequence of the demographic composition of the population of such areas, which is both scanty and scattered.[43]

Where electricity supply is inadequate or unavailable, people have to seek alternative means of meeting their energy needs, as was the case before the advent of central station power supply. In fact, for some rural communities in Nigeria, central station electricity supply is something they are yet to experience.[44] The time, energy and other resources, which the affected people invest in the search for alternative fuel, usually wood, are resources that, otherwise, would have gone into other productive activities that could enhance their quality of life. Not only does the use of wood take more of their time, it raises serious concerns relating to its quality, reliability and safety as a fuel source as well. In addition, it leads to deforestation, soil erosion and the depletion of both the quantity and quality of available farmland.[45] All of these combine to diminish

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[41] See National Council on Privatization, *supra* note 2 at 3.

[42] This is inevitable as investors, unlike governments, are in business to make profit and "[A]s in any business, the most lucrative and secure places are developed first." See Richard P. Keck, "Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer" (1985) 16 Envt'l Law 39 at 42.

[43] See Fleming, *supra* note 30 at 11

[44] It has already been noted that the vast majority of Nigerians have no access to central station power. See note 2 and accompanying text, *supra.*

[45] See Stiglitz, *supra* note 17 (noting that "in poor countries, like Nepal, the impoverished have no source of energy other than the neighboring forests; but as they strip the forests for the bare necessities of heating and cooking, the soil erodes, and as the environment degrades, they are condemned to a life of ever-increasing poverty") at 83.

the quality of life for rural people who lack access to central station power and for individuals who cannot meet the financial cost of their basic electricity needs.[46] What is the citizen's expectation from the state in all this?

Under the social contract alluded to earlier, the state owes its citizens the duty to facilitate their access to the resources necessary for enhancing their quality of life. The state's obligation in this respect extends to the creation of the necessary conditions for the citizens to obtain the requisite resources, such as a free market. Even if the state creates the right atmosphere there might still be those who may not be capable of taking advantage of it. The state owes this class of people the duty of implementing targeted welfare measures, which would make it possible for them to obtain these resources. As Stiglitz argues, "[P]art of the social contract entails "fairness," that the poor share in the gains of the society as it grows, and that the rich share in the gains of society in times of crisis."[47]

There appears to be no other time in national life when this social contract is more relevant than the moment when the state chooses to pursue a policy measure that has far-reaching socio-economic implications. When the state surrenders its traditional responsibilities to the free market, it needs to realize that ordinary citizens may suffer a diminishing of their ability to access the resources necessary for maintaining a minimum level of individual welfare. Such a realization should be accompanied by

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[46] In fact, fuel poverty in this sense is a form of vicious circle. See Stiglitz, *supra* note 16 (arguing that "[I]n poor countries, like Nepal, the impoverished have no source of energy other than the neighboring forests, but as they strip the forests for the bare necessities of heating and cooking, the soil erodes, and as the environment degrades, they are condemned to a life of ever-increasing poverty") at 83.
[47] Stiglitz, *supra* note 19 at 82.

appropriate policy measures to mitigate the difficulties, which may attend the loss of access to these resources. In simple terms, a period of major socio-economic transformation calls for a stricter adherence to the social contract on the part of the state. Once again Stiglitz's illuminating presentation of the argument is apposite. "Maintaining that social contract is particularly important, and difficult, in the midst of the social upheavals that so frequently accompany the development transformation."[48]

Under the Nigerian Social Contract, the Nigerian constitution mandates the state to "control the national economy in such a manner as to secure the *maximum welfare*, freedom and happiness of every citizen on the basis of social justice."[49] The constitution also makes it incumbent on the state to ensure that "*provision is made for public assistance* in deserving cases and other conditions of need."[50] These constitutional provisions appear to place an obligation on the Nigerian government to exercise utmost caution with respect to its economic policies. In particular, these provisions contemplate that the Nigerian government will avoid economic policies that impact negatively on the welfare of its citizens. Where such policies cannot be avoided, it appears to be implied that the government is expected to take necessary measures aimed at cushioning the harshness of such policies. Following the brief discussion of some of the consequences of electricity reform above, the likelihood of electricity price spikes and access restriction post-reform is real.

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[48] *Ibid.* at 78.
[49] Constitution of the Federal Republic of Nigeria, 1999, s.16 (1) (b). (Emphasis supplied.) This provision is not absolute and the jurisprudence on it and on similar provisions of the Nigerian constitution will be discussed in chapter three, *infra.*
[50] *Ibid* s. 17 (3) (g).

This thesis, therefore, seeks to assess the extent, if any, to which the Nigerian electricity reform proposal meets the constitutional requirement of operating the national economy in a manner that maximizes the welfare of Nigerians. In addition, this thesis asks: are there sufficient measures in the reform proposal for providing public assistance to those who may need it for meeting their basic electricity needs? In this respect, mere declarations by the government that it will provide such assistance are not enough. Such declarations have to disclose appropriate measures for their actualization. From a legal perspective, the extent to which those who may suffer from access limitations and/or price spikes are able to secure the institution and implementation of relevant measures is of utmost importance. What, for instance, are the legal options open to those affected where appropriate measures are either not instituted at all or are inadequately instituted?

1.3 OUTLINE OF CHAPTERS

Chapter two identifies and briefly discusses some basic elements of electricity reform. It becomes apparent that electricity reform is a significant undertaking. It cannot happen overnight. Careful planning is required and pragmatism in the spread of its various components over a reasonable period of time and over the capacity of available resources is also necessary. In addition, the capacity – human, infrastructural and financial – must be available for electricity reform to succeed. The government must also exercise the political will required to carry electricity reform through, especially when the difficulties inherent in the undertaking start to dampen the initial enthusiasm. In particular, measures must be instituted to ameliorate any difficulties that a free market in electricity may

impose on low-income earners and on those residing in communities that are far-removed from the nearest electricity infrastructure.

In line with the constitutional provisions on socio-economic rights already noted, chapter three discusses the status of those rights under Nigerian law. The discussion of socio-economic rights under Nigerian law extends to the effects, if any, which the African Charter of Human and Peoples' Rights has had on that status. The progressive development of domestic human rights jurisprudence, to the point where the South African constitution guarantees the judicial review of socio-economic rights to its citizens, demonstrates that those rights are suitable for domestic policy evaluation. This chapter sets the stage for the evaluative exercise I undertake in chapter five.

Chapter four describes the state of the Nigerian electricity industry as well as the proposal for its reform. It will become apparent that the Nigerian electricity industry discloses a state of acute inefficiency, persistent disrepair and widespread malfunction. Access to electricity is severely limited and problems of affordability serve to further reduce the number of people enjoying the opportunities for individual comfort and socio-economic improvement that electricity offer. Worse still, the National Electric Power Authority (NEPA), the Nigerian electricity utility, has little or no results to show for its budgetary and extra-budgetary allocations. These are, in fact, the problems that electricity reform is meant to solve.

The reform proposal, however, focuses too much on efficiency improvement and the attraction of private investment capital as the means of solving these problems. In the process, scant attention is paid to the welfare problems that are likely to attend free market competition in electricity. The reform program appears to hold up privatization and free market competition as sufficient in themselves to solve the problems of access to and affordability of electricity post-reform. Where the Nigerian government carves out a role for itself in the promotion of access to and affordability of electricity, it shies away from specific financial commitment in that respect. Governmental commitments, especially financial commitments aimed at promoting access to affordable electricity, are vague.

I devote chapter five to the evaluation of the electricity reform proposal in line with the findings of chapter three. The evaluative exercise discloses a clear recognition of the likelihood of access and affordability constraints arising out of the reform process. These constraints, however, appear not to have been adequately addressed. In fact, the reform proposal does not connect those problems to the Nigerian social contract. It is noted that privatization transforms citizens to consumers in their relationship with the electricity supplier post-reform. In this respect, it is found that the reform proposal does not adequately address the negative effects that private ownership and control of the Nigerian electricity industry is likely to have on access to and affordability of electricity post-reform.

The remedial measures I propose seek the institution of justiciable rights of access to affordable electric power in the reform proposal. Aggrieved persons should be able to seek the judicial review of the existence and adequacy of measures adopted by the government to promote access to affordable electricity post-reform. Judicial review in this sense involves resource allocation. The main objections against the involvement of the judiciary in the determination of questions of resource allocation are, therefore, highlighted and answered.

Chapter six concludes the thesis by emphasizing the need for the Nigerian electricity reform to be jurisdiction-specific. The transition from one extreme (full public ownership and control) to another extreme (unfettered free market competition) in the Nigerian electricity industry needs to be handled with utmost caution. Given the acute infrastructural and institutional limitations within the Nigerian electricity industry and the severe socio-economic imbalances prevalent in the country, caution needs to be defined in terms of the proportion of the population whose power switch stays on post-reform.

2.0 BASIC ELEMENTS OF ELECTRICITY REFORM

2.1 INTRODUCTION

A major aspect of electricity reform is the design of the post-reform electricity industry. Apart from addressing purely technical questions, the electricity industry structure post-reform is central to the delivery of the benefits upon which reform is premised. This chapter considers some of the major structural elements that are relevant to electricity reform in terms both of creating the appropriate atmosphere for reform to thrive and of actually proceeding with the reform agenda to its logical conclusion. Some of the reform elements considered here are procedural while others relate to substantive structural aspects of the electricity industry. All of them, however, flow from the premise that reform is meant to promote a free market in electricity, as is the case with the Nigerian electricity reform program.

A great deal of experience has been accumulated worldwide in electricity reform. It is, however, not possible to list each and every structural element that relates to that complex undertaking. I will only address those elements that I consider not only fundamental to electricity reform but also relevant to the jurisdictional focus of this work, namely: institutional framework, infrastructural base and industry design. First, though, I will briefly dispose of three preliminary issues as follows: terminology, the "reform bug" and elements of reform, in that order. Hopefully, a discussion of these preliminary issues early on in this work will place this chapter and the entire work in proper perspective and

help clarify any ambiguities that may arise from the arguments that I make and the conclusions I draw.

2.1.1 Terminology

One source of 'confusion' in relation to electricity industry reform is the various terms used in the literature to describe this complex process.[1] This is hardly surprising given the multi-dimensional aspects through which the industry is linked to the growth, development and even the sustenance of the modern society and, especially, of the modern economy. Different disciplines, therefore, have more than a passing interest in any fundamental change to the way and manner the electricity industry functions.

While some writers refer to the process of transforming the *modus operandi* of the electricity industry as reform, there are those who prefer to use the term deregulation. Some writers also describe the process in terms of re-regulation. Yet others insist on referring to the process as restructuring.[2] This confusion stems from the idea behind industry reform itself. Following decades of either public ownership and control or heavy public regulation, a major shift in the understanding of the natural monopoly concept is pushing the electricity industry, among other industries otherwise perceived as representing classic cases of natural monopoly, towards the free-market mechanism all

[1] While the authors of a major work on the reform of, among other industries, the electricity industry in England and Wales, titled it "Regulatory *Reform*: Economic Analysis and British Experience" (emphasis supplied) (Mark Armstrong, Simon Cowan & John Vickers: Cambridge, Massachusetts: MIT Press, 1984), another major author titled his "Privatization, *Restructuring*, and Regulation of Network Utilities" (emphasis supplied) (David M. Newbery: Cambridge, Massachusetts: MIT Press, 1999).

[2] See, for instance, William W. Hogan, "Electricity Market Restructuring: Reforms of Reforms" (2002) 21:1 Journal of Regulatory Economics 103 who insists that "(r)estructuring is the better term, not deregulation." at 103. Incidentally, restructuring appears to be the more popular term in the literature.

over the world.[3] It is worthy of note that while reform is purely a function of the internal socio-economic and political dynamics of certain jurisdictions, mainly in the developed world, it is a political necessity created by certain political dynamics outside the control of other jurisdictions, mainly in the developing world.[4] These other jurisdictions may not even be technologically or economically prepared for electricity reform, much less of being socially prepared.[5] In the result, electricity reform in developing countries has, in many cases, been hasty and insensitive to local peculiarities, with less than salutary socio-economic outcomes.[6]

The hallmark of the market mechanism is the absence of regulation and the prevalence of unhindered competition. Thus, a transition to such a system can very well be referred to as deregulation. However, the move towards the market mechanism in the electricity industry has not anywhere resulted in the disappearance of regulation. Instead the emergent electricity industry is still subject to one form of regulatory control or the

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[3] While it was traditionally thought that the electricity industry exhibits natural monopoly tendencies, it has come to be seen that there are competitive segments to it. See, Joseph P. Tomain, "The Past and Future of Electricity Regulation" (2002) 32 Environmental Law 435 at 444.

[4] It is common knowledge that industry reforms in developing countries represent in most cases a response to international political pressure. See Newbery, *supra* note 1 at 6. Without going into the lengthy controversy over the desirability of such a state of affairs, the significance of the motivation for electricity reform lies in the fact that the motive behind any change in governmental attitude, especially such that involves a major policy shift, determines to a large extent not only the resulting legal and institutional structure but also the effects they will have on citizens as well as the chances of success of that reform program. See Alan N. Miller, "Ideological Motivation of Privatization in Great Britain Versus Developing Countries" (1997) 50:2 Journal of International Affairs 391 at 392.

[5] In fact, the leader of the ruling political party in Nigeria has lamented the problems caused by the wide-ranging reform of Nigeria's energy sector and blamed the problems on external influence. See John-Abba Ogbodo, Madu Onuorah & Lawrence, "Fuel Prices: Ogbeh Blames Foreign Forces" *The Guardian* (Lagos, Nigeria) (September 30, 2004) online: <www.guardiannewsngr.com/news/article01/300904> (date accessed: September 30, 2004)

[6] See Greg Plast, Jerrold Oppeinheim and Theo MacGregor, *Democracy and Regulation: How the Public can Govern Essential Services* (Sterling, Virginia: Pluto Press, 2003) (stating in relation to Brazil that "[i]n Rio de Janeiro, prices following privatization shot up 400 per cent, 40 per cent of the electricity workers lost their jobs, and the lights went out") at 2.

other.[7] The very nature of the industry, retaining natural monopoly features in the wires segment (transmission and distribution) as it does, is the major reason why the market cannot be effectively left alone to manage electricity generation, supply to the end user and all the myriad processes in between. Deregulation and re-regulation are both used, therefore, to denote the reform process in the literature.[8] The terms are interchangeable and their usage depends on the extent of the role that analysts are willing to concede to the state in the electricity industry post-reform.

The electricity industry is said to be undergoing a restructuring process mainly because any reform of such an intricately connected industry ultimately involves some modification of the existing industry structure. In fact, reform has generally meant unbundling electricity monopolies both vertically and horizontally. "Restructuring" is thus used in the literature to describe this process. "Reform," it appears, is used in the literature mainly due to its connotation of new systems and new ways of doing things.

Be that as it may, I do not think that the controversy over what should be the appropriate terminology is one of substance. While the terms are not strictly identical, they generally refer to the same thing with, probably, a variation in emphasis and I will not allow a detailed consideration of the controversy to detain us here. Suffice it to say that for the

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[7] In fact, it has been argued that industry reform has led to more regulation, albeit of a different character and intent. See Barry Barton, Catherine Redgewell, Anita Ronne and Donald Zillman, "Energy Security in the Twenty-First Century" in Barry Barton, Catherine Redgewell, Anita Ronne and Donald Zillman ed., *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (New York: Oxford University Press, 2004) 457 (arguing that "[a]long with market liberalization comes, paradoxically, increasingly complex regulation as the state (and the industry itself) shapes the behavior of a number of companies playing different roles") at 468. This partly explains the tendency among some writers to use the term "reregulation" in describing the transformation going on in the electricity industry.

[8] See Alfred E. Khan, "Deregulation: Looking Backward and Looking Forward" (1990) 7 Yale J. on Reg. 225 at 330

purposes of this work all of the four terms are interchangeable. I will, however, be using "reform" more often than any of the other terms merely for the sake of convenience.

Reform or any of the other related terms is used in this work to denote the changes being made to the electricity industry in different jurisdictions and to varying extents. These terms as used here extend but are not limited to technical, structural, fiscal, legal/regulatory and socio-economic changes that the electricity industry is undergoing.

2.1.2 The "Reform Bug"

While technological reform is a continuous process in the electricity industry, it was not until "the wave of deregulation that started in 1978 in the United States showed that markets were better than regulators at reducing prices and increasing efficiency,"[9] that structural, and legal/regulatory reform of the industry started to gain support. The general acceptance of the superiority of franchise monopolies in or public ownership of, and heavy-handed regulation of the utilities industry began to be doubted. Instead, the belief started to gain ground that this time-worn approach to public utilities management foster inefficiency, and that private ownership and free market competition leads to efficiency and the reduction in prices. The free market approach to utilities ownership, management and regulation gained further support with progress in the deregulation of the transport, telecommunications, oil and gas, banking and cable TV sectors.[10]

[9] Newbery, *supra* note 1 at 2. While this is generally true in the electricity industry, progress to that stage, as we shall later see, comes at a great social cost, especially, to people of little financial means.
[10] See Khan, *supra* note 8 at 326.

In the result, there has been a wave of structural and legal/regulatory reforms of the utilities industry across the globe.[11] The electricity industry has also caught the 'reform bug', albeit a bit later than its counterparts.[12] Among other reasons, the lateness of the electricity industry in initiating reform by itself or being otherwise reformed may be due to certain of its characteristics that make it considerably less suited than its counterparts to reforms predicated on the free-market concept. Certain technical characteristics of electricity tend to make it less amenable to deregulation than its counterparts. Electricity demand fluctuates while the product itself cannot be inventoried. This invests the electricity industry with such strategic social and economic importance that governments were (and some still are) not eager to leave power generation and supply to the operation of the market mechanism.[13] In fact, the resulting free market in electricity has not been really free.[14]

In addition, the wires aspect of the industry remains a natural monopoly, and the industry is so integrated that a negative incident in one part of an interconnected electricity system affects the whole system, creating externalities outside its immediate locality. The simultaneous use of the grid also creates other external effects such as loop flow[15] and transmission congestion. In addition, electricity supply did not pose such problems as

[11] It has been estimated that over 100 developed and developing countries have initiated one variant of reform or the other in their major economic sectors since the 1980s. See Miller, *supra* note 4 at 391.
[12] See John E. Kwoka, Jr., "Twenty-Five Years of Deregulation: Lessons for Electric Power," (2002) 33 Loy. U. Chi. L. J. 885 at 886.
[13] *Ibid.*
[14] See note 7 and accompanying text, *supra.*
[15] Loop flow is used in electricity trading arrangements to refer to the problems created where a transaction is paid for and designated as if electricity currents flow through one direction while it actually flows through another. This situation arises because the direction through which electricity currents will flow on an interconnected system cannot be pre-determined. This is usually not a problem in internal trading arrangements. Trading across different control areas, however, adds another layer of complexity that requires additional rules, pricing and the provision of reserves, among others. See Sally Hunt, *Making Competition Work in Electricity* (New York: John Wiley & Sons Inc., 2002) at 269.

prices staying out of line with costs as was the case with the airlines industry. The fear that regulation may impede great technological change in the industry was also not as pronounced as it was with telecommunications, for instance.[16] Above all, the internal dynamics of the electricity industry, in a developing country like Nigeria, affect every voter or potential voter directly. Voters are likely to reflect any price spike in their voting decisions. Politicians in Nigeria, therefore, view electricity reform with a measure of suspicion and do not want to be associated with any of its negative impacts.[17]

The growing popularity of electricity reform means that a vast body of literature has grown out of the experiences of the jurisdictions that have undergone the process. Reform in one country can (and does) borrow from the experience of another. In addition, certain core elements of electricity reform have come to be recognized. It will, however, be misleading to assume that the reservoir of experience in electricity reform has thrown up a perfect or even a functional template, which any country desirous of electricity reform could just adopt. The nature of the electricity industry, dependent as it is on the geography, the institutional endowments, the developmental capacity and the socio-economic conditions of each jurisdiction, necessitates that electricity reform be adapted

[16] See Kwoka, Jr., *supra* note 12 at 886.

[17] In Nigeria, for instance, most public utilities (including telecommunication utilities) are seen as providing luxury goods for a select few. Only electricity and water utilities directly touch on the day-to-day lives of a wider segment of the population. Electricity reform is thus politically risky as unchecked price spikes (a likely consequence of reform in the short to medium terms, at least) can bring down a government and end political careers. See Stephen R. Dow, "Energy Law in the United Kingdom" in Martha M Roggenkamp, Anita Ronne, Catherine Redgewell, and Inigo Del Guayo, *Energy Law in Europe: National, EU and International Law and Institutions* (New York: Oxford University Press, 2001) 901 at 966. Nigerian politicians understandably have been extremely cautious and have found little comfort in both the California electricity crisis and the ENRON debacle. This inclination to caution is partly responsible for the failure of the Nigerian Electricity Sector Reform Bill, the enabling reform legislation, to be passed into law and thus for the continued delay of electricity reform in the country.

to the peculiar characteristics of the country in which it is to be implemented. What works in one jurisdiction may not necessarily work in another.[18]

Unfortunately, it is all too easy to lose sight of this fact, especially in developing countries where the search for quick-fix answers to complex developmental problems and heavy dependence on foreign expertise tend to encourage uncritical copying of the experience of countries regarded as success stories. Nigeria is in the process of electricity reform and has taken several policy steps in this respect, including the drafting of an electricity reform bill, which is currently before the country's legislature.[19]

While there is nothing inherently wrong with catching the 'reform bug' (it is, in fact, beneficial),[20] it is necessary for each jurisdiction to define its priorities based on its

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[18] In the United States, for instance, there is a general move towards free and competitive electricity markets but each of the states adopts different approaches. See Edward L. Flippen & Anne K. Mitchell, "Electricity Utility Restructuring after California" (2003) 21:1 Journal of Energy & Natural Resources Law 1 at 3.

[19] See Sufyan Ojeifo and Emmanuel Aziken, "Obasanjo Sends Bill to Break NEPA's Monopoly," *The Vanguard* (Lagos, Nigeria) (October 11, 2001) online: <www.vanguardngr.com/news/articles/2001/October/11102001/r4111001.htm> (date accessed: March 1, 2003). The Power Sector Reform Bill 2001 was introduced in the Nigerian legislature by the Executive in October 2001 and was passed in a form substantially different from what the Executive proposed by the Nigerian Legislative Session which ended in May 2004. It has been re-introduced in the new Session. However, serious disagreements between the Legislature and the Executive have created uncertainty around the passage of the bill without which any serious reform of the Nigerian electricity industry cannot proceed. See Madu Onuorah, "Atiku Lists Dangers of New Privatization Bill," *The Guardian* (Lagos, Nigeria) online: <www.guardiannewsngr.com/news/article07> (date accessed: February 20, 2004) where the Vice President of Nigeria was reported to have expressed his dissatisfaction with the amendments the legislature is introducing into key reform bills in a meeting with some legislators. Just as the final draft of this thesis was been reviewed for submission, however, news came that the House of Representatives, the lower arm of Nigeria's bicameral legislature, has finally passed the Electricity Sector Reform Bill. See Ahamuefula Ogbu & Onyebuchi Ezigbo, "House Passes Power Sector Reform Bill," *This Day* (Lagos) online: <www.thisdayonline.com/nview.php?id=4571> (date accessed: December 15, 2004). This is exciting. The Bill, however, still has to be passed by the Senate and go through executive assent. Given the Bill's antecedents, it may be too soon to celebrate.

[20] Electricity reform in England and Wales has been credited with remarkable efficiency gains and even a downward pressure on prices. See Newbery, *supra* note 1 at 238-42. See also David M. Newberry & Michael G. Politt, "The Restructuring and Privatization of the U.K. Electricity Supply - Was It Worth It?"

peculiarities and to borrow from the experience of others only as appropriate.[21] In particular, developing countries such as Nigeria need to be wary of electricity reform models for which they do not have the requisite institutional and infrastructural capacity.[22]

2.1.3 Elements of Electricity Reform

As already mentioned, one of the consequences of the widespread reform of the electricity industry is the wealth of experience that has been accumulated in that respect. Certain core elements of electricity reform have come to be recognized. I consider it appropriate to briefly discuss some of these core elements here. In view of the variation in the structure of the electricity industry in each jurisdiction, I do not claim that my list is exhaustive. It is even doubtful that an exhaustive list can be devised. The purpose here is just to present an overview of some significant consequences of electricity reform.

2.1.3.1 Unbundled Vertical Monopolies

Traditional public regulation of the electricity industry was based mainly on the assumption that the industry represents a classic case of natural monopoly with

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in *Public Policy for the Private Sector,* Note No. 124, New York: The World Bank Private Sector Development Department, September 1997 at 3.

[21] Jurisdictions with developing economies such as Nigeria need to be cautious when borrowing electricity reform concepts and practices from developed economies. See John E. Beasant-Jones, "The England and Wales Electricity Model – Option or Warning for Developing Countries?" in *Public Policy for the Private Sector,* Note No. 84, New York: The World Bank Private Sector Development Department, June 1996 at 2.

[22] *Ibid.* A trading arrangement based on a Power Pool, for instance, may not be practicable where the institutional and infrastructural capacity for securities trading are either lacking or poorly developed. The technology for operating a power pool simply does not exist in Nigeria at the moment and electricity reform has to be cognizant of this fact.

significant economies of scale. Duplicating network infrastructure in the industry is also wasteful and counterproductive.[23] Recent thinking,[24] however, points to the competitiveness of the generation and retail segments of the industry while universal, non-discriminatory access is now employed to by-pass the problems of duplication. Electricity industry reform in the sense of creating free market conditions, therefore, leads to the breaking-up of vertically integrated entities in order to create competition in the generation and retail segments. Unless broken up, vertically integrated incumbents (and even new entrants) are likely to stifle competition, as well as acquire and exercise market power.[25]

Electricity sector reform would thus usually involve the unbundling of the wires segment, transmission and distribution,[26] both of which continue to exhibit the characteristics of a natural monopoly, in control terms at least, from the generation and retail segments. Unbundling can be limited to accounting procedures whereby a vertically integrated entity is required to keep separate books for each of its subsidiaries operating in different segments of the industry. Separating the books alone, however, is not sufficient to avoid abusive practices in a competitive environment.[27] This is the case in electricity markets

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[23] The usual way of exemplifying this situation is the construction and operation of two parallel power lines on either side of the same street where one would do. Not only does this waste resources that could be better employed while increasing the overall cost of delivering electricity to end users, crisscrossing electricity wires in that manner can also create major safety problems. In addition, such power lines will present environmental and aesthetic concerns.

[24] See Tomain, *supra* note 3 at 436.

[25] See Hunt, *supra* note 15 at 60.

[26] The transmission system refers to the network of high voltage wires that transport electricity currents from generation stations to large industrial users or electricity trading entities. It is from when these currents are stepped-down through distribution transformers that electricity can be safely fed directly to consumers.

[27] Separating the accounts of different sectors of the same company where each operates in a different industry segment is a necessary first step in the unbundling process. It is, however, also necessary that

where day-to-day transactions require access to information held by third parties and to facilities owned or controlled by them. Unbundling, therefore, can only be effective when control is not allowed to inhere in one entity across different industry segments.[28]

The essence of unbundling is to avoid conflicts of interest, especially where a company's subsidiary is competing with other companies in a different industry segment that relies on the patronage of or access to the parent company's facilities. Conflict of interest also arises where a company's subsidiary competes with others in situations where the parent company controls the basic information on which competitors rely. A situation like this encourages and usually leads to abusive market practices, which in turn distorts competition.[29] Unless the atmosphere is created for competition to thrive, free market competition in electricity may not survive for long. In its place electricity monopolies will arise and the much-sought efficient allocation of resources and downward pressure on prices may not materialize.[30] Such a situation will make a mockery of reform efforts, and cast doubts on government's sincerity in introducing reform.

2.1.3.2 Universal, Non-discriminatory Access to the Wires

The entities that follow from the unbundling process (either created from incumbents or entering newly) in the generation and supply segments of the industry need the wires

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physical separation of people and of the information that regulators may need also occur. See Hunt, *supra* note 15 at 60.

[28] *Ibid.*

[29] *Ibid.*

[30] See Kwoka Jr., *suprà* note 11 at 893. See also Richard D. Cudahy, "The Folklore of Deregulation (with Apologies to Thurman Arnold)," (1998) Yale J. on Regulation 427 at 428.

either to transmit or to distribute electricity to retail companies or to end-users. If the industry has been effectively unbundled, however, these entities will not control any transmission or distribution lines (the wires). The control of the wires would rest with other entities, which may have reason to exploit their position for selfish advantages. Given the natural monopoly characteristics of the wires, all market participants have to be allowed access to them in an open and non-discriminatory manner.[31] The pricing mechanism and all the procedures related thereto must be transparent and based on clear and predictable terms.

In addition, unbundling the industry means that the co-ordination otherwise available to a vertically integrated monopoly is lost. This loss of co-ordination must be made up for in the control of the wires, and this needs to be done in such a manner as to ensure adequate system reliability.[32] It is important for industry players to be confident that, once generated, electricity can be transported to consumers in a safe and unhindered manner. In this respect, it is usual for an independent entity to be entrusted with the control and management of the transmission system. In Alberta, for instance, the transmission system

[31] Universal, non-discriminatory access is a novel concept in the electricity industry that came with industry reform. Prior to reform, most electricity utilities had their protected franchises defined in geographical terms within which they took care of all the processes involved in the generation and distribution of electricity to end-users. While valuable experience on universal access has been gained in some jurisdictions, however, it is not the same in others. Nigeria falls into the latter category and sustained efforts have to be made to meet the challenges, which universal, nondiscriminatory access will pose.

[32] Reliability refers to the availability of adequate ancillary services such as frequency response, operating and reactive reserves as well as scheduling, system control and dispatch service. All of these serve to ensure that the interconnected electricity system is capable of withstanding any unexpected disruption with the minimum of losses. This is usually contrasted with adequacy of power supply which refers to the continued addition of generation, transmission and distribution capacity so as to meet growing demand. Supply adequacy ensures that the electricity industry keeps up with societal growth and development. See Hunt, *supra* note 15 at 155.

is operated by the Alberta Electric System Operator, which has responsibility also for the Power Pool.[33]

2.1.3.3 Independent Regulation

In addition to the purely structural issues considered above, there is the need for an effective regulatory framework. Unlike the pre-reform era, regulation post-reform seeks to mimic market competition. From the regulatory perspective, ensuring that the electricity industry is operated in a manner that mimics market competition is a much more engaging task than heavy-handed regulation of monopolies. Not only are the informational requirements massive, regulators also had to worry about the accumulation and possible exercise of market power. In addition, there are now several players in an industry hitherto operated by a monopoly.[34]

Similarly, the otherwise integrated industry is now unbundled into different segments and operational decisions, instead of flowing from top – down, are now dispersed.[35] Consequently, regulatory decisions have to take into consideration the competing interests of several entities while aiming to secure operational efficiency and consistency. It is this kind of situation that makes industry participants more sensitive to regulatory decisions, which they can, rightly or wrongly, interpret as unduly favoring competitors.[36]

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[33] See the Operators web site at http://ets.powerpool.ab.ca/ (date accessed: December 14, 2004)
[34] See note 7 and accompanying text, *supra.*
[35] *Ibid.* No where is this more apparent than in the United States where the Federal Energy Regulatory Commission (FERC) keeps expanding the scope of its existing powers in order to keep pace with the increasing sophistication of electricity regulation. For some of FERC's innovative approach, see Tomain, *supra* note 3 at 454.
[36] See note 7 and accompanying text, *supra.*

The regulatory process must thus be clear and consistent, and regulators must be independent in the sense of being free from political pressure. The government may choose to reserve to itself the final say with respect to matters of national policy but it should not otherwise meddle in the regulatory process. The appointment and removal of regulators, in addition, should require legislative approval and their term of office should be long enough to allow for some continuity in regulatory decisions. Regulators must also possess requisite skills to inspire investor confidence and strong regulatory institutions must be created and nurtured.[37] The limits of regulatory discretion must also be defined as clearly as possible in order to promote transparency and predictability.[38]

2.1.3.4 Privatization

The main inspiration for reform is the failure of public ownership and control as well as heavy regulation to ensure that resources are efficiently allocated in power supply. Electricity industry reform must, therefore, involve privatization in a broad sense. Narrowly defined, privatization refers to the sale of public assets to private individuals.[39] In its wider sense, however, privatization is used to denote the introduction into the public sector of conditions that typify the private sector.[40] It may or may not involve a

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[37] Regulatory institution(s) usually precede reform. Nigeria, however, has had no experience with direct electricity regulation. The country's electricity monopoly has only been subject to the political oversight of a government department. I will come back to this later in chapter four, *infra.* It is, however, important that the reform process is designed with social peculiarities such as this in mind.

[38] See, Mark Thatcher, "Institutions, Regulation and Change: New Regulatory Agencies in the British Privatized Utilities" (1998) 21: 1 West European Politics 139 at 139. Public participation is critical and is more so in jurisdictions with no previous regulatory experience in the electricity industry like Nigeria. In particular, electricity reform in such jurisdictions needs the widest possible publicity and debate.

[39] See Dennis Swan, *The Retreat of the State: Deregulation and Privatization in the UK and US* (Ann Abor: University of Michigan Press, 1998) at 2-3.

[40] *Ibid.*

change in ownership but the privatized company will be required to provide cost-effective goods and services and to adopt cost-minimizing procedures as well as to make a profit.[41] It is in this sense that electricity industry reform must involve an appreciable level of privatization. Otherwise competitive market conditions and the expected gains of reform may not materialize.

2.1.3.5 Wholesale Electricity Market

Electricity reform aims to increase efficiency and, hopefully, stimulate a downward pressure on prices.[42] The attainment of any of these goals depends on the presence of a competitive market in electricity. It is usually far easier to create a free market in the sense of freedom to choose one's supplier in wholesale electricity trade than in retail electricity trade. A market in wholesale electricity is normally a trading arrangement between large, industrial customers or end-use electricity distributors and power generators.[43] Retail trade in electricity, on the other hand, involves small-scale, usually

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[41] *Ibid.* Public corporations are not usually required to make profit. Instead, they may be required to provide universal service at uniform prices, to provide employment and to promote other goals the government considers strategic in addition to merely balancing their books. The National Electricity Authority (NEPA), the public electricity monopoly in Nigeria which is to be privatized, is required merely to balance its books at the end of each fiscal year. See National Electricity Authority (Amendment) Decree 29, 1998, s. 18 (5). In addition to a new corporate culture required for a successful privatization program, questions of legitimacy respecting the spread of ownership of the privatized public corporations and the value received for their sale have to be carefully handled.

[42] These have been the main argument used to support electricity reform. While increase in efficiency is not difficult to achieve in a competitive environment, a downward pressure on prices has, however, proved difficult to attain, especially during the transition stage. When it is achieved, it is almost always with respect to large scale, mainly industrial, consumers and at huge social costs. Electricity price spikes following reform are common even in industrialized jurisdictions but the situation appears to be even worse in developing economies such as Nigeria. See Plast, Oppeinheim and MacGregor, *supra* note 6 at 2.

[43] See Christopher G. Bond, "Shedding New Lights on the Economics of Electric Restructuring: Are Retail Markets for Electricity the Answer to Rising Energy Costs?" (2001) 33 Conn. L. R. 1311 at 1338-40

residential, consumers.[44] Wholesale buyers of electric power are usually in a strong enough position to negotiate favorable power supply deals but, even with consumer association and advocates, retail buyers remain in a weak bargaining position.

The large quantity of electricity involved in wholesale trade means that transaction costs are minimal relative to the volume of sales. Retail electricity is just the opposite and retail choice has not been widely embraced by consumers. This is mainly due to the low level of market power among small consumers and the high transaction costs associated with supplying them power relative to the returns they can individually deliver.[45] A wholesale market is required for effective competition while retail competition is a plus.[46]

2.2 PRELIMINARY STEPS TO ELECTRICITY REFORM

In addition to being a fundamental policy shift, electricity reform is also transformative of the operational dynamics of the electricity industry. Reform must, therefore, be rooted in a clearly designed and strongly constructed structural foundation. The industry that will ultimately emerge from electricity reform needs an enduring basis in order to withstand the structural shock and uncertainties of a new set of operational dynamics. The foundation upon which the reform is constructed determines, to a great extent, the results that it will deliver. I consider three broad structural issues, namely: infrastructural readiness, institutional framework, and industry design.

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[44] *Ibid.*
[45] *Ibid.*
[46] See Graham Shuttleworth, " Opening European Electricity and Gas markets," in Colin Robinson ed., *Utility Regulation and Competition Policy* (Cheltenham: Edward Elgar Publishing Ltd., 2002) at 128.

2.2.1 Infrastructural Readiness

Electricity reform presents several challenges, one of which is the continued ability to add capacity both to generation and to the wires segment of the industry. Traditionally, this is comfortably handled by a publicly owned and publicly operated utility for strategic reasons.[47] The traditionally regulated utility also finds it easy to add capacity as needed because it is assured of a reasonable return on its investment under the rate of return regulation.[48] After all, electricity utilities under this form of regulation are mainly monopolies with a captive market. The situation is quite different under free market conditions, where competition leads industry participants into cost-cutting measures and under which each investment has to be justified in terms of its paying for itself and earning reasonable returns within the shortest time possible.[49] In such a situation, there is the danger that investment decisions may focus on short-term planning.

Investment in capacity addition where there is little or no likelihood of reasonable returns, even if strategically important, may not be made by private investors. Private investors are, in this respect, most likely to simply watch and respond to market signals. Such signals, however, are not sensitive to strategic considerations in the sense identified here. Company directors have to answer to shareholders whose immediate interests lie

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[47] The government may consider it strategic to continue investing in additional generation, transmission and distribution capacity irrespective of returns or lack of it or even economic viability. It might just be interested in promoting industrial and economic growth, increasing the comfort and welfare of its citizens, enhancing development or even for the protection of certain industries.

[48] Under the traditional regulatory system, the investments made by an electricity utility in infrastructural improvement within its captive market is built into the rate structure such that the utility will ultimately earn the capital it expended as well as a reasonable return thereon over the life of the investment.

[49] See Stephen Scott, "Energy Source and Market Structure for Efficient Electricity Production: Will Ontario Satisfy the Criteria?" (paper presented to the CRUISSE Conference on Canadian Energy Policy in the Sustainable Development Era, Ottawa, October 17-18, 2002)

more with greater dividends than with adequacy of electricity supply and system reliability in any strategic sense.[50]

In addition, the approval process for adding electricity infrastructure capacity is also lengthy and fraught with uncertainties. For an integrated electricity utility secure in its geographical franchise, lengthy and uncertain approval processes could be tolerable. This is mainly because such a utility stands a good chance of ultimately securing approval and, more importantly, can spread its cost over an assured consumer base and over the life of the investment. The traditional rate of return regulation guarantees this much comfort. Private investors neither share such geographical franchise nor an assured customer base in a volatile competitive atmosphere. Instead, they have to compete with other investors for customers and for returns on investment.[51]

There is thus a strong possibility that capacity addition in generation and the wires segment may not keep pace with societal power demand.[52] The first casualties of such a scenario would be rural and other sparsely populated areas where consumption levels may not send a strong enough market signal to attract capital investment.[53] In addition, low-income consumers in places with central station power supply may not be able to

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[50] See Tomain, *supra* note 3 at 473. See also North American Energy Reliability Council (hereinafter, NERC), "Reliability Assessment 2002-2011: The Reliability of Bulk Electricity Systems in North America," online: <www.nerc.com/pub/sys/all_updl/docs/2002ras.pdf> (date accessed: May 15, 2003) at 11. The need for additional capacity for strategic reasons (in the sense that governments will interpret it) is not among the major factors that drive private investment decisions in a restructured electricity industry. Instead, capital commitments are predicated on securing the quickest and biggest possible returns on investment, with the result that capacity additions may not come where it is needed, when or as quickly as it is needed.

[51] *Ibid.*

[52] *Ibid.*

[53] Keith R. Fleming, *Power at Cost: Ontario Hydro and Rural Electrification, 1911 – 1958* (Montreal & Kingston: McGill- Queen's University Press, 1992) especially at 11

keep pace with the price spikes that will naturally result from insufficient infrastructural capacity, as the laws of demand and supply plays out in the new dispensation.

Jurisdictions seeking electricity reform, therefore, need to be cautious about the extent of reliance, which they place on the market mechanism alone for the addition of necessary infrastructure capacity as and when needed. The need for additional infrastructure capacity may be due to demand in places where 'power at cost' may not be feasible such as rural settlements, given the relatively high cost of supply relative to demand.[54] Even in urban centers certain segments of the population, such as those found in city slums, may also not be in a position to pay for power at cost. The perils of insufficient infrastructure capacity usually manifest in the form of supply inadequacy and system reliability constraints. Adequacy of supply refers to the availability of sufficient generation load to meet demand at any given time while system reliability refers to the ability of an electricity system to withstand negative occurrences with minimal disruption.

2.2.1.1 Adequacy of Electricity Supply

While some scholars look at adequacy of supply from the long-term security of supply perspective,[55] others view it from the perspective of meeting present power demand within an interconnected electricity system.[56] Long-term security of supply involves the ability of an interconnected electricity system to continue to meet immediate power demand while ensuring that adequate plans are in place for meeting forecast demand, as it

[54] *Ibid.*
[55] See generally Barton, *et al, supra* note 7 at 458.
[56] See Hunt, *supra* note 15 at 82.

increases both with population growth and with economic expansion into the distant future.[57] Short-term adequacy refers to the availability of sufficient electricity generation capacity to meet present electricity demand as well as demand forecast for the immediate future within an interconnected electricity system at market prices.[58]

However defined, the balance between demand and supply is a given in classical free market discourse as price will go up or down depending on the direction towards which the balance tips. If demand outstrips supply, prices will rise and vice versa.[59] A typical scenario of price fluctuation in response to the shifting balance between demand and supply was recorded in England and Wales in February 1996 (post-electricity reform). There was a threat of blackout due to gas supply problems but no blackout occurred because electricity prices rose steeply at different times during the crisis, curtailing demand and keeping economically required generation within the gas supply levels.[60]

This scenario highlights the winner/loser dichotomy, which the free market mechanism fosters, and which is a likely consequence of electricity reform. The state, however, has an interest in ensuring that citizens have access to a minimum quantity of electric power and that they are in a position to afford the cost of that quantity.[61] This could be seen as a consequence of the distribution of rights and responsibilities between the state and its

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[57] See Barton, *et al, supra* note 7 at 458.
[58] See Hunt, *supra* note 15 at 82.
[59] *Ibid.*
[60] *Ibid.*
[61] This interest is traceable to the social contract between the state and its citizens. See Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002) at 78.

citizens.[62] It could also be seen as one of the consequences of the 'social contract' between the state and its citizens whereby individuals surrender their autonomy to the state in return for certain rights against the latter.[63]

As Alan Gewirth argues, "[T]he main justification of the state (and hence of political obligation) is, indeed, that it serves to secure a person's generic rights to freedom and well-being."[64] The state may thus want to promote power supply adequacy over and above what the market may be willing or able to do so as to enhance public welfare[65] or to prevent of the problems that may attend the widespread use of less reliable and less safe alternative energy sources such as wood.[66] These could be the justification for state intervention in market economics to re-direct resources towards achieving results that otherwise would not have been possible.[67]

One may add that, from a long-term security of supply perspective, adequate mix in power-generating technology also serves to increase the security of electricity supply. An example will be a balance between the relatively easy to start Combined Cycle Gas

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[62] See Cosmo Graham, *Regulating Public Utilities: A Constitutional Approach* (Oxford and Portland, Oregon: Hart Publishing, 2000) at 142.
[63] See Stiglitz, *supra* note 61 at 78.
[64] Alan Gewirth, "Economic Rights" in George R. Lucas, ed. *Poverty, Justice and the Law: New Essays on Needs, Rights and Obligations* (Lanham, MD: University Press of America, Inc., 1986) (hereinafter, Gewirth, "Economic Rights") 7 at 23.
[65] The obligation of the state to protect the liberty of its citizens is increasingly being related to citizens' welfare. See, for instance, Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2002) (arguing that "the first thesis is that *legal* liberty, that is, the legal permission to do or not to do, is valueless without *factual* (real) liberty, that is, the factual possibility of choosing between permitted alternatives.") at 337 (emphasis in the text, notes omitted).
[66] See Stiglitz, *supra* note 61 at 83.
[67] For a justification of state intervention in market operation from a rights discourse perspective, see Geraldine Van Bueren, "Including the Excluded: The Case for Economic, Social and Cultural Human Rights Act" (2002) P. L. 456 at 459.

Turbines with higher maintenance cost and the cheaper to maintain but relatively more difficult to start nuclear generating plants in the interconnected electricity system.[68]

It might be necessary for reform to be preceded by the availability of infrastructure capacity to sustain it or, at least, the right conditions that will spur the addition of such capacity.[69] This is especially the case in developing societies such as Nigeria, where the electricity infrastructure is underdeveloped and where access to electricity is still a major national concern.[70] Otherwise the new electricity market is likely to exclude a wide section of the population.

2.2.1.2 Electric System Reliability

System reliability denotes the capacity of the interconnected electricity system to absorb the impacts of unexpected incidents - either accidental or otherwise - with minimal disruption. It also refers to the availability of sufficient ancillary services in an electricity system.[71] System reliability constraints would include transmission congestion or large technical load losses that may lead to fluctuations in electricity currents. Electricity current fluctuations can result in serious damage to domestic appliances and to industrial

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[68] The perils of inadequate technology mix were amply demonstrated in Ontario after the August Blackout of 2003 in parts of the U.S and Canada. It took the province days, and weeks in some cases, compared to hours mainly in the U.S., to restore supply because it takes longer to bring nuclear power-generating stations back online. See Stephen Handelman, "The Week After: It Took the Worst Blackout Ever to Shed Light on the True State of Canada's Energy Supply" *Time, Canadian Edition,* September 1, 2003 at 36.

[69] Among the many factors that led to the California electricity crisis a pricing structure that led to power supply inadequacy is prominent. See Flippen &. Mitchell, *supra* note 18 at 4-5. See also, Michael A. Yuffee, "California's Electricity Crisis: How best to Respond to a Perfect Storm" (2001) 22:1 Energy Law Journal 65

[70] See National Council on Privatization, *National Electric Power Policy* (Abuja: Presidency, 2001) at 3.

[71] For a discussion of system reliability and the factors that affect it, see Hunt, *supra* note 15 at 155-8.

equipment. The perils of insufficient attention to system reliability include power blackouts, which always come with grave consequences.[72] Unstable power supply could have a negative impact on consumer confidence in the new electricity market. Consumers will be forced to incur additional costs in order to acquire supplementary generating sets. This is common in Nigeria and it needs to be addressed by electricity reform.[73]

2.2.2 Institutional Framework

The institutional framework upon which reform will proceed extends both to the legal rules that validate and regulate the entire program as well as to the institutions created to initiate and sustain the reform process. The institutional framework drives the industry practices that will result upon reform, and an appropriate institutional framework is needed to give a clear focus and direction to the reform program. Unless these matters are properly handled, market participants may seek to exploit the prevailing ambiguities or gaps to secure selfish advantages under the new dispensation.[74]

2.2.2.1 The Underlying Basis of Reform

In spite of the fact that power lines are increasingly crossing national boundaries, electricity reform remains essentially a nationally centered priority. Each nation seeking

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[72] *Ibid.* at 40 where the massive blackouts of 1965 and 1977 across the East Coast of the US and parts of Canada are cited as examples. Virtually the same area suffered another major blackout on August 14, 2003 which was, essentially, traced to system reliability problems. See, U.S – Canada Power Outage Task Force, *Interim Report: Causes of the August 14th Blackout in the United States and Canada*, November 2003 at 21-63.

[73] See Adeola F. Adenikinju, "Electric Infrastructure Failures in Nigeria: A Survey-based Analysis of the Cost and Adjustment Reponses," (2003) 31 Energy Policy 1519 at 1519.

[74] See Albert A. Foer, "Electricity: Notes on the Transition Phase," (2002) 33 Loy. U. Chi. L.J. 813 at 818.

electricity reform must clearly define the objectives that reform is to achieve and consistently direct the reform process towards such objectives. These objectives must address all the facets of the relationship between the state, the citizenry and the electricity industry post-reform. In addition, the underlying purpose of reform must be politically realistic and exhibit clear sensitivity to local peculiarities. Whether or not the ultimate aim of reform is a departure from public ownership and heavy regulation to private enterprise, the reform objective must take into account the country's technological development, institutional endowments, and geographical constraints. It must also be relevant to the nation's political dynamics and socio-economic conditions.[75]

It is only when policy makers are seized of the ramifications of the objectives of reform that they can move towards attaining them. Uniformity between purpose and process will serve to minimize the starts and stops that can result from unanticipated domestic political pressure from voters that may shake the resolve of politicians to carry out the reform process to its fullest.[76] Delays in proceeding with reform are likely to increase the transaction costs and create uncertainty, both of which are not helpful to the process.[77]

2.2.2.2 Pace and Order of Reform

Following the definition of clear and consistent national objectives is the question of the speed with which reform should proceed and the sequence of its various stages. The

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[75] See Flippen & Mitchell, *supra* note 18 at 3.
[76] Ontario, for instance, has had to institute a price cap. See Satish Saini, "Deregulation in Ontario: Another Price Cap," Energy Pulse, online: <www.energypulse.net/cetners/article/id=613 (accessed: 2/10/04)
[77] See Miller, *supra* note 4 at 392. See also, Robert Pritchard, Eight Guidelines of Electricity Industry Reform," online: <www.worldenergy.org> (date accessed: May 27, 2003).

answer to this question will depend on the type of electricity industry that is to be restructured. The speed with which, and the order in which, one jurisdiction restructures its electricity industry will, necessarily, vary from the speed and sequence employed by another jurisdiction. The variation in the ownership and management arrangements of electricity infrastructure in different jurisdictions necessitates differences in reform measures.[78] In some jurisdictions, for instance, the electricity industry is already subject to regulation while it is owned and operated by a state monopoly subject only to the political oversight of a government department in others.[79] In jurisdictions with a history of exclusive public ownership and control, it may make sense to proceed slowly with reform. This is particularly the case in jurisdictions with little or no local electricity regulatory experience to draw from.

The order of reform relates to what first and subsequent steps to take in the pursuit of reform: Is reform to commence with wholesale power supply or with retail electricity? Should reform be nationwide or is it to be limited to geographically defined pilot projects? It has to be decided whether reform commences with privatization or with competition as well.[80] While international trends offer useful guides and regional factors play crucial roles in this regard, the ultimate driving forces have to be local conditions. Each country has to make its reform policy choices with a clear view of the local conditions under which such policy choices are given concrete manifestation. Designer

[78] For an account of the various approaches to electricity reform among U.S states, see Flippen & Mitchell, *supra* note 16 at 3.

[79] The electricity industry in Nigeria has had no experience in direct industry regulation as only a federal ministry responsible also for steel has exercised oversight functions over it.

[80] Different approaches are suggested in the literature. See Hunt, *supra* note 15 at 41. See also Kwoka, Jr., *supra* note 12 at 892. The experience of jurisdictions that have restructured their electricity industries also point to variety. In England and Wales, for instance, privatization preceded competition while competition was the immediate priority of Alberta's already partially privatized electricity industry upon reform.

reform programs from other jurisdictions may not survive without the pruning, cutting and grafting that local conditions may dictate.[81]

2.2.2.3 Legislative Techniques and Regulatory Institutions

Reform must be entrenched in the legal system and appropriate regulatory institutions created. Public ownership and traditional regulation of the electricity industry are consequences of legislation under which relevant institutions are created. In some jurisdictions electricity generation, transmission and distribution are the exclusive responsibility of the state and the law does not permit private participation in public electricity supply.[82] Even in jurisdictions that already permit private participation in the electricity industry, the magnitude of the structural and institutional modifications that electricity reform requires is such that it can only proceed under appropriate legislative and institutional reform.

The questions then are what legislative techniques should be employed and what regulatory institutions have to be created? Should reform legislation contain minute directions to the regulator or should it merely state broad principles, which regulatory discretion must satisfy and to which industry practice post-reform must conform? What kinds of regulatory institutions are to be created: should they be independent or subject to

[81] See Francis N. Botchway, "The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends," (2000) 21 U. Pa J. Int'l Econ. L. 781 at 793.
[82] Until recent legislative amendments, public electricity generation, transmission and distribution were the exclusive preserve of the state in Nigeria. See Electricity (Amendment) Decree No. 28, Nigeria 1998, s.1; Nigerian Investment Promotion (Amendment) Decree No. 32, 1998, s.1. See also Lekan Salami and Afolabi Elejibu, "Investment Incentives for the Electricity Business in Nigeria," (2004) 22:1 Journal of Energy and Natural Resources Law 94 at 94.

political oversight? Who qualifies to play the regulatory role? The answers to these questions must reflect local realities while benefiting from the experience of other jurisdictions that have undergone an electricity reform process. These questions must, however, be clearly answered in the legislative instruments that bring about reform.

The reform legislation must allow for flexibility both in the reform process and with respect to the exercise of regulatory power.[83] The limits of regulatory discretion must, however, be unambiguously stated so as to minimize abuses. The tough test that a reform program must pass is how to balance regulatory flexibility with appropriate checks on regulatory discretion. If the enabling reform legislation tilts in favor of either, there are likely to be complications in the regulatory process, and complications in the regulatory process can only work against the reform process.[84] There is no standard prescription for achieving an appropriate balance between regulatory flexibility and the extent of regulatory discretion. Suffice it to say, however, that the enabling reform legislation should spell the powers and duties of the regulator as clearly as possible and in general enough term to allow for flexibility in the exercise of regulatory power.

The flexibility of regulatory power would be checked by the right to appeal regulatory decisions to a superior court. In England and Wales the Electricity Act of 1989 made very broad provisions with respect to regulatory offices, regulatory procedures, the regulator's powers, licensing arrangements and industry participation. Details of industry practice were left for inclusion in the operating licenses, which every market participant must

[83] See Armstrong, *et al, supra* note 1 at 360-61. See also Newberry, *supra* note 1 at 58.
[84] See Foer, *supra* note 74 at 814.

obtain from the regulator and which were made enforceable contracts between parties thereto.[85] The courts would thus serve as checks to the abuse of regulatory discretion. This approach allows sufficient room for the exercise of regulatory discretion, with the broad legislative provisions and contract terms serving to check the use of such discretion.

Qualifications for the office of the regulator must also be clear and be such as to promote confidence in the regulatory process[86] while the procedure for appointing individual regulators must be transparent, preferably involving legislative hearings. Above all, the regulatory process must be insulated from undue political interference. Thus, regulatory institutions must in general be independent of executive and legislative control. There will, however, be some policy issues for which the regulator should be required to seek political guidance. The government should also be allowed to intervene in the regulatory process where the requirement to seek political guidance is not complied with. Such policy issues must be clearly spelt out in the enabling legislation and political guidance should be sought and provided in a transparent manner.

I have avoided a discussion of the specific institutions that result from electricity reform. I have also not discussed specific industry practices that will flow from that process. These are mainly substantive matters of detail and will necessarily vary from jurisdiction to jurisdiction. They are, consequently, not easily amenable to consistent generalization. I

[85] See Armstrong, *et al, supra* note 1 at 360-61; Newberry, *supra* note 1 at 58.
[86] Persons appointed to regulatory positions must, for example, possess the requisite skills and experience and should not be permitted to have proprietary interest in any segment of the electricity industry.

will now discuss some specific substantive issues that have direct bearing on the regulatory process and post-reform industry practices in the following section.

2.2.3 Industry Design

Industry design is here taken to refer to the terms of participation in the resulting electricity market and the rights and duties that it creates between investors, the state and consumers. The number of investors allowed into each of the competitive segments of the electricity industry has to be determined. The resulting trading arrangements or market design, which is the means by which production is linked to consumption, must be spelt-out as well. The regulatory purpose and the means of attaining it would also have to be decided. Finally, there is the period between the commencement of reform and a substantial completion of reform, which is essentially a transitory stage. I will return to this later. For now, the following general comments will suffice.

As already noted, the general move towards electricity reform is informed, in part at least, by the perceived failure of intensive economic regulation whereby important decisions relating to the industrial organization of the electricity industry rests with public officials.[87] Transforming this arrangement cannot occur overnight. More importantly, the electricity industry cannot move from intensive economic regulation to free market competition abruptly. Progress towards the free market occurs gradually and in phases for

[87] Typically the major industrial organization decisions relating to electricity involve pricing, profits, entry or market participation and exit. See Foer, *supra* note 74 at 814.

the electricity industry in part because of the complexity of the issues involved and because of the socio-economic significance of electricity in national life. Between the moment reform is decided on and steps taken towards its actualization and the time competition is ultimately introduced in electricity supply lies the transition stage.

The transition stage is the most difficult stage to define before hand. The starting point has been (and still is) around and the competition stage, which is the goal of reform, is clearly, albeit provisionally, defined but the transition stage is likely to be more chaotic and unpredictable than any other stage of the reform process.[88] It is a stage where the rules and regulations under which reform is to proceed have not been fully defined either from experience or by judicial review. In jurisdictions such as Nigeria where there are no standing regulatory institutions, the new regulatory mechanism may not have been firmly established.

Generally, electricity reform involves some modification in the membership of industry actors as well as of the relationship between and among them. It might involve the introduction of private investment where there was none or the institution of a form of regulation unknown to a particular industry. More fundamentally, reform alters the relationship between the citizens and the state, as far as the supply of electricity is concerned.[89] Citizens' will, upon privatization, discover that their relationship with the supplier of electricity will no longer have any direct bearing on their status *qua* citizens.

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[88] *Ibid.* at 813.

[89] See Graham, *supra* note 62 (arguing that "privatization of public utilities transforms the end users from citizens to consumers") at 4

They would have been transformed into consumers with mere contractual rights against the new power supplier.[90]

From the perspective of rights, obligations and expectations, this is a major transformation for the citizen. For most citizens, and especially for those with very limited income, this transformation may not always be for the better. The proposal for electricity reform in Nigeria, which I discuss in chapter four, typifies this situation. Citizens will, for instance, discover that any benefit that inheres in obtaining supply from the state, such as a less aggressive drive for revenue and less emphasis on profit considerations in the investment decision process, may not sit well with private investors operating under free market conditions. This is especially the case with Nigeria where the industry has been wholly publicly owned and publicly operated.[91]

The challenge, therefore, is to design the post-reform industry in a manner that will be consistent with the obligations of the state to its citizens. Admittedly, electricity reform is mainly aimed at reducing the role of the state. The state, however, cannot just disappear from the scene merely because of industry reform in any aspect of national life. If nothing else, the state needs to continually ensure that the objectives of reform are being met. State intervention in the market may be necessary to remediate any negative socio-economic consequences arising from the transition to a new dispensation.[92] The new

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[90] *Ibid.* Relative to citizenship rights, contractual rights are neither as strong nor do such rights vouchsafe holders as much privileges. In fact, residential consumers would especially be confronted with the limited market power, which their small-scale power use entails and the disadvantages that come with it.
[91] See Salami and Elejibu, *supra* note 82 at 94.
[92] See Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf, 2001) at 7, 119-120. See also Stiglitz, *supra* note 61 at 55.

industry *modus operandi* may, for instance, make access to and affordability of electricity more difficult for segments of the population on account of low income. The state may, therefore, find it necessary to institute lifeline tariffs or rural electrification programs.

2.2.3.1 Market Participation

Market participation relates to the pace and order of reform earlier discussed. It refers to the presence of different players in the different sectors of the electricity industry. It is a condition precedent to competition. Competition comes from the entry of other participants into the electricity industry post-reform. Merely permitting participation may not be enough and the necessary atmosphere has to be created to ensure that participation actually occurs.[93] Otherwise, prospective participants may consider the presence of an entrenched incumbent a sufficient disincentive to not invest in the post-reform industry. Lenders may also not be too disposed to providing new entrants with investment capital. Even where participation does occur, consumers may not respond immediately to new alternatives.[94] In essence, participation, especially in the early stages of reform, may have to be encouraged in some form.

Clear rules of entry, participation and exit must, therefore, be fashioned and compliance therewith ensured. A choice has to be made between promoting and restricting competition in different industry segments and in different geographical areas of the country. The level of demand for electricity in certain geographical areas may require the

[93] See Kwoka, *supra* note 12 at 892.
[94] *Ibid.*

issuance of an exclusive geographical franchise to a retail company to operate there. Certain industry segments or specific geographical areas, depending on electricity consumer population density and on aggregate consumption levels, may also require direct public financial support either to initiate electrification projects or to sustain existing projects.[95]

These measures could amount to governmental intervention in the electricity market. They are, however, indispensable to electricity reform in jurisdictions with poorly developed and inadequate electricity infrastructure. The mere fact that such measures are built into the electricity market may not amount to a lack of commitment to free market competition. Rather, they are necessary to ensure the sustainability of electricity reform and to create the right atmosphere for free-market competition to flourish. The relationship between the state and the citizens requires that measures for extending electricity to areas where the market is either unwilling or unable to bear the cost of such extension, be instituted at the early stages of free market competition at least.[96]

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[95] Rural electrification, for instance, may need the injection of public resources to grow and flourish. Indeed, jurisdictions that have achieved total or near-total electrification of its rural communities got that far, in part, owing to the recognition of this fact early on. For an account of governmental role in rural electrification in the US, for instance, see Joel A. Youngblood, "Alive and Well; The Rural Electrification Act Preempts State Condemnation Law: City of Morgan V. South Louisiana Electric Cooperative Association" (1995) 16 Energy Law Journal 489 especially at 490-96. See also Richard P. Keck, "Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer" (1985) 16 Envt'l Law 39. For accounts of other jurisdictions, see Frand and John Dolphin, *Country Power: The Electrical Revolution in Rural Alberta* (Edmonton: Plains Publishing Inc., 1993); Keith R. Fleming, *Power at Cost: Ontario Hydro and Rural Electrification, 1911 – 1958* (Montreal & Kingston: McGill Queen's University Press, 1992)

[96] See Fleming, *supra* note 95 at 13; Graham, *supra* note 62 at 132.

2.2.3.2 Trading Arrangements

Unbundling vertically integrated utilities, as earlier noted, is an essential aspect of electricity reform. However, unbundling de-integrates an industry in serious need of co-ordination. The link between the generator and the consumer becomes less certain in an unbundled electricity industry. Thus, arrangements have to be worked out to strengthen this link in the form of trading arrangements. Such arrangements relate both to bulk power sales and to retail electricity sales.

There are basically two methods for organizing bulk trade in electricity, namely pooling and bilateral agreements. The pooling system entrusts the Transmission System Operator, usually an independent entity, with the responsibility of managing the system and of establishing an hourly price for electricity using a complex formula. A bilateral trading arrangement allows consumers to deal directly with generators in the purchase of electricity, usually for delivery at some future date that may be up to several years into the future.[97]

The two methods contrast sharply in their complexity, with the pooling method being more complex and requiring greater institutional capacity than bilateral trading arrangements.[98] It is thus important that a trading arrangement supportable by the

[97] See Richard D. Cudahy, "The Folklore of Deregulation (with Apologies to Thurman Arnold)" (1988) Yale Journal on Regulation 427 at 434.

[98] While bilateral trading can flourish in jurisdictions without sufficient infrastructure for securities' trading, the pooling system requires advanced institutional and technological capacity in that respect.

available expertise, institutional capacity and other resources is adopted. This may involve grafting some elements of one method on to the other.

2.2.3.3 Regulatory Purpose

A major determinant of the nature of the intricate web of relationships that will develop between and among the major stakeholders in a restructured electricity industry is the purpose that regulatory power is designed to achieve.[99] Regulatory purpose derives from the wider reform objectives, earlier discussed, and reflects the electricity concerns that each jurisdiction seeks to address through reform in more detailed and more practical terms. If reform is to advance free market principles, for instance, the main purpose of regulation must include the promotion of competition.[100] Given the nature of an electricity market, however, the regulatory purpose may also include some form of consumer protection aimed at the promotion of access and affordability.[101]

Beyond the traditional consumer concerns such as adequate product labeling and protection from false advertisements, the government may also find it necessary to promote access to and affordability of electricity among low income earners and other disadvantaged members of the society.[102] The promotion of access and affordability might involve the subsidization of electricity tariffs for specific classes of people and of the cost of extending the electricity infrastructure to sparsely populated areas. If nothing

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[99] See Botchway, *supra* note 81 at 820.
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*

else, widespread access to affordable electricity will assist in extending electricity to people who otherwise would have been excluded by the market. In this respect, access expansion helps not just the affected consumers but investors who will benefit from a wider reach of the electricity market as well.[103]

Due to the flexibility inherent in public utility regulation, many of the regulator's powers are usually expressed in very general terms.[104] At the core of these powers are the main objectives that legislation requires the regulator to achieve. These objectives serve as the reference point both for the regulator and for other industry operators. They are also the lens through which the general public views the electricity industry post-reform. The objectives should, as such, reflect the shared concerns of the people who have to rely on the new electricity market for their electricity needs. In places where access to electricity is a major concern, for instance, the promotion of competition needs to proceed with great emphasis on promoting access to electricity. Otherwise, the electricity market will remain inaccessible to a wider customer base.[105]

2.2.3.4 The Transition Stage

Much of the scholarly attention received by electricity reform focuses on either the beginning or the end of the reform process. In between these two major stages of

[103] See Plast *et al*, *supra* note 6 at 2.
[104] This was the case with the enabling legislation for reform in England and Wales. See Newbery, *supra* note 1 at 59.
[105] In Nigeria, only thirty-six per cent of the population has access to electricity. See National Council on Privatization, *National Electricity Policy* (Abuja: Presidency, Federal Republic of Nigeria, 2001) at 3. It will, on the balance, be in the interest of industry stakeholders that access is also promoted along with competition. Otherwise, the actual market will soon be saturated while a big potential market is left unexplored.

electricity industry reform lies the transition stage.[106] This is essentially a competition-generating stage. It is a sort of halfway house between the old industry and the new one that is unfolding. It is particularly important in terms of public acceptance and the sustainability of the reform program.[107]

The political risk involved in electricity reform may induce politicians to play "hide and seek"[108] with the process. I have noted that such a situation can lead to uncertainty, which drives away investment capital, and an increase in the transaction costs of reform. Consequently, electricity reform has to be defined in stages, each of which "requires policies that are stage-appropriate."[109]

In the case of the transition stage, appropriate policy measures must be taken to ensure that the extent and purpose of regulation match the prevailing issues of the moment and that relevant information is available to prospective industry participants. This is especially the case where reform involves the privatization of public assets. Prospective buyers of these assets would want to know not just how much money they will be paying for them but also the legal and socio-economic regime under which they will be operating those assets.

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[106] See Foer, supra note 74 at 818.
[107] *Ibid.*
[108] I use the phrase 'hide and seek' to refer to a situation where reform is announced, relevant legislation passed and requisite institutions created and start to function only for politicians to halt either the whole process or aspects of it. This usually results from political pressures from voters who are overwhelmed by the harshness that the initial stages of reform might impose on them. The most obvious difficulty comes in the form of price spikes. California and the Canadian province of Ontario represent both total and partial suspension of reform respectively. See, Peter Navarro & Michael Shames, "Electricity Deregulation: Lessons Learned from California (2003) 24:1 Energy Law Journal 33 at 33; Satish Saini, "Deregulation in Ontario, Another Price Cap" Energy Pulse, online: <www.energy pulse.net/centers/article/article_print.cfm?a_id=613> (date accessed: February 10, 2004).
[109] Foer, *supra* note 74 at 821.

In particular, appropriate arrangements have to be made for strengthening the existing regulatory mechanism (and instituting one where none exists) and for providing regulators with the requisite training. The manner in which stranded costs or stranded benefits as the case may be are to be handled needs also to be defined. Stranded costs, which represent the opposite of stranded benefits, arise where a regulated public utility has committed investment capital to the development of its network consequent upon regulatory approval but has not earned its return on that investment prior to the commencement of reform.[110] The question here should bear the burden of these costs: the public utility, consumers or new entrant into the industry? Stranded benefits usually obtain where public electricity infrastructure is sold to private investors at less than market value and presents far fewer problems than stranded costs. As with the entire reform process, the transition phase must be designed and implemented with the local conditions under which reform is to subsist in mind.

2.3 DISCUSSION

I have attempted in this chapter to outline certain elements that have direct bearing on the initiation and sustainability of electricity reform. The main focus has been on issues that relate to the structure of the electricity industry and the legal regime under which it is to operate. While electricity reform can bring immense benefits,[111] the failure of reform can

[110] See Foer, *supra* note 74 at 815.

[111] It is estimated that electricity reform in England and Wales produced efficiency gains - from cutting non-fuel costs – to the tune of 8.8 billion British Pounds in present value terms. There were also substantial fuel cost savings as well as environmental benefits through the reduction of carbon dioxide emissions from coal following competition in generation and the removal of the protection that the British coal industry enjoyed. See Newberry, *supra* note 7 at 238-42. See also Newberry & Politt, *supra* note 20 at 3.

result in grave consequences for everyone: politicians, investors and members of the general public. Electricity reform has been known to fail because of several factors, chief among which relates to the design of both the reform process and the resulting post-reform industry.[112]

Equity concerns relating to electricity reform are relevant to the conditions under which reform is initiated as well as to the sustainability of the reform program. After all, reform can only proceed if it has legal sanction and the operational rules enacted for enhancing equity in the reform process must build on that legal foundation. Only a full appreciation of the peculiar dynamics of the electricity industry can ground appropriate legal rules that are meant to direct the way it operates immediately before, during or after the reform program.

The question whether the Nigerian electricity reform proposal meets the socio-economic rights requirements found in the Nigerian constitution (and discussed in the next chapter) can only be meaningful if there is a sustainable reform program in place. I assume that the Nigerian electricity reform proposal is meant to be sustainable. I have thus highlighted the preceding procedural as well as structural aspects of electricity reform in order to set the stage for its evaluation. In the next chapter, I discuss the provisions of the Nigerian constitution that have direct bearing on the design and implementation of welfare economic policy in Nigeria. It is on those provisions that the evaluation of the reform proposal and the options I identify for improving the reform program are based.

[112] California is, again, a point of reference in this respect. Peter Navarro and Michael Shames discusses eleven fatal errors with the California electricity reform program and ten of these errors relate to the design of both the reform itself and the proposed post reform industry, *supra* note 108.

3.0 SOCIO-ECONOMI RIGHTS UNDER NIGERIAN LAW

3.1 INTRODUCTION

Socio-economic rights are seen as rights of recipience or positive rights because their protection and enforcement requires the direct provision of material resources to individuals.[1] At the very least, socio-economic rights require the creation of conditions necessary for individuals to secure their basic material needs. While some people are able to obtain their socio-economic needs through the market mechanism, others rely either on direct provision of resources by the state or on state intervention in market operations to secure theirs.[2] The state may, in this respect, choose to secure specific socio-economic rights through its welfare economic policies. In such a situation, the enabling legislation might be used to define certain economic results to be pursued by state policy. The enabling legislation may be the basic law (the constitution) or an ordinary statute.

Certain welfare economic policy requirements of the Nigerian constitution fall into this category. These requirements seek to define the results of national welfare economic policies and thus on the consequences of electricity reform. They are framed in terms of

[1] These rights are usually contrasted with civil and political rights which are seen as negative in nature, requiring just forbearance from those owing the duty to respect those rights. This characterization of both categories of human rights is, however, being questioned by modern scholarship. It is clear, for instance, that laws have to be enacted and enforcement agencies set up at considerable expense just to secure forbearance, which is said to be the only requirement for the enforcement of the so-called negative rights. See Raymond Plant, "Needs, Agency and Rights," in Charles Sampford and D. J. Galligan eds., *Law, Rights and the Welfare State* (London: Croom Helm Ltd, 1986) 22 at 37-44. The protection of a right to privacy today, for instance, requires not only more resources but also greater institutional sophistication than, say two or three decades ago.

[2] See Charles Sampford, "The Dimensions of Rights and Their Statutory Protection," in Charles Sampford and D. J. Galligan eds., *Law, Rights and the Welfare State* (London: Croom Helm Ltd, 1986) 171 at 173.

socio-economic rights and the relevant case law revolves around their enforceability *qua* rights. The Nigerian constitution, however, limits the scope of the legal protection it affords these rights.

This chapter discusses the status of socio-economic rights under Nigerian law. I draw from other legislative instruments and Nigerian case law to demonstrate the enforceability of socio-economic rights under Nigerian law. Their inclusion in the Nigerian constitution suggests that they are important to the structure of the Nigerian state. A constitutional provision is not lightly made and, if any aspect of national life is deemed fundamental enough to occupy a place within the constitution even in a non-justiciable form, the least the state can do is to reflect the spirit of such provisions in its policy choices. I will commence with an outline of the constitutional scheme of socio-economic rights in Nigeria. This will be followed by a discussion of the case law relating to the socio-economic rights provisions of the constitution. Thereafter, I discuss the effects that the African Charter of Human and Peoples' Rights has had on the status of socio-economic rights in Nigeria. Finally I attempt an analysis of the implication of the welfare economic policy requirements contained in the Nigerian in the conclusion that follows.

3.2 THE CONSTITUTIONAL SCHEME OF SOCIO-ECONOMIC RIGHTS

The Nigerian federation operates a presidential system of government with a written constitution. Since gaining political independence from Britain, the country has had

several constitutions.[3] On independence on October 1, 1960 Nigeria had a constitution that more or less created a Westminster style parliamentary government and somewhat retained Britain's colonial hold on the country with a Governor-General serving as the Queen's representative as well as ceremonial head of state. In 1963 Nigeria adopted a republican constitution that served to break the country's direct political link to Britain. Subsequently a *coup d'etat* brought in a military government in 1966.

Nigeria has since had several military regimes and many constitutions. There have also been many attempts at constitution making that did not result in an operational document. It was, however, not until 1979 that socio-economic rights were entrenched in the Nigerian constitution (the constitution).[4] The question, therefore, is the extent of protection that these rights enjoy under the Nigerian constitution and, by extension, under Nigerian law. I will attempt to answer this by highlighting the relevant constitutional provisions on socio-economic rights.

Chapter II of the constitution titled, "Fundamental Objectives and Directive Principles of State Policy," states the basis of the Nigerian federation and specifies certain socio-economic rights considered important to the state's relationship with its citizens. The chapter opens with the grand declaration that:

> "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to

[3] For an account of the history of constitution making in Nigeria, see generally B. O. Nwabueze, *A Constitutional History of Nigeria* (London: C. Hurst & Co., 1982) at 5, 29, 72, 89, 127, 205 and 253.
[4] *Ibid.*

conform to, observe and apply the provisions of this chapter of this constitution."[5]

Immediately following this section is a long list of socio-economic rights, which are conferred on Nigerians along with commensurate obligations. For present purposes, however, I will limit myself to two main sections of the constitution. The first of these is s.16 which provides that the state shall "control the national economy in such a manner as to secure the *maximum welfare*, freedom and happiness *of every citizen* on the basis of social justice..."[6] This represents a rather general direction which economic policy is expected to follow and, in support, some details are provided presumably for policy guidance. The constitution, for instance, urges that the state "direct(s) its policy towards ensuring the promotion of planned and balanced economic development."[7] It also requires the state to ensure "that the material resources of the nation are harnessed and distributed as best as possible to serve the common good."[8]

The constitution, therefore, emphasizes desirable economic results and not necessarily the means of achieving those results. Towards that end, the constitution makes it incumbent

[5] Constitution of the Federal Republic of Nigeria, 1999 (hereinafter the constitution) s. 13. There are twelve sections in all under this chapter and section 14 declares, among other things, that the Federal Republic of Nigeria "shall be a state based on the principles of democracy and social justice", that "sovereignty belongs to the people of Nigeria from whom the government, through the constitution, derives its powers" and that "the security and welfare of the people shall be the purpose of government".

[6] *Ibid* s. 16 (1) (b). Emphasis supplied. The other part of this section provides that the state should ensure the equitable distribution of national wealth.

[7] (s. 16 (2) (a)). (Brackets and contents supplied.)

[8] S. 16 (2) (b). See also s. 16 (2) (c), which urges government to ensure "that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or group." In this respect, the National Assembly shall have power "to review from time to time the ownership and control of business enterprises operating in Nigeria." See s. 16 (3) (a). S. 16 (2) (d) essentially lists specific heads of socio-economic rights such as adequate food and shelter and urges the government to ensure that they "are provided for every citizen."

on the Nigerian state to *control* the national economy in a manner that brings about specific results irrespective of the economic policy adopted. Section 16 (1) (c), for instance, mandates the government to "without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy." The constitution does not directly define what is meant by "major sectors" of the economy.

Rather, it provides that reference to major sectors of the economy shall be construed as a reference to "such economic activities as may, from time to time, be declared by a resolution of each house of the national assembly to be managed and operated exclusively by Government..."[9] Public electricity production and supply had been regarded as a major sector of the economy subject to public ownership and control until now.[10] The current economic reform program, which is centered on the privatization of major sectors of the Nigerian economy, seeks to change that policy position.[11] The designation of public electricity production and supply as a major sector of the economy is presumably due to the recognition of its central role in economic development and social welfare.[12]

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[9] S. 16 (4) (a).

[10] Until recent legislative amendments, public electricity generation, transmission and distribution were the exclusive preserve of the state in Nigeria. See Electricity (Amendment) Decree No. 28, Nigeria 1998, s.1; Nigerian Investment Promotion (Amendment) Decree No. 32, 1998, s.1. See also Lekan Salami and Afolabi Elejibu, "Investment Incentives for the Electricity Business in Nigeria," (2004) 22:1 Journal of Energy and Natural Resources Law 94 at 94.

[11] *Ibid.*.

[12] The Nigerian National Electric Power Policy states the "[T]he Power Sector is very critical to the economic, industrial, technological, and social development of the country. Electricity consumption has become one of the indices for measuring the standard of living of a country." See National Council on Privatization, *National Electric Power Policy* (Abuja: The Presidency, 2001) at 1.

The second socio-economic rights provision to which I wish to draw attention is contained in s.17. This section commences with a declaration that the Nigerian "social order is founded on ideals of freedom, equality and justice". In furtherance of that social order, the section states that the Nigerian state shall "direct its policy towards ensuring that... all citizens have adequate means of livelihood as well as adequate opportunity to secure suitable employment"[13] and that "*provision is made for public assistance in deserving cases and other conditions of need.*"[14] These provisions appear to reinforce the broad economic objective outlined under s. 16. Section 17 appears to emphasize the desirable results of economic and social policy at the level of the individual citizen, while s. 16 seems to be directed principally at national welfare economic policies. Towards that end, an obligation is placed on the state to provide assistance to those who require public assistance in order to share in societal economic progress. In a situation of widespread poverty[15] and in the absence of any form of social safety net[16] these cannot but form part of the barest claims that a citizen can make on the state.

It would, therefore, appear that the constitution contemplates that deliberate measures for securing the welfare of the citizens would permeate every economic policy, which the Nigerian state adopts.[17] Did the constitution then intend that a judicial remedy be

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[13] S. 17 (3) (a). Emphasis added.
[14] S. 17 (3) (g). Emphasis added.
[15] See Prisca Egede, "89m Nigerians Live Below Poverty Level, Says Minister," *The Guardian* (Lagos) (September 7, 2004) online: <www.guardiannewsngr.com/news/article03/070904> (September 7, 2004).
[16] Nigeria does not operate any form of social security system for its citizens. Traditionally, the extended family provides social security to its members. However rising inflation and unemployment has substantially whittled down the level of support that an individual can expect from the extended family. See Cletus Akwaya, "FG Plans New Social Protection Policy," *This Day* (Lagos) (August 4, 2004) online: <www.thisdayonline.com/news/20040804news07.html> (date: accessed: August 4, 2004).
[17] It could not have been otherwise in view of the debilitating poverty from which a substantial percentage of Nigerians suffer. After all, as Albie Sachs puts it, "[a]n effective Bill of Rights in any country must relate

available to those whose socio-economic rights are breached or threatened with breach? The answer appears to be in the negative. In defining the judicial powers of Nigerian courts, s.6 states that such power,

> "Shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this constitution."[18]

The authority for the direct enforcement of socio-economic rights does not, therefore, flow from this part of the constitution. Rather, the constitution provides that the authority for enforcing socio-economic rights has to be sought elsewhere. There is, however, no where in the constitution that provision is made for the direct enforcement of socio-economic rights. Rather, the power to decide when and the extent to which socio-economic rights should become enforceable in Nigeria is vested in the National Assembly, which should establish and regulate authorities "to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this constitution."[19] Presumably, this technique was employed to enable Nigerians, through their elected representatives, to decide when both the political progress and economic prosperity capable of supporting the enforceability of such rights have been attained.

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to the culture, traditions and institutions of that country, and, above all correspond to the specific and felt demands of the people at the historic moment when the bill is considered necessary". Albie Sachs, "Towards a Bill of Rights in a Democratic South Africa" (1990) 6 S.A.J.H.R. 1 at 10.

[18] The Constitution, s. 6 (6) (c).

[19] *Ibid.* s. 4 (2) and item 60 (a) of the Exclusive Legislative List.

In fact, the Constitution Drafting Committee that oversaw the inclusion of the first set of socio-economic rights provisions in a Nigerian constitution stated that, "[b]y their nature, they are rights which can only come into existence after the government has provided facilities for them."[20] The expectation then was that the Nigerian state would progressively move towards the fulfillment of specific socio-economic rights. That has, however, not been the case and the National Assembly has, so far, not enacted any legislation for the enforcement of the socio-economic rights provisions contained in the Nigerian constitution.

3.3 THE CASE LAW ON SOCIO-ECONOMIC RIGHTS

Predictably, the position taken by Nigerian courts is that the socio-economic rights provisions of Chapter II of the constitution are not enforceable in Nigerian courts. The courts, correctly in my view, interpret s. 6 (6) (c) of the constitution strictly to preclude judicial review of governmental actions and decisions that arise from the socio-economic rights provisions. Where the constitution does not vest judicial power, and, in fact, expressly precludes the exercise of such power, it is not for courts to assume it. Otherwise, the courts will be undermining the very source of the powers that they exercise.

In *Archbishop Okogie & Ors v. The Attorney-General of Lagos State,*[21] the Lagos state government sought to close down and take over private elementary schools in the state.

[20] Report of the Nigerian Constitution Drafting Committee, Lagos, 1976, Vol. 1, p. xv.
[21] (1981) 2 NCLR 337.

In a suit challenging its competence to proceed on such a course of action, the Lagos State Government contended that it was only discharging its obligation to provide free education under section 18 (10) of the constitution.[22]

The trial court referred the case to the Federal Court of Appeal for answers to certain substantive questions of law, including whether s. 18, one of several socio-economic rights sections, is enforceable by Nigerian courts. The Federal Court of Appeal answered this question in the negative, holding that the section and the whole of Chapter II are unenforceable and cannot support the action the state purported to take. The court also insisted that, until appropriate legislation is enacted under section 4 (2) of the constitution,[23] Chapter II remains beyond the jurisdictional competence of Nigerian courts. It further held that "the arbiter for any breach of and guardian of the Fundamental Objectives and Directive Principles of State Policy... *is the legislature itself or the electorate.*"[24]

In *Senate of the National Assembly & Ors v Tony Momoh,*[25] the respondent sought to rely on section 21 of the Constitution of the Federal Republic of Nigeria, 1979 (now section 22 of the Constitution) to avoid a legislative summons from the National Assembly. Section 21 confers on the Press the duty of upholding the accountability of the

[22] Section 18 falls within the socio-economic rights provision of chapter II of the Nigerian constitution. It is, however, curious for a level of government to claim that it is promoting free education by abolishing private schools within the Nigerian legal order. Free public schools and private schools at cost can, under Nigerian law, surely exist alongside each other.
[23] This section, as noted earlier, vests in the National Assembly the power of enacting laws for the purpose making the socio-economic rights provisions judicially enforceable. See note 19 and accompanying text, *supra.*
[24] *Ibid* per Justice Mamman Nasir (PCA) as he then was *at* 350. Emphasis supplied.
[25] (1983) 4 NCLR 269.

government and falls under chapter II of the constitution. The National Assembly was investigating the source of the respondent's newspaper story. The trial court found for him, quashing the summons. On appeal, however, the Federal Court of Appeal held that section 21, along with the rest of Chapter II is not justiciable before Nigerian courts.[26] In another case,[27] the court held that Chapter II is merely "a goal to which the government should strive."[28] Subsequent court decisions on the status of socio-economic rights under Nigerian law have been essentially to the same effect.[29]

Nevertheless, constitutional declarations are not ordinary statements that could be ignored either by the citizens subject to its authority or, especially, the state which owes its existence to that constitution. As remarked by a renowned Nigerian constitutional law scholar,

> "Although this statement of principles (contained in chapter II of the Nigerian constitution) is expressly made non-justiciable (s. 6 (6) (c)), their explicit affirmation in the constitution has value in investing them with the quality of constitutional, albeit non-justiciable, norms which the rulers must endeavor to observe and respect."[30]

As constitutional norms, such declarations go beyond deserving the respect of the political leadership. They also serve as constitutional declarations of intent that are capable of developing into justiciable constitutional or other legislative provisions with

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[26] The court also held that section 36 – which confers the fundamental right to press freedom – is the proper section to call in aid. Even then the court further held that no such protection against a legislative summons can be claimed.
[27] *Alh. J. A. Adewole & Ors. V Alh. Lateef Jakande & Ors* (1981) 1 NCLR 262.
[28] *Ibid.* at 286.
[29] See, for instance, O*lateru Olagbegi v. A-G, Ondo State & Anor.* (1983) 3 FRN 6 at 9.
[30] Ben O. Nwabueze, *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy* (New York Longman Inc., 1985) at 9. Brackets and contents in the text.

time.[31] That the Nigerian constitution recognizes this fact is clear in the power it vests in the National Assembly to elevate the status of any of the socio-economic rights provisions to the level of enforceability already noted.[32]

The socio-economic right to free education, for instance, came close to becoming enforceable in Nigeria in 1995. In that year, the right to education was included among the fundamental rights provisions of chapter IV by the Constituent Assembly debating a new constitution for Nigeria. Unfortunately, the 1995 Draft Constitution of Nigeria, in spite of the considerable effort that went into its production, never saw the light of day.[33] The military government, under which it was drafted and which claimed to be preparing to hand over power to a democratic civilian government that will operate that constitution, collapsed when the then Head of State, General Sanni Abacha died in office.

The succeeding military government prepared a different constitution, the 1999 Constitution of the Federal Republic of Nigeria, which is now in force in Nigeria. Nevertheless, incremental development of constitutional norms to the level where socio-economic rights might become enforceable took concrete form in Nigeria with the country's ratification of the African Charter for Human and Peoples' Rights (the Charter). It is to a discussion of the position of the Charter in and the effects that it has had on socio-economic rights under Nigerian law that I now turn.

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[31] See B. Obinna Okereke, "Social and Economic Perspectives of Human Rights in Africa" (1998) 1 National Human Rights Commission Public Lecture Series, Abuja, Nigeria at 21

[32] See note 19 and accompanying text, *supra.*

[33] See Okereke, *supra* note 31 at 21.

3.4 SOCIO-ECONOMIC RIGHTS, THE CHARTER AND NIGERIAN LAW

Under the umbrella of the Organization of African Unity (OAU),[34] African countries adopted the African Charter on Human and Peoples' Rights on June 27, 1981, which came into force on October 21, 1986. Subsequently, Nigeria, in accordance with relevant constitutional provisions,[35] incorporated it into its domestic law in 1983.[36] The Charter largely responds to the peculiar developmental needs of the African continent characterized, as it is, by high poverty levels and high inflationary trends. In adopting the Charter, the then OAU was,

> "[C]onvinced that it is henceforth essential to pay particular attention to the right to development and that *civil and political rights cannot be dissociated from economic, social and cultural rights* in their conception as well as universality and that the *satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.*"[37]

The range of positive rights recognized and protected by the Charter, therefore, reflects the felt needs of Africa and Africans at the time when the Charter was drafted. These include the rights to health care, to education, to decent jobs and to specific rights of access to public resources. For present purposes, however, I focus on the last mentioned set of rights, namely: the individual's right of *"equal access to the public service of his*

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[34] The OAU has been transformed into the African Union (AU), with greater leaning towards European Commission-style unification of the African continent.

[35] Under the Nigerian constitution, treaties into which Nigeria enters are only binding when the National Assembly, through the instrumentality of domestic legislation, ratifies it. S. 12 (1) of the 1999 Constitution of Nigeria provides that "[N]o treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has enacted into law by the National Assembly."

[36] See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federation of Nigeria, 1990, s.1.

[37] African Charter on Human and People's Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev. 5, 21 ILM 58 (1982) (entered into force on October 21, 1986), Preamble. Emphasis supplied.

country,"[38] of *"access to public property and services,"*[39] as well as the right of "the aged and the disabled... *to special measures of protection in keeping with their physical and moral needs."*[40]

These rights are similar to the socio-economic rights found under the Nigerian constitution, albeit with a variation in emphasis. The right of equal access to public property and public service is relevant to the privatization component of the Nigerian electricity reform proposal. Privatization, as envisaged under the reform program, will transfer public property into private hands. Once that is done, the beneficiary of the privatized property acquires all the incidents of the common law property right, including that of exclusive ownership and enjoyment as far as that property is concerned.

An immediate consequence of the cessation of public ownership and control is the new owner's freedom to devise a property use regime of his choice with respect to the property in question. It is always in the interest of the new owner to restrict the use of that property through the imposition of antecedent conditions of use as he might deem necessary. In the context of electricity reform, a person who acquires a generation station, for instance, will be free to attach whatever price the market can bear as a condition precedent to enjoying access to the electricity generated from that station. This will be the case with persons acquiring a retail franchise.

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[38] *Ibid.* article 13, paragraph 2. Emphasis supplied.
[39] *Ibid.* paragraph 3. Emphasis mine.
[40] *Ibid.* article 18, paragraph 4. Emphasis supplied.

The rights of the aged and the disabled as expressed are similar to the obligation of public assistance contained in the Nigerian constitution, in that both demonstrate a commitment to public support for the most vulnerable members of the society. The requirement of special measures of protection suggests that the state can intervene in the operation of the market in support of those who otherwise may not be capable of procuring their basic needs (in this case basic electricity needs) from the market. These and other provisions of the charter could be seen, therefore, to have the same effect as the provisions on socio-economic rights found in the Nigerian constitution. Nigerian courts have, in this respect, consistently ruled that the Charter and its socio-economic rights provisions are protected by and enforceable under Nigerian law.[41]

In *Ogugu v. The State* (1994) 9 NWLR (Pt. 366) 1, the status of the Charter came up for consideration in the context of an appeal of a criminal conviction. The appellant sought to rely on some of the human rights guarantees contained in the charter in addition to those of the Nigerian constitution to quash his conviction. The Supreme Court of Nigeria held that the Charter's provisions, including those guaranteeing socio-economic rights, are justiciable under Nigerian law. The then Chief Justice of Nigeria held that

> "Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the juridical powers of the courts as

[41] Section 4 of the constitution which empowers the legislature to extend the reach of Chapter II and which has already been mentioned appears to have contemplated a situation where socio-economic rights could either be enacted into enforceable provisions by the National Assembly of its own motion or upon the presentation of an executive bill. It could also be said to have contemplated situations, such as is the case with the Charter, where Nigeria's international obligations may necessitate the elevation of socio-economic rights to the level of judicial enforceability in Nigeria. Whatever be the case, the provisions of the charter seems to strike a balance between the concerns of those opposed to the constitutional entrenchment of socio-economic rights in Nigeria and those who wants constitutional guarantee for the basic socio-economic needs of sections of the populace.

provided by the constitution and all other laws relating thereto... It is apparent from the foregoing that the human and peoples' rights of the African Charter are enforceable by the several High Courts[42] depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court."[43]

In *Abacha v Fawehinmi,*[44] the State Security Services, under a Military Decree that suspended parts of the 1979 constitution of Nigeria, had detained the respondent[45] without trial. The Decree also ousted the jurisdiction of courts to entertain any question arising from actions or decisions taken pursuant to its provisions.[46] The respondent relied on the Charter to enforce his constitutional right to freedom of movement and association, both of which were suspended by the Decree. The Nigerian Supreme Court ruled in his favor and held that having been incorporated into domestic law, Nigerian courts must give effect to the provisions of the Charter. The court followed the ratio of *Ogugu v. The State* (*supra*) to hold that the socio-economic rights provisions of the Charter are enforceable by Nigerian courts.[47]

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[42] Under Nigerian law, the fundamental rights provisions of the constitution are enforceable by way of a special enforcement procedure known as The Fundamental Rights Enforcement Procedure Rules, 1999 and its various amendments. Jurisdiction for trials at first instance under these rules lies with the High Court, federal or state, which is the third on the hierarchy of Nigerian courts.

[43] At 26-7.

[44] (2000) 6 NWLR 228. This case turned a lot on the legal implication of the ratification of international treaties and on whether Nigeria can contract out of its international obligations. Strangely, government lawyers had argued that the Charter, being a treaty, could not be the subject of litigation before Nigerian courts. The case does not directly consider the socio-economic rights provisions of the constitution, or socio-economic rights in general for that matter. It upholds the position taken in earlier cases by the same court that the Charter's ratification imbues it with the character of domestic law in Nigeria.

[45] The respondent was Gani Fawehinmi, Senior Advocate of Nigeria (SAN), who is well known in Nigeria on account of his human rights activism, and on account of which he has been jailed several times by different military regimes.

[46] This was a common practice among successive military regimes in Nigeria.

[47] See especially *per* Ogundare JSC delivering the lead judgment at 293-4, paragraphs E-A.

It is instructive that this decision was handed down under the most dictatorial military government that Nigeria had. The court essentially narrowed the reach of the State Security (Detention of Persons) Decree No. 2 of 1984, which precludes courts from entertaining questions as to the propriety of actions and decisions taken under its provisions. The court as well limited the scope of the Constitution (Suspension and modification) Decree No. 107 of 1993, which, among other things, suspended the fundamental rights provisions of the Nigerian constitution. It would appear, therefore, that Nigerian courts treat the socio-economic rights provisions of the constitution as constitutional declarations of intent and are willing to give effect to them wherever there are sufficient grounds for so doing.

It is of some interest that the Optional Protocol for the Creation of an African Court on Human and People's Rights (the Protocol), which was adopted on June 10 1998[48] and which came into effect on January 25, 2004 creates a supranational Human Rights Court for Africa.[49] Until the coming into force of this protocol, the Charter had established an African Commission on Human and People's Rights (the Commission) with a mandate, among others, "to formulate and lay down, principles and rules aimed at solving legal problems relating to human and people's rights and fundamental freedom *upon which*

[48] See The Association for the Prevention of Torture (APT), "The African Court on Human and People's Rights: Presentation, Analysis and Commentary" (Occasional Paper: January 2000), online: <www.apt.ch/africa/African%20Coyrt.pdf> (date accessed: February 11, 2004).

[49] See African Union, Press Release 121/2003, "The Protocol on the African Court on Human and People's Rights to come into Force Soon", online: <www.africa-union.org/home/Welcome.htm> (date accessed: February 11, 2004). This followed the deposit of the instrument of ratification by the Union of the Comoros on December 26, 2003 as the 15th nation to do so and the lapse of the mandatory 30 days following such a deposit. Under the Protocol, ratification by 15 State Parties was a condition precedent to the creation of the African Court. Thirty days must also lapse following ratification by the 15th State Party.

African governments may base their legislation."[50] The italicized words seems to be an admonition for African governments to enact enforceable socio-economic rights into law following the Charter's model.

In effect, the Commission had no adjudicatory powers beyond interpreting the provisions of the Charter at the request of "a State Party, an institution of the OAU, or an African organization recognized by the OAU."[51] It was merely a precursor to the present African Court of Human and Peoples' Rights (African Court) and appear to have served the purpose of encouraging African countries to expand domestic human rights legislation to socio-economic rights as enshrined in the Charter. Under the Protocol individuals may institute cases before the court so long as their countries have deposited an instrument of ratification and have submitted a declaration accepting that their citizens can institute cases in their personal capacities.[52] Such a court strengthens the guarantee of human rights, including socio-economic rights, in Africa and offers individuals further chances of remedy where they are not satisfied with the results of domestic judgments. Nigeria, however, is yet to ratify the Protocol.[53]

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[50] *African Charter on Human and People's Rights,* June 27, 1981, OAU Doc. CAB/LEG/67/3/rev. 5, 21 ILM 58 (1982) (entered into force on October 21, 1986) article 45 paragraph 1 (a). Emphasis mine. The italicized words appear to me to be aimed at encouraging African countries that are members of the then Organization of African Unity (now African Union) to enact socio-economic rights legislation.

[51] *Ibid.* Article 45, paragraph 3.

[52] *Protocol to the African Charter on Human and People's Rights on the Establishment of an African court on Human and People's Rights,* June 10, 1998 (entered into force on January 25 2004) arts. 5 (30); 34 (6).

[53] See James Dadzie, "Nigeria Yet to Join African Human Rights Court" *The Guardian* (Lagos), (February 6, 2004) online: <www.ngrguardiannews.com/news/article14 (date accessed: February 6, 2004) One cannot, however, make too much of an issue out of Nigeria's failure to ratify the protocol given the status of the Charter under Nigerian law. This is more so the case as individuals can only have standing before the African Court where they have exhausted domestic remedies and are still unsatisfied, an unlikely situation under Nigerian law.

3.5 DISCUSSION

This chapter has focused on disclosing a socio-economic rights basis for evaluating the Nigerian electricity reform program. The Nigerian state cannot contract out of its obligations under the social contract as can be inferred from the Nigerian constitution. Government policies must, at all times, conform not just to the letters of subsisting statutory instruments, be they the constitution or ordinary legislation, but also to their spirit.

The Nigerian government's recognition of the crucial role that electricity plays in national life has been noted. It has also been noted that electricity reform is likely to alter the economic dynamics of access to and affordability of electricity. In most cases electricity reform also brings with it a real possibility of an increase in fuel poverty, as access to electric power shrinks and affordability becomes a serious concern for segments of the population.[54] Consequently, privatization of electricity infrastructure would be easier for low-income earners in jurisdictions where there is a system of social security. A system of social security could be in the form of massive job creation, the legislation of an appropriate minimum wage or the institution of welfare programs. Whichever form it takes, the social security system must respond to the needs of those who require it most. In the case of electricity reform, the social security system should

[54] See Greg Plast, Jerrold Oppeinheim and Theo MacGregor, *Democracy and Regulation: How the Public can Govern Essential Services* (Sterling, Virginia: Pluto Press, 2003) (stating in relation to Brazil that "[i]n Rio de Janeiro, prices following privatization shot up 400 per cent, 40 per cent of the electricity workers lost their jobs, and the lights went out") at 2.

be capable of addressing the issues of access and affordability for society's most vulnerable members effectively.

Nigeria does not operate any system of social security. In the absence of social safety nets, the twin problems of access and affordability are likely to diminish the welfare of some citizens, at least. It is thus necessary that reform measures are designed and implemented in a manner consistent with the socio-economic rights provisions of the constitution. Guidance, in this respect, could be sought from the Nigerian case law on socio-economic rights generally and those relating to the Charter in particular.

The legal protection guaranteed socio-economic rights under Nigerian law lies somewhere between basic constitutional guarantee and ordinary statutory protection. While the socio-economic rights provisions of the constitution fall short of directly enforceable guarantees, the legislation of the Charter into Nigerian domestic law appears to have strengthened their rather tenuous constitutional status. In other words, the absence of a constitutional guarantee for socio-economic rights under Nigerian law does not disclose a lack of recognition for such rights. Instead, socio-economic rights are recognized and protected but the level of protection accorded them falls short of the protection available in terms of civil and political rights.[55]

This constitutional scheme, nevertheless, discloses sufficient basis in Nigerian law for evaluating the government's electricity reform policy. The proposal to hand over the production and supply of electricity to the free market mechanism represents a manner

[55] The Constitution recognizes and protects the traditional fundamental human rights under Chapter IV.

of controlling the national economy that is likely to affect the state's ability to ensure the "maximum welfare of every citizen" as required by the constitution. In addition, the existence and extent of "public assistance" measures in the reform program are also relevant to these constitutional requirements. It is, therefore, necessary that appropriate policy measures are adopted for balancing the pursuit of efficiency and satisfying the evaluative provisions contained in the constitution. This chapter sets the context for the evaluation of the Nigerian electricity reform proposal.

4.0 THE NIGERIAN ELECTRICITY REFORM PROPOSAL

4.1 INTRODUCTION

This chapter discusses the Nigerian electricity reform proposal. It outlines the major aspects of the Nigerian electricity industry and describes the measures proposed to restructure it. Efforts will be made to identify the main policy thrusts under which particular reform measures could be grouped so as to keep our discussion within manageable levels. The aim of the discussion is to place the Nigerian electricity reform program in proper perspective for its evaluation that will follow in the next chapter. I commence with the structure of the industry.

4.2 THE NIGERIAN ELECTRICITY INDUSTRY

Electricity generation began in Nigeria in 1896 under the British colonial administration. The then Public Works Department, an arm of the colonial government charged with infrastructure development, built Nigeria's first generation station in Lagos.[1] Subsequently, the Nigerian Electricity Supply Company, the country's first electricity utility, commenced operations in 1929 with the construction of a hydro power station[2] at Kurra Falls near Jos in the Middle Belt region of Nigeria. The first transmission network, a 132KV line, was constructed in 1962 to link the Ijora Power Station in Lagos with the

[1] See, National Electric Power Authority (NEPA), "Organizational Profile," online: <www.nepanigeria.org/profile.html> (date accessed: Nov. 14, 2003).
[2] This power station is now defunct.

Ibadan Power Station both in the Southwestern region of Nigeria.[3] The Nigerian electricity industry has since expanded to all of the country's major urban centers but not to most of the country's rural communities.

4.2.1 Industry Structure

The Nigerian electricity infrastructure is owned and operated by the federal government of Nigeria through the National Electric Power Authority (NEPA).[4] NEPA is the culmination of several government corporations that existed at different times and under different names such as the Nigerian Electricity Supply Company (NESCO), the Electricity Company of Nigeria (ECN) and the Niger Dams Authority (NDA). All of these corporations performed essentially the same functions. Established in 1972 by statute,[5] NEPA has since operated the Nigerian electricity industry as a government monopoly.[6] In the execution of its statutory mandate NEPA generates, transmits and distributes electricity to end-users all over Nigeria and handles all the processes in between. NEPA's operational mandate includes both urban power supply and rural electrification.

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[3] See National Council on Privatization, *National Electric Power Policy* (Presidency: Federal Republic of Nigeria, March 2001) at 1

[4] See National Electric Power Authority, *supra* note 1

[5] National Electric Power Authority Decree (No. 24) of 1972 (now National Electric Power Authority Act [NEPA Act]), Chapter 256, Laws of the Federation of Nigeria, 1990, s.1.

[6] See National Council on Privatization, *supra* note 3 at 1. Until recent legislative enactments (especially the enactment of the Public Enterprises (Privatization and Commercialization) Decree No. 28 of 1999) changed the legal position, the law did not permit private participation in public power supply. Public power supply was on the exclusive legislative list (areas of exclusive federal legislative jurisdiction) and, under federal laws, private participation in public power supply was not permitted. See also Lekan Salami & Afolabi Elejibu, "Investment Incentives for the Electricity Business in Nigeria," (2004) 22:1 Journal of Energy and Natural Resources Law 94 at 94.

As a government agency, NEPA is under the political oversight of the ministry responsible for electricity supply, in addition to that ministry's other portfolios.[7] The ministry initiates national electricity policy on behalf of the federal government and sets policy goals for NEPA. The ministry also supervises NEPA's day-to-day operations, including the hiring and firing process, and has to approve its major investment decisions. The ministry appoints NEPA's Board and principal executive officers subject to the approval of the President of the Federal Republic of Nigeria as well. The Board and principal executive officers hold office at the President's pleasure.

With respect to its finances, NEPA is not obliged to earn a return on its capital. Rather, its mandate is to charge such electricity rates as will meet its financial needs and allow it to balance its books at the end of each fiscal year.[8] The government provides its capital needs and it is not subject to any form of serious regulation. In fact, NEPA appears to be its own regulator, with the result that no strict regulatory process is in place, and definitely not one to which the public is privy or one which is transparent. In the circumstances, public participation in NEPA's policy initiatives (and, therefore, in the operation of the Nigerian electricity industry) is severely limited if not entirely non-existent.

Needless to say, NEPA's operation of the Nigerian electricity industry is integrated, both vertically and horizontally. In addition to its other major operational bases, NEPA is, by

[7] Depending on the distribution of ministerial responsibilities by successive governments, NEPA has been under the political oversight of different government ministries. It is currently under the Ministry of Power and Steel. In that status, NEPA competes with other government agencies (including several steel rolling plants and an aluminum smelter plant) both for policy attention and for budgetary revenue allocation.
[8] NEPA Act, s.13.

law, headquartered at Nigeria's capital city. NEPA's day-to-day business operations follow the Nigerian civil service pattern, complete with the slow and winding pace of its bureaucracy.[9] It has 33,000 employees and its pension liability (as at December 31, 2000) stood at 73.77 billion Nigerian Naira (about US$652.85m).[10] NEPA also has a huge debt profile that stands at 21.65 billion Nigerian Naira (about US$191.59m).[11] These liabilities, in addition to its ailing infrastructure, are likely to transform NEPA's legacy from stranded benefits to stranded costs.[12] NEPA operates a centralized organizational structure, with its major departments reflecting the traditional sectors of the electricity industry, namely generation, transmission and distribution.[13] The rest of the discussion will proceed along that line, too.

4.2.2 Generation

The generation sector of the Nigerian electricity industry is composed of nine power stations with a total installed generating capacity of 5,906MW.[14] Three hydro stations alone have a combined capacity of 1750MW. Thermal stations (Steam Plant and Open

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[9] A major reason behind the Nigerian electricity reform program is the inefficiency of the bureaucratic structure behind power supply in Nigeria. See National Council on Privatization, *supra* note 3 at ii. See also Uddin Ifeanyi, "NEPA's Many Problems," *This Day* (Lagos) (July 19, 2004) online: <www.thisdayonline.com/comment/20040427con01.html> (date accessed: July 19, 2004).

[10] See Bureau for Public Enterprises, "The Present Structure of the Nigerian Electricity Sector" (an undated internal memo on file with the author) at 1.

[11] *Ibid.*

[12] Stranded costs refer to unsettled liabilities which an incumbent publicly owned utility monopoly transfers to its new private owners post-privatization while stranded benefits refers to discounted assets which the private investors purchase along with a public utility. Usually, private investors inherit stranded benefits when they purchase government holdings in the electricity industry as part of the reform process because such holdings are usually sold at less than market value.

[13] A fourth sector, which is essentially a later addition to the structure of the electricity industry, is power trading, retail or wholesale. This sector had no place in NEPA's vertically integrated operational structure.

[14] See National Council on Privatization, *supra* note 3 at 2.

Cycle Gas Turbines) generate the balance, powered mainly by natural gas.[15] In addition to NEPA's generation capacity, the government estimates that "there is about 2,400MW of self-generation in the form of small diesel and petrol generating sets."[16] Self-generation reflects the general state of distrust with which the public power supply system is held in Nigeria. Consequently, self-generated power cannot, in real terms, be classified as additional capacity since much of it will be lost to cost savings once the public power supply records appreciable improvement in adequacy and reliability.

Another factor in the generation capacity of the Nigerian electricity industry is represented by the Rural Electrification Boards (REBs). The REBs are owned and operated by state governments as a means of extending electricity to rural areas. The main source of power generation for the REBs is diesel-powered electricity generating sets. These generating sets are operated for a few hours, mainly from dusk to about 10.00 pm at optimal generation and for fewer hours and varying regularity otherwise. The high operational and maintenance costs of such generators together with a low maintenance culture within government establishments in Nigeria combine to put these generators are out of service temporarily most of the time and permanently not too long after being officially commissioned.[17] There does not seem to be any official figures on the generating or other capacity of the REBs.[18]

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[15] Of these, two presently non-functional diesel and coal-powered stations account for 60MW and 30MW respectively. See Bureau of Public Enterprises, "NEPA Profile" online: <www.bpeng.org/10/addsector.asp?DocID=43&MenuID=38> (date accessed: August 10, 2004).
[16] See National Council on Privatization, *supra* note 3 at 2.
[17] The unreliability of the rural electrification network, as operated by REBs in Nigeria is well known in Nigeria. There has, however, been not much research in that area. For a general description of the failure of rural electrification in Nigeria, see Adeola F. Adenikinju, "Electric Infrastructure Failures: A Survey-based Analysis of the Cost and Adjustment Responses," (2003) 31 Energy Policy 1519 at 1521-2.
[18] *Ibid.*

The more recent approach to rural electrification in Nigeria, however, is the construction of distribution lines indiscriminately in rural areas by state governments. These lines are just built and linked to the National Grid without regard to the availability of sufficient load to support the additional demand.[19] Rather than improve access to electricity, this approach simply compounds the adequacy and reliability problems associated with power supply in Nigeria. Public ownership and control of NEPA tends to limit the extent, if any, to which it can prevent or even curb this manner of pointlessly over-stretching its distribution infrastructure.

It is worthy of note that the location of generation stations in Nigeria is insensitive to load factors. With a few exceptions such as the thermal power stations located in major cities like Lagos, generation stations are mainly located close to the fuel source. This lack of sensitivity to load factors in the location of generation stations means that the Nigerian electricity industry is heavily dependent on the adequacy and reliability of the transmission network. The transmission network, as discussed further on, is, however, neither reliable nor adequate. In fact, it is not designed to support a free market in electricity.

In any case, the installed capacity of the Nigerian electricity industry paints a picture different from actual generation. Prior to preparations for industry reform, the maximum load ever recorded by NEPA was 2,470MW and by August 2000 the average load had shrunk to 1,500MW.[20] Preparations for industry reform, however, forced the government

[19] See National Council on Privatization, *supra* note 3 at 2.
[20] *Ibid.*

to inject massive funds into the rehabilitation of generating stations and of NEPA's other operational infrastructures.[21] Subsequently, NEPA achieved a new generation peak of 3,479.3MW in August 2003.[22] It has, however, been unable to maintain its real time generation at that level. This means that generation cannot keep pace with growing demand[23] and generated load continues to be as unpredictable as ever. Rather than keeping up with demand, electricity generation battles in vain to reflect NEPA's inadequate nameplate capacity.

Even if NEPA were to utilize all of its installed generation capacity and self-generation capacity is added to NEPA's load, there would still be substantial power supply inadequacy in Nigeria. The demand forecasts for 2005 and 2010 are 9780MW and 20,000MW of electricity respectively.[24] To meet this forecast, the government estimates that 12,700MW and 25,000MW will be required for 2005 and 2010 respectively.[25] These respectively represent over a hundred percent and over three hundred percent increases in generation capacity over less than half a decade and less than a decade since the projection was made in 2001. According to the Bureau for Public Enterprises (BPE), which is responsible for Nigeria's massive privatization program, "[H]eavy capital investment required to meet this need has been estimated at over $25 billion."[26]

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[21] See Onyebuchi Ezigbo, "NEPA Gulps N102bn in Four Years – Imoke: Gets $100m World Bank Grant," *This Day* (Lagos) (April 27, 2004) online: <www.thisdayonline.com/comment/20040719con01.html> (date accessed: April 27, 2004).

[22] See, Uddin Ifeanyi, "NEPA's Many Problems," *This Day* (Lagos) (July 19, 2004) online: <www.thisdayonline.com/comment/20040719con01.html> (date accessed: July 19, 2004).

[23] See, for instance, Mike Oduniyi and Gloria Achoyamen, "Power Output Drops by 800MW," *This Day* (Lagos) (June 18, 2004) online: <www.thisdayonline.com/news/20040618news04.html> (date accessed: June 18, 2004)

[24] See National Council on Privatization, *supra* note 3 at 3

[25] *Ibid.*

[26] See Bureau for Public Enterprises, *supra* note 10 at 1. The dollar figure is US denominated

The projected additional generation capacity is massive given that the Nigerian electricity industry witnessed its last generation capacity addition in 1990.[27] Insufficient capacity addition was rampart even when the driving force behind government's investment in electricity infrastructure was welfare improvement. Whether private investors would have undertaken those capacity addition projects is unclear. However, the government (in furtherance of its resolve to prepare the industry for privatization) has awarded contracts for the construction of four new generation facilities to add 1,400MW to current generation levels.[28] Though a much-needed positive development, this is still far below the required capacity addition.

As for how the shortfall in generation capacity is to be met, the government maintains that the reform program will "permit the flow of private sector resources to fund power sector expansion."[29] In other words, the reform program is designed to rely on private investment both to rehabilitate existing and ailing generation stations and to add the shortfall in generation capacity. The government seems to believe that privatization and the introduction of free market competition are sufficient in themselves to spur an influx of capital, especially of foreign capital, into the Nigerian electricity industry.

It is unclear what informs this line of policy reasoning. There are no empirical data to support the suggestion that mere introduction of free market competition will translate

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[27] See National Council on Privatization, *supra* note 3 at 45-6. That was when a total of 450MW was added to the Shiroro Hydro Power Station to bring its capacity to 600MW and a total of 500MW was added to bring the capacity of the Delta Thermal Power Station to 912MW.
[28] See Mike Oduniyi, "FG Approves $138m for 4 New Power Plants" *This Day* (Lagos) (June 27, 2004) online: <www.thisdayonline.com/comment/20040719con01.html> (date accessed: June 27, 2004).
[29] See National Council on Privatization, *supra* note 3 at i.

into immediate addition of generation capacity or into any form of infrastructural expansion for that matter. If anything, market signals are not likely to respond to the need for capacity expansion in the electricity industry unless the potential for profit is evident. This is due to the capital intensive nature of capacity expansion. In addition electricity facilities are long-lived assets that may take very long to yield returns.[30] Yet, electricity capacity addition has to compete with other investment opportunities for capital utilization.

Then there is the rather lengthy approval process for power generation projects, which is fraught with much uncertainty. Success at one stage of the approval process does not guarantee success at the next. Even when approved, power generation facilities, even using the relatively quicker Combined Cycle Generation Turbine (CCGT) technology, have rather long lead times.[31] Together, these factors do not inspire confidence in the ability of the free market mechanism to inject investment capital in capacity addition in the electricity industry in a manner that will promote access and affordability. The urgency with which generation capacity addition may be required may not always be met under market conditions.[32]

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[30] See David M. Newbery, *Privatization, Restructuring and Regulation of Network* (Cambridge, Massachusetts: MIT Press, 1999) at 29.

[31] Generally the lead times for bringing traditional thermal and nuclear generation stations online are between 4 – 8 years. Hydro power stations take even longer. The advent of the CCGT technology has, however reduced the lead time to as few as two years for thermal generation facilities. See David M. Newberry, "Privatization, Restructuring, and Regulation of Network Utilities" (Cambridge, Massachusetts: MIT Press, 1999) at 207.

[32] In fact, experience shows that free market competition engenders gaps between power needs and supply in general and between power generation and transmission capacity in particular. See, for instance, Joseph P. Tomain, "The Past and Future of Electricity Regulation" (2002) 32 Envt'l Law 435 at 473.

4.2.3 Transmission

The transmission system, known as the National Grid, is composed of 5,000km of 330kV and 6,000km of 132kV power lines. There are about twenty-three 330/132kV and ninety-one 132/33/11kV sub-stations. The total capacity of the 330Kv transformers is 5,526MVA while the capacity of 132Kv transformers is 5,780MVA.[33] With such limited figures, it is no wonder that the transmission system is inadequate and that available transmission lines are overloaded.[34] The inadequacy of the transmission system poses serious reliability constraints. Ancillary services are almost non-existent and dispatchers simply keep pushing available power into the transmission system whenever they can.[35] In the event, transmission load losses are estimated at 30% of generated power.[36] This is in addition to even higher technical and non-technical load losses at the distribution level to which I will return later.

Another major problem with the transmission system is the physical security of installations. Partly due to the long stretch of land that they traverse and partly due to inadequate resource allocation to the Nigerian Police Force, the physical security of the electricity infrastructure is, at best, shaky. The transmission system, therefore, records a

[33] See National Council on Privatization *supra* note 3 at 1.
[34] As the Nigerian government see it, "[T]h transmission lines are radial and overloaded." *Ibid.* at 2.
[35] Not much information relating to the conditions under which NEPA engineers work will be found on official records. As a former employee, however, I have been told of how this is common practice by my engineering colleagues. In any case, NEPA's infrastructural capacity is severely constrained by its ageing equipment that breaks down frequently on account of lack of scheduled, and in some cases any, maintenance operations. See National Council on Privatization, *supra* not 3 at 2. See also Ifeanyi, *supra* note 9.
[36] See National Council on Privatization, *supra* note 3 at 2.

high rate of equipment tampering, and transmission lines are regularly vandalized[37] with grave consequences for NEPA's ability to meet its supply obligations.[38] Added to the high technical and non-technical transmission load losses, load losses due to equipment tampering and transmission line vandalization simply worsen an already desperate situation.

The irony here is that available generation is inadequate and a substantial part of generated load is lost to transmission problems. Again, the government's approach to these transmission problems is to hope that reform will attract sufficient investment capital to plug the shortfall in transmission capacity. As noted earlier,[39] there are no empirical data on which to found such optimism.

4.2 4 Distribution

The distribution network consists of 23,753km of 33KV and 19,226km of 11KV lines. There are six hundred and seventy nine 33/11KV and twenty thousand, five hundred and forty three 33/0.417KV or 11/0.417KV sub-stations with associated distribution transformers.[40] The distribution system is simply inadequate and up to 40% of transmitted load does not get to the consumer due to both technical and non-technical

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[37] See Bureau for Public Enterprises, "National Electricity Authority" online: <www.bpeng.org/10/addsector.asp?DocI=43&MenuID=38> (date accessed: August 10, 2004) at 1.
[38] NEPA claims that vandalization of its equipment accounts for 30% of electricity blackouts. See "News and Information: NEPA Challenges," online: <www.nepanigeria.org/news.html> (date accessed: August 5, 2004)
[39] See note 32 and accompanying text, *supra*.
[40] See National Council on Privatization *supra* note 3 at 2.

losses.[41] The result is that "[E]lectricity supply is both unstable and of very low quality" in Nigeria.[42]

Illegal connections (with the resulting power theft) are also quite common. These illegal connections cause system overload and damage sensitive equipment.[43] In addition, billing and collection inefficiency keeps revenue collection below 50% of the cost of generation.[44] The BPE estimates "that a minimum of $400m - $500m per annum will be needed in the first three years post-unbundling to make the distribution systems to be fully effective."[45]

Over all, "13.9% of NEPA's installed capacity are (sic) over 20 years old; or 57.1% of installed capacity are over 15 years old, or 79.6% of installed capacity are over 10 years old"[46] with little or no scheduled maintenance. In fact, denied of much-needed operating capital and incapable of generating such capital by itself, NEPA's practice has been to keep falling back on available system back-up facilities until there are no such facilities left to fall back on.[47] Once a generation turbine in a multi-turbine generation facility goes out under the weight of poor maintenance, for instance, NEPA will simply switch it off

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[41] *Ibid.* at 1-2.
[42] Adenikinju, *supra* note 17 at 1515. See also Yinka Omoregbe, "Regional and National Frameworks for Energy Security in Africa," in Barry Barton, Catherine Redgewell, Anita Ronne and Donald Zillman ed., *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (New York: Oxford University Press, 2004) 121 at 121-2.
[43] See "News and Information: NEPA Challenges," online: <www.nepanigeria.org/news.html> (date accessed: August 5, 2004)
[44] See National Council on Privatization, *supra* note 3 at 2.
[45] See Bureau for Public Enterprises, *supra* note 10 at 1. The dollar is US denominated.
[46] *Ibid.*
[47] See note 35, *supra.*

and rely on the reduced capacity and the increased operational burden of using only the remaining turbines.[48]

In addition to the need for additional capacity, therefore, much of the electricity infrastructure is in dire need of rehabilitation and upgrade. The government is currently taking some steps to remedy the situation[49] but it remains to be seen if the Nigerian electricity infrastructure will be in good enough shape to attract private investment if and when the government is finally able to implement its reform program.

For now, access to central station power supply in Nigeria is very limited. In fact, the government estimates that only thirty-six percent of Nigerians have access to electricity.[50] Even at that, it is estimated that "unreliable and erratic power supply costs the country over one billion dollars ($1bn) per annum.[51] It is against this background that the Nigerian government has proposed an electricity reform program. The program focuses on privatization, and the introduction of free market in the Nigerian electricity industry. It essentially seeks to minimize and, if possible, eliminate the government's role in the generation and supply of electricity in Nigeria. In its place, private entities are expected to invest in the electricity infrastructure and will ultimately take over the operation of the Nigerian electricity industry. Government's role will be limited to setting policies and providing the framework for private initiative to thrive. I turn now to some details of that proposal.

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[48] Adenikinju, *supra* note 16 at 1521.
[49] See "Govt. Spends N102b on Power Sector," *The Guardian* (Lagos) (June 30, 2004) online: <www.guardiannewsngr.com/news/article15.html> (date accessed: June 30, 2004).
[50] See National Council on Privatization, *supra* note 3 at 3.
[51] See the Bureau of Public Enterprises, *supra* note 10 at 1. The dollar is US denominated.

4.3 THE NIGERIAN ELECTRICITY REFORM PROPOSAL

An official Nigerian government document states that "[T]he reform of the electricity sector is of extreme priority to the government of Nigeria and the citizenry."[52] It also states that the central policy goals of the Nigerian electricity reform program are "...total liberalization, competition and private sector led growth."[53] The government hopes that reform will enable the Nigerian Electricity Supply Industry (ESI) "to meet *current and prospective economically justifiable demand for electricity* throughout Nigeria" and "to support national economic and social development, including relations with neighboring countries."[54] Key pronouncements by high ranking government officials point to the government's hopes that reform will check corruption in the Nigerian electricity industry.[55]

The Nigerian electricity reform proposal is the outcome of the Electricity Sector Reform Implementation Committee's (EPIC's) work, which was adopted by the government. EPIC held a one-day workshop at which the recommendation of an electricity sector expert was discussed. An expert had been hired by the government to develop a blueprint for electricity reform in Nigeria. Subsequently the National Electric Power Policy (2001) was published. The National Council on Privatization (NCP) and the Bureau for Public Enterprises (BPE) were also set up in 2001. The NCP and the BPE are the vehicles

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[52] National Council on Privatization, *supra* note 3 at i.
[53] *Ibid.*
[54] *Ibid* at 4. Emphasis added. The reference to "neighboring countries" appears to be recognition that electricity reform in Nigeria will substantially affect the final form that the West African Power Pool (WAPP) that is being put together as a regional electricity network market and in which Nigeria is playing a leading role will finally take.
[55] See Sunny Ogefere, "Privatization will Check Corruption, Says Atiku" *The Guardian* (Lagos) (June 7, 2004) online: <www.guardiannewsngr.com/news/areticle06> (date accessed: June 7, 2004)

through which the government hopes to create free market competition in the major sectors of the Nigerian economy, including the electricity sector, which forms the focus of this work. The ultimate aim of electricity reform in Nigeria is the gradual but assured divestment of government's interest in the Nigerian electricity industry.

The government plans to achieve free market competition in electricity by divesting itself of interests in thermal electricity generation and by unbundling NEPA into four industry segments, namely: generation, transmission, distribution and power trading. With the exception of transmission each segment will be composed of several companies created from NEPA and sold to private investors.[56] An Independent System Operator will operate the transmission system based on universal, non-discriminatory access. The government is proposing a series of fiscal and other incentives for attracting private participants both to buy these companies in the short-term and to invest in a privatized Nigerian electricity market in the long-term.[57]

The regulatory framework will be composed of the Federal Ministry of Power and Steel, with responsibility for formulating electricity policy on behalf of the government, and an independent Nigerian Electricity Regulatory Commission (NERC) with responsibility for both technical and commercial regulation of the industry post-reform. NERC's powers will include the issuance of licenses under specific terms to operators and the monitoring of compliance with those terms. Trading arrangement post reform will be based on

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[56] See, Onochie Anibeze, "BPE Carves 18 Firms Out of NEPA" *The Vanguard* (Lagos) (March 27, 2003) online: <www.vanguardngr.com/articles/2002/national/nr427032003.html (date accessed: March 27, 2003)

[57] The government does not intend to sell any of the hydro power generating stations. Instead its plan is to transfer only their operation to private investors. National Council on Privatization, *supra* note 3 at 17.

bilateral contracts between generating and distribution companies. A reasonable rate of return on investment is the proposed basis for tariff regulation.[58]

An Anti-Trust Commission, to follow much later in the program, will be responsible for addressing market abuse cases. In the interim, anti-trust regulation will be part of NERC's functions. The resulting Nigerian electricity market will not permit cross-ownership of interests over the four core areas of generation, transmission, distribution and sales/marketing. The government proposes several legislative instruments to give effect to its reform proposal.[59]

So far, no legislation has been passed.[60] The principal reform legislation is the Electric Power Sector Reform Bill (hereinafter, the Bill). The legislative session of the Nigerian National Assembly, which ended in April 2004, passed it in a form substantially different from what the Executive had proposed. The Bill was consequently denied executive assent and has been re-presented to the subsequent legislative session. It is still before the National Assembly at the time of writing.[61] The two arms of government have, so far, been unable to reach a compromise and the Bill remains contentious.[62] Consequently, the proposal to restructure the Nigerian electricity industry has, so far, been unable to proceed as planned.

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[58] *Ibid.* at i.
[59] *Ibid.*
[60] See note 19 at p. 25-4, *supra.*
[61] *Ibid.*
[62] See "Power Sector Reform Bill" (editorial) *This Day* (Lagos) (June 25, 2004) online: <www.thisdayonline.com/editorial/index.html> (date accessed: June 25, 2004

For the purposes of this work the discussion will be limited to the Bill as presented by the Executive. In particular, I will discuss the Bill's approach to two welfare challenges posed by electricity reform. These relate to the likely limitation of access to electricity, especially in rural areas, and the affordability of electricity post-reform. The Bill clearly recognizes that access to and affordability of electricity present serious challenges to the reform process and attempts to addresses them in some detail. The question, however, is whether the measures adopted are effective in doing that. I now turn to a consideration of that question.

4.3.1 Access to Electricity Post-Reform

Industry restructuring tends to compound any access problems present within electricity industries while creating more of such problems. As already noted,[63] access (especially, transmission[64]) expansion is capital-intensive and the regulatory approval process can also last for lengthy periods of time. The approval process for transmission projects is replete with uncertainties as well: success at one stage of the regulatory process does not guarantee success at the next. Uncertainty in this sense negatively affects the flow of investment capital, especially given that private investors have to decide on the most optimum use of available capital.

Market signals are not likely to indicate the need for investing in power supply to any place unless the demand for power in that place justifies the cost of sustaining supply.

[63] See note 32 and accompanying text, *supra.*
[64] Though transmission expansion is the commonest means of expanding access to electricity, access can be expanded without necessarily expanding the transmission system through off-grid generation, for instance.

This is due to the fact that, like all other markets, an electricity market tends to develop the most lucrative and secure places first.[65] In other words, the strategic considerations that usually inform government's investment decisions in the electricity industry will be replaced by the profit motive. Where the government will invest in generation or transmission capacity expansion simply to improve living standards, for instance, the market will require proof of a potential for profit.

In the result, electricity reform has always been accompanied by a serious lag between infrastructural capacity and increasing demand.[66] A lag in transmission capacity naturally leads to transmission congestion, which in turn, creates a host of other reliability constraints. Reliability problems impact negatively on access to electricity. Governments have, thus, always sought to address the question of access to electricity post reform in one form or the other.[67] I will discuss two approaches that stand out in this respect, namely the indirect use of regulatory purpose to encourage access expansion where the market might not do so and continued direct public investment in rural electrification.

4.3.1.1 Regulatory Purpose

Given that the state will gradually surrender public electricity supply to the dynamics of the market post-reform, clearly defined regulatory purpose has been employed to gently

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[65] See Richard P. Keck, "Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer" (1985) 16 Envt'l Law 39 at 42.

[66] This has been the case in much of the liberalized electricity market of North America. See, North American Energy Reliability Council, "Reliability Assessment 2002 – 2011: The Reliability of Bulk Electricity Systems in North America," online: <www.nerc.com/pub/sys/all_updl/docs/2002ras.pdf> (date accessed: May 15, 2003) at 11.

[67] See Keck, *supra* note 65 at 44.

direct investment capital towards the stated objectives of reform. Usually, the enabling reform legislation will indicate the importance that the regulator should attach to specific welfare issues such as access to electricity.[68] All the rules and regulations flowing from such legislation would also be clear about the central role that access enhancement ought to play in the new dispensation. Consequently, the regulator as well as other industry participants would be left in no doubt as to what results are expected from reform. The expectation is that the resulting industry practices would reflect the declared regulatory purpose.[69] The regulatory purpose is usually in harmony with the entire reform program.

It is thus worth considering the role that regulatory purpose is meant to play in enhancing access to electricity under Nigeria's electricity reform program. The Bill enumerates several regulatory objectives. For present purposes, however, I refer to only one of those objectives, which is relevant to the evaluative exercise undertaken in chapter five. This is where the Bill provides that the regulator "shall maximize access to electricity services, by promoting and facilitating consumer connections to distribution systems in both rural and urban areas."[70] The broadness of this provision accords with the practice of defining the regulatory purpose in very broad terms. The details are now left for inclusion in the regulations to be promulgated under the Act. It is expected that, ultimately, the regulator

[68] In England and Wales where access to electricity is not an issue, the affordability problems that arose upon electricity reform led to the enactment of the Utilities Act, 2000 under which consumer protection became one of the core objectives of regulation. See Francis N. Botchway, "The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends" (2000) 21 U. Pa. J. Int'l Econ. L. 781 at 822-3.

[69] *Ibid.* The impact of the mere inclusion of consumer protection, especially as it relates to the manner in which the payment of electricity bills and the interruption of supply should affect certain classes of consumers, in the regulatory purpose in England and Wales was enormous.

[70] Electricity Sector Reform Bill, Draft Version 5.0, Nigeria, s. 25 (10) (a).

in cooperation with industry participants will work out the most effective means of meeting this goal in the industry practices that will develop.

4.3.1.2 Rural Electrification

Rural electrification presents a major welfare concern in electricity reform. A brief consideration of the concept of rural electrification before a discussion of its place in the reform proposal is, therefore, in order. Rural electrification is one of the major challenges that the electricity industry faces in virtually every jurisdiction irrespective of the structure of the industry, infrastructure ownership and operational control. The major reason for this is the demographic composition of rural settlements. Their population density is not only low but is also scattered over large expanses of land as well.

Long transmission and distribution lines are thus required to extend electricity to the inhabitants of such areas. More often than not the level of power consumption in rural areas is too low to justify the capital investment necessary to extend electricity to those places. In Nigeria, for instance, rural poverty is widespread and electricity is mainly used to meet basic lighting and temperature control needs in rural settlements where it is available. The most optimistic revenue projections from retail electricity in rural areas may, therefore, not even offset the cost of revenue collection in some cases. This is one of the things that make rural electrification an unattractive investment proposition.[71]

[71] See Keith R. Fleming, *Power at Cost: Ontario Hydro and Rural Electrification, 1911 – 1958* (Montreal & Kingston: McGill Queen's University Press, 1992) at 126. See also Keck, *supra* note 57 at 42.

Consequently, governments have always found it necessary to support the electrification of rural areas. In fact, in all jurisdictions where access to electricity is widespread in rural areas, the hand of the government can be seen behind that accomplishment. The government either provides the funds required for rural electrification directly or intervenes with a tariff structure under which urban consumers subsidize rural electrification. Three major ways by which the government achieves rural electrification stand out. These are direct injection of public funds into the expansion of electricity infrastructure, indirect subsidies and cross-subsidization of certain classes of consumers by others.[72]

Depending on its finances and (arguably more importantly) on its perception of the mood of voters, most elected governments will invest heavily in rural electrification where there is a compelling need for such investment.[73] The government may choose to directly foot the bill of rural electrification programs. This it can do by offsetting part or all of the cost, usually the fixed cost, of extending transmission lines and of establishing new distribution networks in rural areas. The government could also impose a price cap on electricity supplied to residents of rural areas at levels it deems affordable to them. It will then provide the funds needed to cover the revenue shortfall that will arise from the price cap. Even then, some rural residents may not be in a position to meet the cost of wiring their homes or of purchasing electricity appliances. The government may also play some

[72] *Ibid.* at 26-9.
[73] *Ibid.* at 136.

role in supporting such people, usually with soft loans spreading its cost on their electricity bills over time.[74]

Electricity price caps are used to encourage consumption as well as to protect low-income earners from prohibitive electricity bills. Price caps also serve to bridge the disparity between electricity tariffs in urban and rural areas, which result from the higher cost of supplying power to the latter. Direct public funding of rural electrification together with price caps were the approaches adopted in Ontario.[75] The government, at different points in the development of the rural electricity network, passed legislation mandating direct government contribution to rural electrification. The government thus paid for the construction of new transmission lines and of new distribution networks in addition to funding the revenue shortfall arising from its rural electrification price caps.[76]

A program of indirect subsidies involves the provision of government loans at subsidized interest rates, usually to rural electrification cooperatives that the government encourages rural residents to form. The cooperatives will then use the loans to develop electricity infrastructure to serve the electricity needs of their members. Government loans will continue to be available until the rural electricity network is developed enough to stand on its own and to offer consumers competitive electricity rates. This approach has been

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[74] *Ibid.*
[75] *Ibid.* at 64-6, 139-40.
[76] *Ibid.* Though the use of price caps was not embraced here in the context of deregulation, the Ontario government continues to cap the cost of electricity to consumers – rural and urban – even as it institutes electricity deregulation. See Satish Saini, "Deregulation in Ontario, Another Price Cap?" Energy Pulse, online: <www.energypulse.net/centers/article/article_print.cfm?a_id=613> (date accessed: February 10, 2004).

used in the United States and in Alberta.[77] In both cases, the rural electricity network was not only built but has been fully developed.

The instances of government intervention in the electricity markets given here were not within the context of electricity deregulation. They were, however, policies adopted within an electricity market where the concept of 'power at cost' is proclaimed. In any case, the underlying principle remains clear: governments will intervene to re-direct the market mechanism when the interests of its citizens are threatened by the unfettered operation of the electricity market. This represents the type of policy measure that jurisdictions seeking electricity reform, such as Nigeria, need to reflect in the reform program in a manner consistent with both their electricity industries and the prevailing socio-economic realities within which reform is to take place.

With cross-subsidization the emphasis is on spreading the burdens of equity, with part of the higher cost of electricity in rural areas being subsumed in the lower electricity rates that obtain in urban areas. Cross-subsidization is also used to promote the affordability of central station power for low-income urban consumers. This usually involves lifeline or baseline tariffs directed at individual customers within specified geographical locations. In California, for instance, the California Alternative Rates for Energy (CARE) program provides a fifteen-percentage discount on electricity tariffs for low-income consumers.

[77] See Keck, *supra* note 65 at 44. Frand and John Dolphin, *Country Power: The Electrical Revolution in Rural Alberta* (Edmonton: Plains Publishing Inc., 1993) at 39.

CARE is used along with a baseline rate and Economic Development Programs to expand electricity access to rural areas and to persons of low income.[78]

The basis of preferring one form of rural electrification subsidy to the other appears to depend on local conditions, and all the three mentioned approaches have proved their effectiveness in the places where they have been used. The Nigerian reform proposal appears to have adopted a hybrid of direct government funding and cross-subsidization for the purpose of expanding access to electricity post-reform. I discuss rural electrification under the reform proposal in the following paragraphs.

As already noted, one of the principal functions of the regulator is to ensure access maximization in both rural and urban areas.[79] The government also hopes to establish a Rural Electrification Fund (REF), which is meant to "provide rural electrification programs through public and private sector participation."[80] The government's financial commitment, however, is not specific and does not disclose a measurable obligation to make such contributions as far as the REF is concerned. Instead, its only commitment is for "donations, gifts or loans."[81] Specified classes of electricity consumers (referred to as eligible consumers under the Bill) are to contribute to the Fund.[82] The REF will, in addition, draw its capital from the excess funds of the Nigerian Electricity Regulatory Commission (NERC) at the end of its fiscal year. Another source of funds for the REF is

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[78] See Peter Navarro, "A Guidebook and Research Agenda for Restructuring the Electricity Industry" (1995) 16:2 Energy Law Journal 347 at 412-13.
[79] Electricity Sector Reform Bill, Draft Version 5.0, Nigeria s. 25 (b).
[80] *Ibid* s. 85 (4).
[81] *Ibid* s. 83 (3) (c).
[82] *Ibid* s. 86 (1). Non-payment of the contribution rate is an offence punishable with a fine. See s. 89.

represented by fines that the NERC may impose on violators of applicable legislative provisions and other regulations in force.[83]

A major criterion for funding a rural electrification project is that "the proposed activity can demonstrate technical, economic and financial viability for a sustained period of time."[84] It is also important that such a project secures an "investor commitment" prior to receiving REF funding.[85] On cross-subsidization, the Bill provides that "in establishing tariff methodologies, the Commission may differentiate among consumers on the basis of location within the country."[86] Appropriately employed, cross-subsidization is a time-tested means of extending access to electricity in rural areas.[87]

4.3.2 Affordability of Electricity

Even when electricity is just a connection fee away, it might still be very difficult or even impossible for some sections of the population to enjoy the comfort and opportunities for economic improvement that it offers. Electricity price spikes within the short to mid-term, at least, have always accompanied electricity reform.[88] Even when prices start falling after several years, industrial and other heavy consumers of electricity are the ones that enjoy that benefit first. Small, mainly residential, consumers are likely to continue

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[83] *Ibid* s. 85 (3).
[84] *Ibid* s. 88 (2) (a).
[85] *Ibid* s. 88 (2) (c).
[86] *Ibid* s. 73 (5).
[87] See note 78 and accompanying text, *supra*.
[88] In the United Kingdom, Alberta, California and Ontario, electricity deregulation lead to price spikes. See Botchway, *supra* note 51 at 818-21; Bryan Avery, "Price Spikes Fear among Alberta Power Users" *Edmonton Journal,* (April 25, 2002) online: <www.iasa.ca/ED_news_EdmontonJournal/114.html (date accessed January, 13, 2003); Peter Navarro & Michael Shames, "Electricity Deregulation: Lessons Learned from California" (2003) 24:1 Energy Law Journal 33 at 33; and Saini, *supra* note 76.

paying higher electricity tariffs for much longer.[89] It is even very difficult in many jurisdictions to get to the stage of downward pressure on prices. In Ontario, for instance, electricity reform has been stalled under the weight of price spikes and the government has had to put a price cap regime in place.[90]

In other places such as Alberta, electricity industry reform has proceeded without major stoppages along the way but it brought about an upward pressure on electricity tariffs.[91] That was also the case in England and Wales where the substantial benefits that came with electricity reform were almost eclipsed by price spikes and other welfare concerns.[92] Also, flaws in industry design led to electricity price spikes and, ultimately, forced the government to abandon the Californian electricity reform experiment.[93]

It is thus quite normal for governments to devise the means of cushioning the impact of price spikes, especially for low-income earners. In England and Wales, for instance, it took the government time and several legislative amendments to get to the stage where small and medium consumers of electricity could enjoy some of the benefits of reform.[94] All the examples cited, so far, are taken from jurisdictions where the electricity infrastructures are fully developed and adequately spread. Those jurisdictions also have developed economies and operate robust social security systems. These facts should serve as indicators of the magnitude of the challenges facing the Nigerian electricity industry

[89] Electricity reform in England and Wales ultimately led to downward pressure on residential prices of electricity but that was several years after large power consumers enjoyed the same benefits. See Botchway, *supra* note 68 at 818-19.
[90] See Saini, *supra* note 76.
[91] See Avery, *supra* note 88.
[92] See Botchway, *supra* note 68 at 818-21.
[93] See Navarro, *supra* note 78 at 33.
[94] See Botchway, *supra* note 68 at 21.

post-reform, given that none of those facilitative indicators is applicable to Nigeria. I now consider the measures put in place under the Nigerian electricity reform program to enhance the affordability of electricity post reform.

The preamble to the Electric Sector Reform Bill declares that it is meant, "to enforce such things as... consumer rights and obligations." Section 80 of the Bill establishes a Power Consumer Assistance Fund (PCAF). Pursuant to this, the responsible Minister is empowered to prescribe contribution rates to the PCAF.[95] Also, money from the fund "may be used to subsidize underprivileged power consumers as specified by the Minister."[96] Provision is also made for differential as well as lifeline tariffs[97] and the regulator is to make regulations with respect to, among other things, "practices concerning customers with difficulties paying bills."[98]

These measures appear to be well-suited to promote the affordability of electricity post-reform. As with the REF, however, the government makes no commitment to funding the PCAF beyond "any subsidies received from the Federal Government of Nigeria."[99] The absence of clear financial obligations on the part of the Nigerian state is a major shortcoming within the context of governmental obligations and, especially, in the light of the welfare policy requirements contained in the Nigerian constitution. The other

[95] See Electricity Sector Reform Bill, Draft Version 5.0, Nigeria s. 26 (3).
[96] *Ibid* s. 80 (4).
[97] *Ibid* s. 73 (5).
[98] *Ibid* s. 94 (20 (j).
[99] *Ibid.* s. 80 (3) (b).

source of money for the fund is the contributions made by eligible consumers under s. 80 (3) (a) and s. 81 (1).[100] The funding scheme of the PCAF is thus inadequate.

4.4 DISCUSSION

It is apparent that the Nigerian electricity industry got to its present sorry state due to the inefficiency of public ownership and control. Industry reform is thus called for and it is necessary that such reform involves some form of privatization. The question that has to be answered, however, relates to the extent to which the Nigerian state should abandon the electricity industry to the operation of the free market mechanism? What form of industry design can achieve the 'maximum welfare of every citizen' in a free Nigerian electricity market? More specifically, do the socio-economic rights provisions of the constitution discussed in chapter three authorize governmental intervention in the post-reform electricity market? I leave the answers to these and other questions for the next chapter. For now I limit myself to general comments.

Having demonstrated its inability to manage the electricity industry with grave consequences, it may be tempting for the Nigerian government to relieve itself of major responsibilities in the operation of the industry post-reform. The government appears attracted to limiting its role in the Nigerian electricity industry post-reform to merely providing "the over all direction for the development of the electricity supply

[100] As with the REF, non-payment of contributions constitutes an offence subject to the penalty of a fine under s. 84.

industry."[101] It has thus proceeded to design a reform program in which the provision of the financial resources required to promote key welfare issues is left to the private sector.

It will be very difficult, however, for the government to effectively provide "overall directions" when some one else is picking-up the bills for the implementation of the measures that lead to those directions. Moreover, it will soon become apparent that the electricity market may be either unwilling or incapable of effectively following desired directions at critical points in time. Above all, however, the government recognizes that "[T]he Power Sector is very critical to the economic, industrial, technological and social development of the country."[102] It may not take too long post-reform for the government to realize that the provision of the financial needs of a sector of the national economy that important can only be left to the private sector at the government's own peril. Failure by the private sector in this respect will cost the government dearly in political capital as well as in financial resources.

In any case, it does not help either the government or its electricity reform program to generate access and affordability constraints that carefully targeted and consistent injection of public funds would have prevented. People whose geographical location or low income level would put in a position of disadvantage post-reform will need greater public support than the reform program appears to be offering in order to overcome their disadvantage.

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[101] See National Council on Privatization, *supra* note 3 at 3.
[102] *Ibid* at 1.

5.0 EVALUATION OF THE REFORM PROPOSAL

5.1 INTRODUCTION

The discussion of socio-economic rights under Nigerian law in chapter three disclosed the enforceability of such rights. It is also clear from the discussion that the Nigerian constitution expressly attached an evaluative character to its socio-economic rights provisions. I pointed out that two of those provisions, at least, mandate the government to tailor its economic policies towards the attainment of certain broad results in chapter three. The constitution, it was also noted, contemplates that national economic policy will achieve maximum welfare for every citizen. Pursuant to this goal, the constitution further required that public assistance be provided for those who cannot achieve such level of welfare otherwise. Electricity reform is essentially an economic policy and falls, therefore, within the contemplation of these constitutional provisions. It is thus on these provisions that the following evaluative exercise builds.

For present purposes two major evaluative tools could be identified from the socio-economic rights provisions of the Nigerian constitution. For convenience only, I will refer to these as the welfare test and the public assistance test. The main evaluative question I attempt to answer here, therefore, is: does the Nigerian electricity reform proposal meet these requirements? The first thing that this question invites us to consider is the extent to which the proposal discloses a deliberate intention, backed up by appropriate policy measures and – where necessary – public resources, to ensure that

electricity reform increases the welfare of every Nigerian citizen. A minimum threshold requirement in this sense will be for the proposal to ensure that electricity reform does not decrease the welfare of any citizen.

The question also invites us to consider the adequacy of the measures of public assistance identifiable in the electricity reform proposal for ensuring that those whose maximum welfare cannot be obtained otherwise are given a further chance of achieving the stated level of welfare. Such measures may involve state intervention in the operation of the electricity market in order to ensure that affected persons receive the public support they might need. For the purposes of both questions, welfare is necessarily measurable in relative terms, the benchmark revolving around the availability of resources to the Nigerian state.

In this chapter, therefore, I evaluate the extent to which the Nigerian electricity reform program meets these two tests of the citizens' maximum welfare and public assistance for those of them who may need such assistance to achieve the required level of individual welfare. The context for this evaluation is all the argument presented and the conclusions drawn in the preceding chapters. These include the basic elements of electricity reform discussed in chapter two, especially as they relate to the identified peculiarities of the Nigerian electricity industry, and the socio-economic context within which its reform is to take place. The status of socio-economic rights under Nigerian law discussed in chapter three also forms part of the context for this evaluative exercise. Finally, the

context includes the Nigerian electricity reform proposal discussed in chapter four. Given this context, I commence with the welfare test.

5.2 THE WELFARE TEST

Socio-economic rights analysis of welfare turns on the ability of an individual to exercise rational agency, potential or actual.[1] Rational agency refers to the ability of an individual to do more of what she wants to do.[2] This ability can be impaired by obstacles put in the individual's way in the form of state actions or its failure to act.[3] These obstacles may be represented by major shifts in government/citizen relations that follow in most cases from far-reaching policy changes such as electricity reform.[4] Private actions may also impair the ability to exercise rational agency. The focus here, however, is on governmental actions as well as its failure to act, not only because of the citizen's relationship with the state but also because of the far-reaching socio-economic implications of governmental actions and its failures to act.[5]

Action, generally speaking, is the presence and effective utilization of the capability for achieving specific goals. In terms of welfare analysis, however, it takes on certain

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[1] See Raymond Plant, "Needs, Agency and Rights," in Charles Sampford & D. J. Galligan eds. *Law, Rights and the Welfare State* (London: Croom Helm Ltd, 1986) at 25.
[2] *Ibid.* at 28.
[3] See Cosmo Graham, *Regulating Public Utilities: A Constitutional Approach* (Oxford: Hart Publishing, 2000) at 129
[4] *Ibid.*
[5] For a discussion of the far-reaching effects of governmental policies on individual and social life, see Craig Scott & Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141:1 U. Pa. L. Rev. 1. at 20. See also, Nicholas Haysom, "Constitutionalism, Majoritarian Democracy and Socio-economic Rights" (1992) 8:4 S.A.J.H.R. 451 at 455-56; D. M. Davis, "The Case against the Inclusion of socio-economic Demands in the Bill of Rights Except as Directive Principles" (1992) 8:4 S.A.J.H.R. 475 at 478-79

technical connotations, which seek to bring out its innate features as they relate to the affected individual as well as those external characteristics that are beyond the control of such individual. Definitional controversy always attends any concept that attracts the attention of more than one analysis, as each analyst seeks to emphasize the aspect that is either most familiar to him or that arouses his curiosity the most. I will not step into a definitional foray here. Instead, I adopt the definition offered by Alan Gewirth, which I consider to highlight the features that are relevant to the present study. According to Gewirth, action

> "...is composed of two generic features and necessary conditions, namely freedom and well-being. Freedom is the procedural unforced choice while having knowledge of relevant circumstances. Well-being... consists in having the purpose-related general abilities and conditions that are required either for being able to act at all or for having general chances of success in achieving the purpose for which one acts"[6]

Welfare, I have noted, involves individual liberty to act, and liberty in this sense requires access to the requisite resources. Absent such resources, one's chances of successful action are either diminished or totally extinguished. Citizens, in this respect, should be able to look up to the state for these resources. At the very least, they should be able to expect the state to not make such policy choices as would foreclose their reasonable chances of obtaining such resources. A justification for state obligation as described here can be found in the 'social contract' whereby individuals surrender their autonomy to the

[6] See, Alan Gewirth, "Economic Rights" in George R. Lucas, ed. *Poverty, Justice and the Law: New Essays on Needs, Rights and Obligations* (Lanham, MD: University Press of America, Inc., 1986) (hereinafter, Gewirth, "Economic Rights") 7 at 10.

state in return for certain obligations, which the state assumes on their behalf.[7] As Gewirth argues, "[T]he main justification of the state (and hence of political obligation) is, indeed, that it serves to secure person's generic rights to both freedom and well-being."[8] Where the state makes the conscious policy choice of electricity reform involving privatization and the introduction of free market in power supply, one would expect that adequate measures would be devised to mitigate the accompanying harshness.

The required measures do not have to be designed to avail everyone of relief. Relief is only necessary with respect to those who may not be in a position to obtain the requisite resources from the market, usually due to extenuating circumstances such as poverty.[9] The state's duty to provide resources for this class of citizens is an equation that should be factored into policy decisions.[10] This obligation becomes even more urgent where access to such resources by the affected is, or appears likely to be, negatively affected by a change in government policies. In other words, the state should assume responsibility for the reasonably foreseen consequences of its policy choices. This is in addition to its prevailing duty to promote the welfare of those subject to its authority.[11] The state, however, cannot meet all the potential welfare demands that citizens may make on it.

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[7] *Ibid* at 23.
[8] *Ibid.*
[9] The operation of the market is suitable for the acquisition of such resources for some people and not for others. The state only needs to concern itself with the welfare of the latter. See Graham, *supra* note 3 at 132. See also Wojciech Sadurski, "Economic Rights and Basic Needs," in Charles Sampford & D. J. Galligan eds. *Law Rights and the Welfare State* (London: Croom Helm Ltd., 1986) 49 at 63-4.
[10] *Ibid.* at 8. See also Plant, *supra* note 1 (noting that "[H]ence, human rights are normative property in goods that every person must have either in order to be an agent at all or in order to have general chance of success in fulfilling the purpose for which he or she acts.").
[11] See Gewirth, *supra* note 6 at 23.

It is thus necessary that the finite capacity of the state to provide welfare-enhancing resources relative to a potentially infinite human demand for such resources be defined in some way. In this respect, goods – in socio-economic rights discourse[12] - are classified into three categories. These are basic goods; non-subtractive goods and additive goods.[13] Basic goods here refer to the essential prerequisites of action such as life, physical integrity, health etc, etc. Non-subtractive goods are general abilities required to maintain one's level of purpose fulfillment and capabilities for particular actions in an undiminished state such as freedom from theft, from violence and the like. Additive goods are those goods required to increase one's general capabilities and will include self-esteem, wealth and education.[14] Access to and affordability of electricity could, in this respect, be categorized as an additive good.[15]

Access to electricity, as used here, refers to the availability of electricity infrastructure in a manner that everyone is able to connect his home to the public supply at market prices or at rates otherwise dictated by the prevailing price regime. What this requires is for the state to ensure the extension of electricity infrastructure, either through grid or off-grid systems, to every community within the country. This is contrasted with the public assistance test (discussed later), which assesses the availability of public assistance for those who cannot otherwise afford the cost of their basic electricity needs despite the availability of access.

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[12] *Ibid.* at 17-8. See also Asbjorn Eide, "Realization of Social and Economic Rights: The Minimum Threshold Approach," (1989) 43 International Commission of Jurists' Review 40 at 47; Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Housing, and Health? (2004) 98:3 AJIL 462 at 464.

[13] See Gewirth, *supra* note 6 at 23

[14] *Ibid.*

[15] *Ibid.*

The first point of inquiry with respect to the welfare test would be to ascertain if the Nigerian electricity reform discloses a deliberate intention to extend electricity facilities so that they are within the reach of every citizen. As noted in chapter two, such intention is usually found in the underlying basis for reform. The intention to expand access will normally be one of the goals declared either in the reform policy or in relevant legislation or both. A clear declaration of access expansion as a major reform goal compels government agencies and officials involved in the implementation of reform to take full cognizance of that goal and work towards its attainment. It was noted in chapters two and four that privatization and free market competition are likely to lead to higher tariffs, and is likely to affect access expansion to rural areas negatively. The people who will be directly affected by these likely outcomes would require some assurance from the government that adequate steps are being or will be taken to protect them from those outcomes. What then is the underlying basis of the Nigerian electricity reform program?

The declared goals of the Nigerian electricity reform proposal are "...total liberalization, competition and private sector led growth."[16] Reform is also meant "to meet current and prospective *economically justifiable demand* for electricity throughout Nigeria."[17] The emphasis is thus on free market competition and the efficiency that it is expected to deliver. No deliberate effort was made any where in the reform program to recognize the relationship between the declared purpose of reform and the state's obligations towards its citizens.

[16] See National Council on Privatization, *National Electric Power Policy* (Abuja: Presidency, 2001) at 4.
[17] *Ibid.* Emphasis supplied.

The Nigerian government appears to have assumed away the likelihood that an electricity market will constrain access to and affordability of electricity for Nigerians. Rather, it seems to find comfort in the expectation that welfare enhancement will flow from electricity reform as a matter of course. This reasoning finds support in its heavy reliance on the resulting electricity market for capacity expansion post-reform (noted in chapter four). As was also noted in chapter four, however, neither the literature nor the experience of other jurisdictions with electricity reform justifies such optimism. Consequently, the declared goals of the Nigerian electricity reform program fail to meet the test of deliberately "controlling the national economy in such a manner as to secure *the maximum welfare... of every citizen.*"[18]

It is not apparent from the declared purpose of reform that the government intends to achieve maximum welfare for every citizen. There is no clear explanation for the reform program's avoidance of transparency. It could be due to the fear that prospective investors may construe an open promotion of subsidy in the reform proposal as a sign that the government may not allow a truly free market in electricity to emerge. The designers of the reform program seem to view this likely interpretation of open subsidy as a being capable of limiting the flow of the much sought private capital into the Nigerian electricity industry post-reform. Even though it is generally understood that the state will, at some point, intervene to re-direct market operations towards desirable goals,[19] the Nigerian government appears to be overly sensitive to anything that might discourage

[18] Constitution of the Federal Republic of Nigeria, 1999, s. 16 (1) (b). Emphasis mine.
[19] See Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002), arguing that "many government activities arise markets have *failed* to provide essential services" at 55. Emphasis in the text. See also Geraldine Van Bueren, "Including the Excluded: The Case for Economic, Social and Cultural Human Rights Act," (2002) PL 456 at 459.

private investors from responding favorably to its electricity infrastructure reform program. It appears that the Nigerian government wants to institute some form of subsidy but does not want it to be transparent so as not to discourage private investment.

Whatever the reason for the lack of transparency in this respect, a discussion of the measures that touch on welfare promotion in the reform proposal may be of some help in identifying the welfare goals of the reform program. How, for instance, does the reform program address the likelihood of access and affordability constraints for the most vulnerable members of the society post-reform? Vulnerability is here taken to refer to limitations on an individual's ability to access central station power supply. Such limitations may be due to low-income, arising out of unemployment, disability, old age or any other cause. It is customary for governments to institute welfare measures to support these classes of people.[20] There is, however, no subsisting system of social security in Nigeria[21] and, as was noted in chapter one, electricity reform is taking place against the background of high poverty, unemployment and inflation rates in Nigeria.[22] The question then is: what measures have been instituted for welfare promotion under the electricity reform proposal?

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[20] See Francis N. Botchway, "The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends" (200) 21 U. Pa. J. Int'l Econ. L. 781 at 818-21.

[21] In fairness to the current Nigerian government there have been official pronouncements to the effect that a system of social security is being planned. See Cletus Akwaya, "FG Plans New Social Protection Policy," *This Day* (Lagos) online: <www.thisdayonline.com/news/20040804news07.html> (date accessed: August 4, 2004). There is, however, little, if any, evidence that the government will single this plan out for implementation out of its long list of declarations of intention for which nothing exists to inspire confidence in its ability (or even willingness) to actualize.

[22] See p. 6, *supra.*

In chapter four it was noted that one of the principal functions of the regulator under the reform program is "to maximize access to electricity services."[23] It was also noted that the government also hopes to establish a Rural Electrification Fund (REF), to "provide rural electrification programs."[24] These measures, however, do not disclose any commitment on the part of government to make specific financial contributions to the REF. Its only commitment is for "donations, gifts or loans."[25] Only electricity consumers (referred to as eligible consumers under the Bill) are bound to contribute verifiable amounts of money to the REF.[26] The REF will also draw its capital from the excess funds that NERC may be left with at the end of its fiscal year, as well as from fines that the NERC may impose on violators of applicable legislative provisions and other regulations in force.[27]

The main constraint here is that none of the arrangements for promoting rural electrification involves mandatory and verifiable contributions on the government's part. The reform program seems to assume that the market mechanism by itself will solve the access problem that, it recognizes, will likely result post-reform. It was, however, noted in chapters two and four that experience with the creation of competitive electricity markets[28] in other jurisdictions does not bear-out such an assumption. We also noted the

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[23] Electricity Sector Reform Bill, Draft Version 5.0, Nigeria s. 25 (b).
[24] *Ibid* s. 85 (4).
[25] *Ibid* s. 83 (3) (c).
[26] *Ibid* s. 86 (1). Non-payment of the contribution rate is an offence punishable with a fine. See s. 89.
[27] *Ibid* s. 85 (3).
[28] To the extent that electricity is supplied to the consumer for consideration a market for electric power can be said to exist. Electricity has been supplied for consideration for as long as it has existed. The difference between the traditional electricity markets and their competitive counterparts is that while the state or its agents take the major decisions relating to the industrial organization of electricity supply such as price, profit, entry and exit, etc. etc. in the former, the responsibility for these decisions in the latter rest with the private sector. See Albert A. Foer, "Electricity: Notes on the Transition Phase,"(2002) 33 Loy. U. Chi. L.J.

price spikes that attend electricity reform and the shift of emphasis in investment decisions from social considerations of governmental obligation to the economic considerations of profit maximization. It would thus seem that, to meet the constitutional requirement of controlling the economy to maximize the welfare of every citizen, the REF would have to involve verifiable financial commitments from the government. It may then be possible for aggrieved citizens to keep the government to its commitments through the judicial review process.

The transition to a free electricity market appears to be one of the crucial points in national life when the Nigerian government is required by the constitution to adopt measures protective of access to and affordability of electricity for the society's most vulnerable members. This requirement arises from the fact that electricity reform, especially where public assets are privatized, transforms 'citizens' into 'consumers' in their relationship with the new electricity suppliers. Both from an economic and, especially, from the Nigerian constitutional perspective, the implications of such a transformation are substantial. One immediate implication is that the terms of access to electricity will be altered for the citizen post-reform and there are no guarantees that the alteration is going to be for the better.[29] These terms could be altered in a manner that either increases cost for those who already have access to central station power supply or limits access expansion to areas that do not already have it.

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813 at 814. See also Sally Hunt, *Making Competition Work in Electricity* (New York: John Wiley & Sons, Inc., 2002) at 67.

[29] See, generally, Cosmo Graham, *Regulating Public Utilities: A Constitutional Approach* (Portland, Oregon: Hart Publishing, 200) at 130

The market mechanism, however, is now seen as the most effective means of providing electricity at the least cost.[30] The challenge here lies in devising a strategy of intervention that the government may undertake without distorting the market to the point of stifling competition and scaring investors away. The Nigerian state has to ensure that appropriate balance is maintained between its obligation to promote access to electricity for the most vulnerable members of the society and the creation of a free market in electricity. There is no standard formula for maintaining this delicate balance. The Nigerian state, however, must demonstrate its commitment to protecting access for those already enjoying it and the prospects of obtaining access for those not so fortunate. It also has to create the atmosphere where private investors can pursue reasonable returns on investment. I now turn to an examination of the extent, if any, to which the Nigerian electricity reform program discloses measures that secure the right balance between the welfare of Nigerians and the creation of a free market in electricity.

To qualify for funding under the REF, a rural electrification project is to "demonstrate technical, economic and financial viability for a sustained period of time."[31] Such a project must also secure an "investor commitment" prior to receiving REF funding.[32] These conditions precedent are, to say the least, too stringent for a rural electrification project. It is, after all, the likelihood that rural electrification projects will neither demonstrate economic viability nor attract investor commitment that necessitated the REF in the first place. While clear and strictly enforced disbursement criteria are

[30] See Joseph P. Tomain, "The Past and Future of Electricity Regulation," (2002) 32 Envt'l Law 435 at 435.
[31] *Ibid* s. 88 (2) (a).
[32] *Ibid* s. 88 (2) (c).

necessary for the sustainability of the REF, such criteria certainly have to be relevant to and meet the purpose the REF is meant to serve.

A realistic set of criteria for disbursing funds from the REF needs to be based on social welfare considerations. It should be remembered at all times that the fund is needed, in the first place, to supplement profit-motivated investment decisions of the electricity market that are not likely to promote investment in rural electricity infrastructure post-reform. In addition, a favorable atmosphere for investment in rural electrification needs to be created. For example, tax breaks and other regulatory incentives can be used to encourage investment in access expansion. Legislative or regulatory provisions that commit market participants to a specified mandatory investment in rural areas can also enhance such incentives.

The use of captive markets, at least in the transitional stages of reform, is one way of promoting mandatory investment in access expansion. These are matters that the enabling legislation for the electricity market needs to be clear about. It is also unwise to burden the Nigerian Electricity Regulatory Commission (NERC) with the additional function of administering the REF. Such additional tasks may be too much for a nascent electricity regulator with no previous local electricity regulatory experience to fall back on. It may be worthwhile to create a separate institution that will be responsible for the administration of rural electrification, as is the case in other jurisdictions.[33] If a separate

[33] Notable among such jurisdictions is the United States where the Rural Electrification Administration was a federal agency. See Richard P. Keck, "Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer" (1985) 16 Envt'l Law 39 at 44. See also Joel A. Youngblood, "Alive and Well: The

body administers the REF, the NERC will devote its time and other resources to strictly regulatory functions.

In essence, while the reform program discloses some measures aimed at promoting access to electricity, it is clear that those measures fall short of meeting the constitutional requirement of ensuring maximum welfare for *all* citizens with respect to electricity supply post-reform. Though the Nigerian government could get its reform program so wrong that the resulting electricity market generally worsens access to electric power, it is almost certain that a winner/loser scenario (discussed in chapter two) will result. Whatever be the case, it is the welfare needs of the financially challenged who stand to suffer access and affordability constraints more than any one else that have not been adequately addressed by the reform program. These are the people who stand most in need of this constitutional protection.

5.3 THE PUBLIC ASSISTANCE TEST

The Nigerian constitution, pursuant to its provision that the national economy be controlled in a manner that ensures the maximum welfare of every citizen, also requires the state to make provision "for *public assistance* in deserving cases and other conditions of need."[34] With respect to electricity reform, those who may not be financially capable of meeting the cost of their basic electricity needs will require this form of assistance. The test here is whether the Nigerian electricity reform proposal meets the requirement

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Rural Electrification Act Preempts State Condemnation Law: City of Morgan City V. South Louisiana Electric Cooperative Association" (1995) 16 Energy Law Journal 489 at 489.

[34] S. 17 (3) (g). Emphasis added.

for the provision of such assistance. Usually public assistance could take the form of favorable payment terms or of subsidized tariffs for electricity up to a defined consumption level, after which the affected person is to pay market rates for additional power consumed. The latter is known as lifeline tariff.[35]

The Nigerian electricity reform program proposes certain measures of assistance for those who may need it for meeting their basic electricity needs. The preamble to the enabling reform legislation (the Bill) declares that it will enforce "consumer rights and obligations."[36] Such rights and obligations are not defined, but section 80 establishes a Power Consumer Assistance Fund (PCAF). The PCAF is to be funded by contribution rates prescribed by the responsible Minister.[37] The fund is to be used for subsidizing the cost of electricity for "underprivileged power consumers."[38] The Bill also provides for cross-subsidization as well as lifeline tariffs.[39] Finally, the regulator may make regulations with respect to, among other things, "practices concerning customers with difficulties paying bills."[40] The monies that constitute the fund will also be coming from contributions made by eligible consumers under s. 80 (3) (a) and s. 81 (1).[41] As with the Rural Electrification Fund, however, the government makes no specific financial

[35] See Peter Navarro, "A Guidebook and Research Agenda for Restructuring the Electricity Industry," (1995) 16:2 Energy Law Journal 347 at 412-3.
[36] Electricity Sector Reform Bill, Draft Version 5.0, Nigeria.
[37] *Ibid.* s. 26 (3).
[38] *Ibid* s. 80 (4).
[39] *Ibid* s. 73 (5).
[40] *Ibid* s. 94 (20 (j).
[41] As with the REF, non-payment of contributions constitutes an offence subject to the penalty of a fine under s. 84.

commitment to funding the PCAF beyond "any subsidies received from the Federal Government of Nigeria."[42]

The proposed assistance measures appear more suited for the purpose they are meant than those adopted for welfare promotion under the reform program. It could thus be said that some form of assistance is entrenched in the reform program for those who may need it for meeting their basic electricity needs. As with rural electrification the government imposes clear and enforceable obligations on everyone but itself to pay for these assistance measures. What the constitution contemplates, however, is *public assistance*. The 'public' component of the identified assistance measures under the reform program as proposed is neither concrete nor verifiable. It will not be possible for anyone to ascertain if, and the extent to which, the government is meeting its obligation at any given time. The absence of a public character to identified assistance measures leaves these measures below the constitutional requirement. In the result, the reform proposal does not meet both the welfare and the public assistance tests. A discussion of some remedial measures is thus in order at this point. I devote the last section of this chapter to that purpose.

5.4 TOWARDS SATISFYING THE CONSTITUTIONAL REQUIREMENTS

It has been noted that the problems of access to and affordability of electricity combine to define fuel poverty as it relates to electrical energy.[43] It was also noted that central

[42] *Ibid.* s. 80 (3) (b).

station electricity is the cheapest means of meeting societal electricity needs.[44] It was further noted that electricity serves to increase individual comfort, improve efficiency in day-to-day life and, generally, boost societal development.[45] Electricity has, in fact, been characterized as "a necessity of modern living."[46] The Nigerian government recognizes that electricity "is critical to the economic, industrial technological and social development of the country."[47] More specifically, the Nigerian government believes that "[E]lectricity consumption has become one of the indices for measuring the standard of living of a country."[48] It is against this background that I discuss some measures that could satisfy both the welfare and the public assistance tests.

The measures I propose are based on a legislative framework that commits the Nigerian government to verifiable financial contributions to access expansion and to electricity affordability promotion post-reform. In other words, I propose a right-granting legislative framework for meeting the welfare and public assistance tests. The citizen should be able to turn to the courts for the review of governmental compliance with constitutional and other legislative requirements in the design and implementation of national economic policies. He should be able to demand that the government proves that its policy measures maximize his welfare. Judicial review, I believe, is most appropriate in this respect as the cost involved is likely to check frivolous litigation among the citizenry

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[43] See David M. Newberry "Privatization, Restructuring, and Regulation of Network Utilities" (Cambridge, Massachusetts: MIT Press, 1999) at 200.
[44] See John Saunders, J. Michael Davis, Gelen C. Moses & James E. Ross, *Rural Electrification and Development: Social and Economic Impact on Costa Rica* (Boulder, Colorado: Westview Press, 1978) at 163.
[45] James C. Bonbright, *Principles of Public Utility Rates* (New York: Columbia University Press, 1961) at 8.
[46] *Ibid.*
[47] National Council on Privatization, *National Electric Power Policy* (Abuja: The Presidency, 2001) at 1.
[48] *Ibid.*

while the likelihood of litigation will keep the government and its officials alive to their obligations.

Right-granting legislation, whether in constitutions or ordinary statutes, usually aims at clarity as to where the right lies, on whom the duty falls and the procedure for the enforcement of the granted rights. What I propose, therefore, is the progressive and incremental grant of the rights of access to and affordability of electricity, with clear governmental responsibility for their fulfillment. These are doubtless positive rights that require resource allocation. The feasibility of an incremental guarantee of such rights, has, however, been effectively demonstrated in South Africa.[49]

Clearly, the most effective means of securing any claim-right is to afford it constitutional guarantee and protection.[50] Such guarantee will usually be expressed in terms of the right to judicial review of state actions and inactions upon which a claim of breach or likely breach is founded. It has, however, been noted in chapter three that, though the Nigerian constitution contains wide-ranging socio-economic rights provisions, it does not directly guarantee their enforceability by the courts. The enforceability of socio-economic rights

[49] The South African constitution guarantees the progressive and incremental enforceability of certain socio-economic rights and the scope of some of those rights has been the subject of some litigation before that country's Constitutional Court. In *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC), for instance, the court considered the reasonableness of the government's policy of limiting the administration of a drug that reduces the risk of mother to child AIDS transmission to a few public clinics within the contest of the socio-economic right to health care enshrined in the constitution. In *The Government of the Republic of South Africa v. Grootboom* (2001) 1 SA 46 (CC) the same court reviewed the extent of the right to housing and came to the conclusion that it is for the government to demonstrate that the measures it is adopting to fulfill that right are reasonable within its scheme of resource allocation.

[50] See Nicholas Haysom, "Constitutionalism, Majoritarian Democracy and Socio-economic Rights: (1992) 8:4 S.A.J.H.R. 451 at 455. See also Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?" (2004) 98:3 A.J.I.L.462 at 466.

under Nigerian law has to be secured through ordinary statutes. This absence of direct constitutional protection for socio-economic rights is a major obstacle in the way of the progressive and incremental grant of the rights of access to and affordability of electricity.

One way to overcome this difficulty would be to amend the Nigerian constitution to guarantee the enforceability of socio-economic rights. The amendment procedure enshrined in the Nigerian constitution, however, is very rigid and amending the constitution so as to guarantee the enforceability of socio-economic rights is next to impossible. Such a task will involve the amendment of the fundamental rights provisions of that constitution. The procedure for amending the Nigerian constitution is contained in s. 9 under which there are two procedures depending on the part of the constitution being amended.[51] This procedure for amending Chapter IV, which contains the fundamental rights provisions, is the special and more stringent amendment procedure.

The criteria for amending chapter IV, or any other part of the constitution for that matter, appear to have been set so high as to be impossible to meet. The supporting votes of four-fifths majority of the membership of both houses of Nigeria's bi-cameral legislature are the first of these requirements. The second and even more onerous requirement is the individual resolutions of the Houses of Assembly of not less than two-thirds of all of the 36 states in Nigeria. Constitutional amendment proposals hardly achieve this level of popularity within Nigeria's political dynamics.

[51] Constitution of the Federal Republic of Nigeria, 1999 (hereinafter the constitution).

This is, in part, due to the fact that Nigeria is a creation of the 19th century "Scramble for Africa," with different socio-cultural and political units merged at the convenience of the colonial powers. The colonial powers paid little, if any, attention to the socio-cultural and political homogeneity of the resulting nations.[52] In the event, Nigeria is so diverse that not even party discipline is strong enough to mobilize sufficient support for constitutional amendment proposals. The result is that all the modifications[53] of the Nigerian constitution have taken place only during military governments. Consequently, I do not suggest that the constitution be amended to guarantee the rights of access to and affordability of electricity.

Rather, I proceed from the common ground that the socio-economic needs of citizens, especially of the most vulnerable among them, is deserving of fulfillment by the state, which should explore other legislative options.[54] Two major approaches for securing socio-economic rights have been canvassed in the literature.[55] These are limited constitutional entrenchment (the constitutional approach), and the use of legislative (and administrative) techniques to secure the recognition and fulfillment of socio-economic

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[52] See especially, Eme O. Awa, *Federal Government in Nigeria* (Berkeley: University of California Press, 1964) at 3. See also Kenneth Post & Michael Vickers, *Structure and Conflict in Nigeria 1960 – 1966* (London: Heinemann Educational Books, 1973) at 17.

[53] I use the term 'modification' deliberately because there has really been no amendment of the Nigerian constitution in the sense contemplated by its amendment provisions. Instead, successive military governments have found it convenient to adopt a new constitution for the country and add or delete whatever they consider necessary each time they hand-over power to an elected government. The history of constitution-making in Nigeria was briefly discussed in chapter three.

[54] As noted in chapter three, it is not denied by even the opponents of socio-economic rights as claim-rights that the socio-economic needs of citizens merit the attention of the state.

[55] See, especially, Craig Scott & Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141:1 U. Pa. L. Rev. 1at 131. See also Albie Sachs, "Social and Economic Rights: Can they be made Justiciable?" (2000) 53:4 SMU L. Rev. 13811385; Randal S. Jeffrey, "Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations" (1993) 27:1 Colum. J. L. & Soc. Probs. 1 at 32; Haysom, *supra* note 51 at 455; Etiene Mureinik, "Beyond A Charter of Luxuries: Economic Rights in the Constitution" (1992) 8:4 S.A.J.H.R. 464 at 468.

rights (the legislative approach). This thesis does not argue for the same level of guarantee for socio-economic rights as obtains for civil and political rights. Rather, it seeks an accommodation, within the framework of legislative guarantees, for the basic material needs of the weakest members of the society, in this case their electricity needs.

The legislative approach posits that the protection and enforcement of socio-economic rights is optimally achieved through the legislature as the representative of the common will. Provisions relating to such rights should, therefore, be confined to ordinary statutory provisions, supplemented only by the administrative process. It is an approach that suits countries with rigid constitutions such as Nigeria. It also addresses the fears of those who may still be uncomfortable with the inclusion of socio-economic rights in the constitution. In addition, the enabling legislation for electricity reform in Nigeria is yet to be passed. It will, in this regard, be possible to simply amend the Electric Power Sector Reform Bill as appropriate without necessarily going through the process of enacting new legislation.

There are, however, serious conceptual objections against the judicial review of socio-economic rights. These objections are based on some perceived practical difficulties with their enforcement. It is, for instance, argued[56] that these rights are rights to resources and that it is not possible for courts to effectively engage in the determination of the existence and extent of a given right to resources. In effect it is said that courts lack the resources and the expertise to effectively determine questions of resource allocation.

[56] See Plant, *supra* note 1 at 28 – 34.

Another criticism[57] is that even if a court can determine questions of the existence and extent of the right to resources other practical questions, such as how a particular judicial decision flowing from that determination fits into the over all social scheme, remain. Further to our discussion of the enforceability of socio-economic rights under Nigerian law in chapter three, a consideration of the major conceptual objections against the justiciability of such rights is in order here.

5.4.1 The Justiciability of Socio-Economic Rights

In addressing the criticisms against the enforceability of socio-economic rights I will draw from the experience of other jurisdictions, notably South Africa.[58] I will classify these criticisms into two main arguments, the first of which concerns the propriety of judicial review of socio-economic rights. The second focuses on the availability of sufficient judicial resources to adequately handle the adjudication of socio-economic rights questions. These are the legitimacy and the institutional competence arguments.

5.4.1.1 The Legitimacy Argument

The legitimacy argument posits that socio-economic rights do not fit into the judicial sphere and should be left to political discretion. A major criticism leveled against judicial review of socio-economic rights in this respect is that these rights are positive demands

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[57] Haysom, *supra* note 51 at 455.

[58] South Africa is not only classified as a developing country like Nigeria, both countries also share the same continent. In addition, South Africa is acclaimed to have enshrined "in its 1996 constitution the most comprehensive range of economic, social and cultural rights in the world". Bueren, *supra* note 20 at 459.

requiring state action and costly expenditure of resources.[59] This argument normally contrasts socio-economic rights with civil and political right, which it is claimed are negative rights requiring mere forbearance from the state.[60] The argument overlooks the simple fact that civil and political rights (usually guaranteed enforcement in democratic constitutions) are costless neither with respect to their protection nor with respect to their enforcement. It is clear that laws have to be enacted and enforcement agencies set up at considerable expense just to secure the protection of civil and political rights.[61] Socio-economic rights should not be differently treated in this respect.

In any case, socio-economic rights can also be negatively enforced. Requiring that no one's access to electricity should be withdrawn without a subsisting court order, for instance, can be a negative expression of socio-economic rights capable of enforcement. If nothing else, such a requirement will allow the courts to scrutinize the validity and extent of any claim to electricity supply which the affected person(s) may make.[62]

Flowing from the objection just discussed that socio-economic rights are rights to resources is the charge that the enforcement of socio-economic rights involves resource allocation, so that judicial involvement would lead to the distortion of the doctrine of separation of powers. The doctrine of separation of powers between arms of government, however, does not presuppose a rigid, water-tight compartmentalization of their

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[59] See Scott & Macklem, *supra* note 56 at 131.
[60] See Plant, *supra* note 51 at 32.
[61] *Ibid.* at 32-6. In South Africa, for instance, the Constitutional Court upheld the right of prisoners to vote while acknowledging that its decision will increase the cost of conducting the election at issue in *August and Another v. Electoral Commission and Others* (1999) 2 SA 91 (CC).
[62] See, generally, Scott & Macklem, *supra* note 56 at 72.

respective roles. Rather, the relationship between these arms of government is one of interaction in resolving the complex issues of common concern.[63]

More specifically, it has been argued that judicial review of socio-economic rights will create a situation where accountable organs of government will be second-guessed by an unaccountable judiciary. While it is true, however, that the judiciary is not accountable in the sense that politicians are, this also means that the courts are more likely to be insulated from the pressure-group influence that politicians are subject to. Rather, courts will favor a more rights-friendly balancing approach.[64] A balancing approach appears even more suited to the proper determination of the existence and extent of socio-economic rights generally and the rights of access to and affordability of electricity in particular.

In any case, it can hardly be said that the determination of socio-economic rights is the only instance where judicial power clashes with either or both of executive and legislative powers. In fact, the very essence of the separation of powers is to institute checks and balances in governance. The judiciary should thus be in a position to check the excesses of the other arms of government by, for instance, questioning the existence and extent of the power or discretion sought to be exercised.[65]

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[63] See the Canadian case of *R. v Mill* (1999) 3 S.C.R. 668 at para 20 where the Canadian Supreme Court observed that "law develops through dialogue between courts and legislatures" cited in Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carsewell, 2001) at 667.
[64] See Sachs, *supra* note 56 at 1388-89.
[65] See note 64 and accompanying text, *supra.*

Socio-economic rights, it is also claimed, are not only too wide but ambiguous as well. Thus socio-economic rights tend to complicate the enforcement of human rights because no corresponding duties are attachable to them.[66] This criticism overlooks the role that judicial experience, gained from "actual, real life situations," can play in moving "from the abstract to the concrete and (in) develop(ing) the meaning and scope of social rights".[67] In addition, appropriate drafting techniques can be used to narrow the scope of socio-economic rights.[68] The United Nations' Committee on Economic, Social and Cultural Rights, for example, has developed a three-layered structure of obligations with respect to socio-economic rights.[69] It is therefore possible to attach very precise obligations to socio-economic rights that the judiciary can enforce against anyone who violates them.[70]

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[66] See Haysom, *supra* note 48 at 454 ff.

[67] Scott & Macklem, *supra* note 56 at 72 (brackets and contents supplied) (arguing that "[I]t would be a mistake to assume that in the 1800s courts in the United States had extensive knowledge of what "equal protection" of the law entailed.")

[68] The South African Constitution, for instance, provides that "The state must take *reasonable legislative and other measures, within its available* resources to achieve the progressive realization of each of these rights." See Constitution of the Republic of South Africa, Act 108, 1996 s.72 (2). Emphasis mine.

[69] These are the duties to respect, to protect and to fulfill socio-economic rights. The first requires that the state refrain from breaching these rights, as is the case with civil and political rights while the second requires the state to protect these rights from the invasive actions of the private sector. The third duty is a positive obligation to fulfill socio-economic rights. See Asbjorn Eide, "Realization of Social and Economic Rights: The Minimum Threshold Approach" (1989) 43 Int. Comm. J. Review 40 at 48. Each of the socio-economic rights could be situated in any of these categories in practical situations. It appears that socio-economic rights at the relatively imprecise level of the third duty are unfavorably compared to civil and political rights at the first level of relatively precise obligation. See Scott & Macklem, *supra* note 56 at 73.

[70] Just to give a few examples, the socio-economic rights of people who face eviction from their homes or who would die or suffer serious consequence to their health if immediate assistance is not provided may fall into this category. See the South African cases of *Soobramoney v. Minister for Health* (1998) 1 SA 765 (CC) and *Government of the Republic of South Africa v. Grootboom* (2001) 1 SA 46 (CC). In *Soobramoney*, the court applied the reasonableness test to limit the right to health holding that it does not mean that a particular patient should be allowed to jump the established queue for access to an expensive dialysis machine and in *Grootboom* the same court reviewed the extent of the right to housing and came to the conclusion that it is for the government to demonstrate that the measures it is adopting to fulfill that right are reasonable in the context of its allocation of available resources.

A further criticism against the enforcement of socio-economic rights contends that these rights would burden the state with too many rights to enforce. This situation, it is charged, will lead to the dilution of established rights such as civil and political rights and even serve as an excuse for tyrannical governments to breach them.[71] It is difficult, even intuitively, to see the justification for this criticism. On the contrary both civil and political rights and socio-economic rights, to the extent that they seek to enhance the capacity of the individual to live out his potential, should be able to complement each other.[72] The right to life, just to take one example, may be meaningless to an individual who lacks the basic means of subsistence.

Another criticism against the enforcement of socio-economic rights contends that such rights "entail the redistribution of wealth and state intervention in market economics" while the constitution ought to guard against such intervention.[73] One would think that it is quite normal for a government to intervene in the market - for instance, to mitigate the negative exercise of market power or to plug the gaps created by the limitations of the

[71] For some of these arguments, see Haysom, *supra* note 51 at 454. (arguing that "[A]s a result, democratic rights and civil liberties go unenforced, democratic space for civil society is eroded and even socio-economic needs are not attended to") at 454.

[72] See Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2002) at 337. (Arguing that "the first thesis is that *legal* liberty, that is, the legal permission to do or not to do is valueless without *factual* (real) liberty, that is, the factual possibility of choosing between permitted alternatives.") at 337 (emphasis in the text, notes omitted). This is more so the case in materially less affluent societies. See the Vienna Declaration and Program of Action, pt. I., para. 5, UN Doc.A/CONF.157/23(1993), 32 ILM 1661 1993) (adopted at the World Conference on Human Rights, 1993) (which declares that all human rights are "universal, indivisible, interdependent and interrelated."); African Charter on Human and People's Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev. 5, 21 ILM 58 (1982) (entered into force on October 21, 1986), Preamble (stating that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.") See also Justice P. N. Bhagwati, "Fundamental Rights in their Economic, Social and Cultural context" (Judicial Colloquium, Bangalore, India, 24 - 26 February 1988) London: Commonwealth Secretariat, 1988 57 at 62.

[73] See Scott & Macklem, *supra* note 56 at 20. See also, Haysom, *supra* note 48 at 455-56.

market mechanism.[74] In any case the enforcement of "social, economic and cultural rights may increase the wealth of a state, even applying a narrow cost benefit analysis."[75] A clearly defined set of socio-economic rights may even serve to advance the operation of the market mechanism.

5.4.1.2 The Institutional Competence Argument

The institutional competence argument is centered on two major concerns. The first is the alleged complexity of questions of socio-economic rights. It is said that the resolution of socio-economic rights questions requires significant time commitment and involves various issues of social policy. The criticism here is that the courts lack the skills and other resources with which to appropriately evaluate and determine any judicial proceedings arising from a claim to such rights.

While the determination of socio-economic claims may be complex, the courts have never shied away from any case brought before it merely because it involves complex questions. It is not in doubt that the courts can effectively adjudicate on and determine questions of socio-economic rights once they are guaranteed at specific and progressive levels. The South African Constitutional Court, for instance, has held that judicial

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[74] See Joseph Stiglitz, *Globalization and it Discontents* (London: Penguin Books, 2002) (arguing that "...many government activities arise because markets have *failed* to provide essential services") at 55. Emphasis in the text. In addition, the boom and burst cycle inherent in the market system will, to say the least, be disastrous in certain aspects of national life such as the functioning of the electricity industry where power must be had, when and at the quantity and quality, demanded.

[75] Bueren, *supra* note 20 at 459. Her examples include education as an investment in human capital, social security as a necessary boost to consumer demand, and health as an indispensable requirement for an efficient workforce. One may add that, in so far as socio-economic rights enhances the individual's ability to participate in the market system, these rights expands both production and consumption (without both of which the market cannot stand) by enabling her to release her potentials into the system.

review of socio-economic rights does not confer on courts a task "so different from that ordinarily conferred on them."[76] It is thus clear that courts have the capacity to use a reasonable priority-setting approach in adjudicating legal claims founded on clearly defined socio-economic rights.[77]

Related to the concern just discussed is the fear that judicial review of socio-economic rights might lead to the overwhelming of courts with a flood of litigation.[78] It is not proper to deny citizens access to the courts merely because it is suspected that there will be too many of them seeking to enjoy that access. Surely, the capacity of the courts can be expanded. In addition, matters of jurisdiction can be structured in such a way as to avoid the concentration of cases in a single court. Hearings at first instance, for example, can be transferred to quasi-judicial and other administrative tribunals such as Human Right Commissions.[79]

Another argument against the enforcement of socio-economic rights is that they are concerned with social policy, which calls for both uniformity and cohesion.[80] Uniformity and cohesion in the formulation of social policy, it is argued, require an assessment of all the relevant issues before any one or a set of many competing options is adopted. The judiciary, it is argued, adjudicates only matters brought to its attention by litigants.

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[76] See *Ex p. Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (1996) 4 S.A 744 (CC) at paras. 77-78.
[77] See Albie Sachs, "From the Violable to the Inviolable: A Soft-nosed Reply to a Hard-nosed Criticism" (1991) 7:1 S.A.J.H.R. 98 (arguing that progressive judicial review is necessary for the "irreversible" extension of rights to the vulnerable).
[78] See Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa (2000/2001) 11:4 Const. Forum 123 at 123.
[79] See Jeffrey, *supra* note 56 at 18.
[80] See Haysom, *supra* note 51 at 457.

Judicial review therefore tends not only to be ad hoc but to be very narrow also - based, as it is, on the peculiar facts of each case. It is on this basis that critics draw the conclusion that judicial review of socio-economic rights questions can only lead to a form of restrictive narrowness. Such narrowness, in this reasoning, can only serve to truncate social policy both in terms of design and in terms of implementation.[81]

The fear that judicial review of socio-economic rights will erode the uniformity of social policy does not seem to have taken into account the fact that, in dealing with each socio-economic rights claim, the court can treat it on its own merit while paying due regard to the surrounding circumstances. In addition, court decisions can be couched in such a way as to allow the executive branch of government a choice among competing alternatives.[82] The judicial review process will, in this respect, avail the government the opportunity of appreciating the different approaches to the same problem that the process highlights.

I have tried to answer some of the conceptual objections to the judicial review of socio-economic rights, albeit briefly, in the preceding paragraphs. I have tried to show that, in spite of the seriousness of some of these objections, the judicial review of socio-economic rights is a conceptual possibility. This is in addition to the judicial review of socio-economic rights under Nigerian law (discussed in chapter three). In particular, the

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[81] See Jeffrey, *supra* note 56 at 16. Any attempt by the judiciary to achieve uniformity and cohesion, it is said, can only bog it down and delay the adoption and implementation of social policies indefinitely.

[82] The reasonableness of the government's HIV/ AIDS policy was recently tested before the South African Constitutional Court in the case of *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC). In ordering the reformulation of the policy, the court considered, among other things, the government's comprehensive AIDS policy as well as its budgetary constraints and refrained from insisting on a particular way of enforcing its ruling.

preceding analysis, especially the aspects of it that relate to the constitutional entrenchment and judicial enforcement of socio-economic rights in South Africa, hopefully answers any concerns that the lack provisions for the direct judicial enforcement of those rights in the Nigerian constitution might raise. The institution of the right of access to affordable electricity is thus a distinct possibility both conceptually and under Nigerian law.

5.4.2 Legal Guarantee of Access to and Affordability of Electricity

In view of the foregoing analysis, it is my reasoned suggestion that the right to the judicial review of governmental measures for the expansion of access to and promotion of affordability of electricity should be instituted in the reform program. The Nigerian state, when demanded by an aggrieved citizen, should be able to show that it has taken reasonable measures to expand access to and promote affordability of electricity within available resources post-reform. If nothing else, the availability of the right to judicial review in this sense would serve as a check on the likelihood of the Nigerian government initiating policies that impose avoidable limitations on access to and affordability of electricity post-reform. Government agencies and their officials would also be reminded to take their responsibilities seriously with respect to expanding access and promoting affordability post-reform

Admittedly, it will take time and experience for the scope of the right to judicial review of the reasonableness of governmental measures for access expansion and affordability

promotion to be adequately clarified. In this respect, the provisions of the Fundamental Objectives and Directive Principles of the Nigerian constitution could serve as interpretive guides for the courts.[83] Non-justiciable socio-economic rights declarations found in the constitution have been used in jurisdictions such as India as interpretive guides in human rights litigations.[84]

Finally, the right of access to affordable electricity might involve governmental intervention in the resulting Nigerian electricity market on behalf of the most vulnerable members of the society.[85] The expression of this right has to be clear about the limit of this governmental power. The power to intervene should be limited to deliberate actions aimed at promoting access expansion and at providing support to disadvantaged persons in meeting their basic electricity needs. It is important that both the expression and the enforcement of the right of access to affordable electricity respect property right. Defined in this way, the right to judicial review, if supplemented by the specific suggestions made in chapter four and in other parts of this chapter for improving the Nigerian electricity reform program, is likely to meet the welfare requirements of the Nigerian constitution.

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[83] See, especially, Ben O. Nwabueze, *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy* (New York Longman Inc., 1985) at 9. See also Bertus de Villiers, "Directive Principles of State Policy and Fundamental Rights: The Experience of India" (1992) 8:1 S.A.J.H.R. 29. See also Gerard Hogan, "Directive Principles, Socio-economic Rights and the Constitution" (2001) 31 Ir. Jur. 174 at 175.

[84] See de Villiers, *supra* note 84 at 30.

[85] See Berma Klein Goldewijk, "From Seattle to Porto Alegre: Emergence of a new Focus on Dignity and Human Rights" in Berma Klein Goldewijk, Adalid Conteras Baspineiro & Paulo Cesa Cabonari eds., *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002) 1 (arguing that the government should intervene by "regulating the market" in this era of globalization so as to protect socio-economic demands) at 11.

6.0 CONCLUSION

Public ownership and control of the Nigerian electricity industry has resulted in gross inefficiency in the country's power supply system. More importantly, this mode of operating the Nigerian electricity industry has also failed to deliver electric power to the vast majority of Nigerians.[1] Even the few who have access to electricity in Nigeria have to contend with frequent and long blackouts in addition to other reliability constraints that negatively impact on the quality of power they get. The operational dynamics of the Nigerian electricity industry is, therefore, in need of reform. Electricity reform for a developing country like Nigeria, however, goes beyond privatization and the introduction of free market competition.

Electricity reform occurs, not in the ideal world of theories but in the practical world of, sometimes, unpalatable socio-economic realities. For Nigeria, electricity reform, if and when it occurs, would be played out under high poverty and inflationary trends and against the backdrop of acute infrastructural and institutional limitations. It will affect citizens who do not have any form of social security system to fall back on and who have direct interest in the assets to be privatized as citizens and as taxpayers. Yet experience with electricity reform generally and, especially, in jurisdictions with developing economies, shows that severe access and affordability constraints attend the introduction of free market competition in power supply. (These constraints affect real people with real lives and not just some figures on statistical charts.)

[1] According to official figures, only thirty-Six percent of Nigerians have access to electricity. See National Council on Privatization, *National Electric Power Policy* (Abuja: The Presidency, 2001) at 3.

Electricity reform, therefore, as much as it is a matter of increasing the efficient allocation of resources in power supply, is also a matter of social equity. This is even more so the case in developing economies such as Nigeria. As Amartya Sen eloquently argues, "[I]n the context of developing countries in general, the need for public policy initiatives in creating social opportunities is *crucially important.*"[2] The resulting free electricity market needs to be supplemented by government intervention aimed at gently guiding the market towards desired socio-economic results. It is in this respect that the legal framework for electricity reform is very important. Government intervention, which may extend to the expenditure of public resources to combat access and affordability constraints, has to be grounded in sound legal foundations, preferably under the enabling reform legislation.

How access and affordability constraints are combated is a matter of state responsibility, which deserves due attention in the reform process. This is the least a citizen can expect from the state where its policy choices is likely to visit hardship on him. Where the constitution or the basic law of the land contemplates certain results from the state's economic policies choices as is the case in Nigeria , addressing these constraints as part of the electricity reform process goes even deeper than the reasonable expectation of the citizen. It becomes a yardstick for measuring the success of reform. The state, as far as the identified constitutional requirements are concerned, is under the obligation to design its electricity reform program in a manner that accords with the achievement of the desired results. At the very minimum, the state needs to ensure that electricity reform

[2] Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf, 2001) at 143. Emphasis supplied.

does not compromise aspects of the constitutional requirements that have been attained prior to reform.

What this means for the Nigerian electricity reform proposal is that deliberate policy measures need to be taken to meet the constitutional requirements of maximum welfare for every citizen and public assistance for those who require it to achieve the required level of welfare. The maximum welfare requirement of the Nigerian constitution in relation to governmental economic policies can only be measured in relative terms. More fundamentally, the Nigerian state may not have the resources required to achieve whatever level of welfare is deemed to satisfy this requirement for every citizen at particular points in time. It is necessary, therefore, that this constitutional requirement be seen in terms of the design and implementation of economic policies that would promote (or, at least, not diminish) the welfare of the citizens. With respect to electricity reform measures need to be devised to minimize, if not eliminate, access and affordability constraints.

Where electricity reform is likely to reduce access, affordability or both for those who already enjoy it, measures need to be built into the reform process to address it. For those who do not enjoy access to electricity, the reform program needs to disclose adequate measures for extending access to them at affordable rates. The measures adopted in each case need to be measurable and the government should be held accountable for such measures by the citizenry. It is in this respect that, more than any other measure for access and affordability promotion, the right to the judicial review of governmental

actions (or failures to act) in relation to access to affordable electricity appears to be more effective and even more pragmatic.

The right of judicial review does not grant immediate access to affordable electricity. (It is doubtful that immediate access to affordable electricity is possible for the millions of people who may need it in Nigeria, any way.) Rather, it institutes an incremental approach to access and affordability promotion with the judiciary as the arbiter of the reasonableness of governmental actions or failures to act. It also institutes a level of transparency in access and affordability promotion. It gives the government an opportunity to demonstrate the reasonableness of the measures it adopts in terms of available resources, and within the scheme of overall national economic goals, whenever challenged to do so. This means that government agencies and their officials are more likely to consciously pursue policy measures for access and affordability promotion.

For the citizen the right to judicial review brings empowerment. He is no longer a mere statistical figure but one whose position is within his power to challenge and, per chance, effect a change. He is more likely to show interest in the electricity reform process and its implementation. He might even develop a sense of belonging and develop the feeling that he has a stake in the success of electricity reform. This can only be helpful to the reform process. General acceptance of reform might ensue among the citizenry and "the social upheavals that so frequently accompany the development transformation"[3] may be averted. More subtly, reform efforts will not meet with social resistance, which is likely

[3] Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002) at 78.

to increase the transaction costs of reform and which might even result in program delays and in hesitation on the part of prospective private investors.

In sum, electricity reform in any jurisdiction needs to borrow from the experience of other jurisdictions that have preceded it on the reform path. More importantly, however, the reform program needs to be deliberately designed for the socio-economic and political landscape within which it is implemented. This approach might require certain novel measures that cannot be learnt from the experience of others. The unfettered freedom of the market need not be a constraint in this respect.[4]

[4] See Sen, *supra* note 2 (arguing that "the far-reaching powers of the market mechanism have to be supplemented by the creation of basic social opportunities for social equity and justice") at 143.

Bibliography

Books

Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf Inc, 2001)

B. O. Nwabueze, *A Constitutional History of Nigeria* (London: C. Hurst & Co., 1982)

Barry Barton, Catherine Redgewell, Anita Ronne and Donald Zillman ed., *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (New York: Oxford University Press, 2004)

Ben O. Nwabueze, *Nigeria's Presidential Constitution: The Second Experiment in Constitutional Democracy* (New York Longman Inc., 1985)

Berma Klein Goldewijk, Adalid Conteras Baspineiro & Paulo Cesa Cabonari eds., *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002)

Charles Sampford and D. J. Galligan eds., *Law, Rights and the Welfare State* (London: Croom Helm Ltd, 1986)

Colin Robinson ed., *Utility Regulation and Competition Policy* (Cheltenham: Edward Elgar Publishing Ltd., 2002)

Cosmo Graham, *Regulating Public Utilities: A Constitutional Approach* (Oxford and Portland, Oregon: Hart Publishing, 2000)

David M. Newberry, *Privatization, Restructuring, and Regulation of Network Utilities* (Cambridge, Massachusetts: MIT Press, 1999)

Dennis Swan, *The Retreat of the State: Deregulation and Privatization in the UK and US* (Ann Abor: University of Michigan Press, 1998)

Eme O. Awa, *Federal Government in Nigeria* (Berkeley: University of California Press, 1964)

Frand and John Dolphin, *Country Power: The Electrical Revolution in Rural Alberta* (Edmonton: Plains Publishing Inc., 1993

George R. Lucas, ed. *Poverty, Justice and the Law: New Essays on Needs, Rights and Obligations* (Lanham, MD: University Press of America, Inc., 1986)

Greg Plast, Jerrold Oppeinheim and Theo MacGregor, *Democracy and Regulation: How the Public can Govern Essential Services* (Sterling, Virginia: Pluto Press, 2003)

James C. Bonbright, *Principles of Public Utility Rates* (New York: Columbia University Press, 1961)

John Saunders, J. Michael Davis, Gelen C. Moses & James E. Ross, *Rural Electrification and Development: Social and Economic Impact in Costa Rica* (Boulder, Colorado: Westview Press, 1978)

Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin Books, 2002)

Keith R. Fleming, *Power at Cost: Ontario Hydro and Rural Electrification, 1911 – 1958* (Montreal & Kingston: McGill Queen's University Press, 1992)

Kenneth Post & Michael Vickers, *Structure and Conflict in Nigeria 1960 – 1966* (London: Heinemann Educational Books, 1973)

Mark Armstrong, Simon Cowan & John Vickers, *Regulatory Reform: Economic analysis and British Experience* (Cambridge, Massachusetts: MIT Press, 1994)

Martha M Roggenkamp, Anita Ronne, Catherine Redgewell, and Inigo Del Guayo, *Energy Law in Europe: National, EU and International Law and Institutions* (New York: Oxford University Press, 2001)

Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carsewell, 2001)

Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2002)

Sally Hunt, *Making Competition Work in Electricity* (New York: John Wiley & Sons Inc., 2002)

Journal Articles

Adeola F. Adenikinju, "Electricity Infrastructure Failures in Nigeria: A Survey-based Analysis of the Costs and Adjustment Responses," (2003) 31 Energy Policy 1519

Ajay Gupta, "Tracking Stranded Costs" (2000) 21:1 Energy Law Journal 113

Alan N. Miller, "Ideological Motivations of Privatization in Great Britain Versus Developing Countries" (1997) 50:2 Journal of International Affairs 392

Albert A. Foer & Diana L. Moss, "Electricity in Transition: Implications for Antitrust" (2003) 24:1 Energy Law Journal 89

Albert A. Foer, "Electricity: Notes on the Transition Phase," (2002) 33 Loy. U. Chi. L. J. 813

Albie Sachs, "From the Violable to the Inviolable: A Soft-nosed Reply to a Hard-nosed Criticism" (1991) 7:1 S.A.J.H.R. 98

Albie Sachs, "Social and Economic Rights: Can they be made Justiciable?" (2000) 53:4 SMU L. Rev. 13811385

Albie Sachs, "Towards a Bill of Rights in a Democratic South Africa" (1990) 6 S.A.J.H.R. 1

Alexander I. Metzner, "Were California's Electricity Price Shocks Nothing More than a New Form of Stranded Costs?" (2002) 52:2 American University Law Review 535.

Alexander J. Black, "Electricity Competition and Fair Market Access in Canada" (1998) 20:2 Energy Law Journal 291.

Alfred E. Khan, "Deregulation: Looking Backward and Looking Forward" (1990) 7 Yale J. on Reg. 225

Asbjorn Eide, "Realization of Social and Economic Rights: The Minimum Threshold Approach," (1989) 43 International Commission of Jurists' Review 40

B. Obinna Okere, "Social and Economic Perspective of Human Rights in Africa" (Lecture delivered to mark the Human Rights Day, National Human Rights Commission, Abuja, Nigeria, December 1997) [published in pamphlet form]

Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa (2000/2001) 11:4 Const. Forum 123

Charles H. Koch, Jr., "Control and Governance of Transmission Organizations in the Restructured Electricity Industry" (2000) 27:3 Florida State University Law Review 569

Christopher G. Bond, "Shedding New Lights on the Economics of Electricity Restructuring: Are Retail Markets for Electricity the Answer to Rising Energy Costs?" (2001) 33:4 Connecticut Law Review 1311

Christopher J. Petri, "Don't be Shocked if Missouri Applies Strict Product Liability to Electricity But Should it?" (1997) 62 Missouri Law Review 611

Comment, "Electricity Deregulation in Oklahoma: A Comparison of Differing Approaches" (2001) 22:2 Energy Law Journal 381.

Craig Scott & Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141:1 U. Pa. L. Rev. 1

D. M. Davis, "The Case against the Inclusion of socio-economic Demands in the Bill of Rights Except as Directive Principles" (1992) 8:4 S.A.J.H.R. 475

David M. Newberry & Michael G. Politt, "The Restructuring and Privatization of the U.K. Electricity Supply - Was It Worth It?" in *Public Policy for the Private Sector,* Note No. 124, New York: The World Bank Private Sector Development Department, September 1997

David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51:4 University of Toronto Law Journal 425

Donald F. Santa, Jr. & Clifford S. Sikora, "Open Access and Transition Costs: Will the Electric Industry Transition Track the Natural Gas Industry Restructuring?" (1994) 15:2 Energy Law Journal 273.

Donald F. Santa, Jr., "Who Needs What and Why? Reporting and Disclosure Obligations in Emerging Competitive Electricity Markets" (2000) 21:1 Energy Law Journal 1

Douglas N. Jones, " Regulatory Concepts, Propositions, and Doctrines: Casualties, Survivors Additions" (2001) 22:1 Energy Law Journal 41

Edward L. Flippen & Anne K. Mitchell, "Electricity Utility Restructuring after California" (2003) 21:1 Journal of Energy & Natural Resources Law 1.

Emilio Carrillo Gamboa, "Proposed Changes for Mexico's Electric Industry" (1998) 20:2 Energy Law Journal 281.

Etiene Mureinik, "Beyond A Charter of Luxuries: Economic Rights in the Constitution" (1992) 8:4 S.A.J.H.R. 464

Francis N. Botchway, "The Role of the State in the Context of Good Governance and Electricity Management: Comparative Antecedents and Current Trends" (2000) 21 U. Pa. J. Int'l Econ. L. 781

Gerald Norlander, "May the FERC Rely on Markets to Set Electricity Rates?" (2003) 24:1 Energy Law Journal 65

Geraldine Van Bueren, "Including the Excluded: The Case for Economic, Social and Cultural Human Rights Act" (2002) P.L. 456

Gregory N. Basheda, Darrel B Chodorow, Peter S. Fox-Penner, Jason A. Hicks, Eric

Hirst, James K. Mitchell, Dean M. Murphy, & Joseph B. Wharton, "The FERC, Stranded Cost Recovery, and Municipalization" (1998) 19:2 Energy Law Journal 351.

Harvey L. Reiter, "Competition Between Public and Private Distributors of Electricity in a Restructured Power Industry" (1998) 19:2 Energy Law Journal 333

Hon. Curt L. Herbert, Jr., "The Quest for an Inventive Regulatory Agenda" (1998) 19:1 Energy Law Journal 1.

Hon. Vicky A. Bailey, "Reassessing the Role of Regulators of Competitive Energy Markets, or: Walking the Competition" (1998) 20:1 Energy Law Journal 1.

Ines Zenke, "Germany Electricity and Gas Markets Stand Alone – Negotiated Third Party access" (2003) 21:2 Journal of Energy & Natural Resources Law 143.

James Baker, Jr., "Regulation of Power Pools and System Operators: An International Comparison" (1996) 18:2 Energy Law Journal 261.

Jason B. Meyers, "The Sale of Electricity in a Deregulated Industry: Should Article 2 of the Uniform Commercial Code Govern?" (2001) 54:2 SMU Law Review 1051

Jim Rossi, "The Electricity Deregulation Fiasco: Looking to Regulatory Federalism to Promote Balance Between Markets and the Provision of Public Goods" (2002) 100:6 Michigan Law Review 1768

Jim Rossi, "Universal Service in Competitive Retail Electric Markets: Whither the Duty to Serve?" (2000) 21:1 Energy Law Journal 27

Joel A. Youngblood, "Alive and Well; The Rural Electrification Act Preempts State Condemnation Law: City of Morgan V. South Louisiana Electric Cooperative Association" (1995) 16 Energy Law Journal 489

John E Beasant-Jones, "The England and Wales Electricity Model - Option or Warning for Developing Countries" *in Public Policy for the Private Sector*, Note No. 84, New York: The World Bank private Sector Development Department. June 1996.

John E. Kwoka, Jr., "Twenty-Five Years of Deregulation: Lessons for Electric Power," (2002) 33 Loy. U. Chi. L. J. 885

Joseph P. Tomain, "Electricity Restructuring, A Case Study in Government Regulation" (1998) 33:3, 4 Tulsa Law Journal 827.

Joseph P. Tomain, "The Past and Future of Electricity Regulation" (2002) 32 Environmental Law 435

Justice P. N. Bhagwati, "Fundamental Rights in their Economic, Social and Cultural context" (Judicial Colloquium, Bangalore, India, 24 - 26 February 1988) London: Commonwealth Secretariat, 1988

Laura R. Starling, "Don't be Shocked! Electric Utility Deregulation Can Benefit Low Cost States" (2000) 74:4 Tulane Law Review 1519

Leigh H. Martin, "Deregulatory Investments: Stranded Costs and the Regulatory Compact in a Deregulated Electric Utility Industry" (1997) 31:4 Georgia Law Review 1183.

Lekan Salami and Afolabi Elejibu, "Investment Incentives for the Electricity Business in Nigeria," (2004) 22:1 Journal of Energy and Natural Resources Law 94

Linda S. Portasik, "The Transition to Fully Competitive Bulk Power Markets: Federal Regulatory Developments in the Electric Power Industry" (1994) 15:2 Energy Law Journal 365.

Mark E. Hardicke, "Competitive-Based Contracts for the New Power Business" (1996) 17:1 Energy Law Journal 103

Mark Thatcher, "Institutions, Regulation and Change: New Regulatory Agencies in the British Privatized Utilities" (1998) 21: 1 West European Politics 139

Michael A. Yuffee, "California Electricity Crisis: How Best to Respond to the Perfect Storm" (2001) 22:1 Energy Law Journal 41.

Michael J. Dennis and David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Housing, and Health? (2004) 98:3 AJIL 462

Michael J. Doane & Daniel F. Spulber, "Municipalization: Opportunism and Bypass in Electric Power" (1996) 18:2 Energy Law Journal 333

Michael J. Trebilcock and Ron Daniels, "Electricity Restructuring: The Ontario Experience" (2000) 33 Canadian Business Law Journal 161.

Miguel Angel Quintana, "Reorganisation of the Mexican Electricity Sector: The Need to Review the Regulatory Framework" (2003) 21:3 Journal of Energy & Natural Resources Law 303.

Natalie Scott, "Implementation of Senate Bill 7: The Implication of Stranded Cost Recovery for Residential Electricity Consumers" (2000) 52:1 Baylor Law Review 237.

Nicholas Haysom, "Constitutionalism, Majoritarian Democracy and Socio-economic Rights" (1992) 8:4 S.A.J.H.R. 451

Nicholas W. Fels & Franklin R. Lindh, "Lessons from the California "Apocalypse:" Jurisdiction Over Electricity Utilities" (2001) 22:1 Energy Law Journal 1.

North American Energy Reliability Council, "Reliability Assessment 2002 – 2011: The Reliability of Bulk Electricity Systems in North America,"

Paul W. MacAvoy & J. Gregory Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001) 22:2 Energy Law Journal 233

Peter Navarro & Michael Shames, "Electricity Deregulation: Lesson Learned from California" (2003) 24:1 Energy Law Journal 33.

Peter Navarro, "A Guidebook and Research Agenda for Restructuring the Electricity Industry" (1995) 16:2 Energy Law Journal 347.

Philip Harvey, "Human Rights and Economic Policy Discourse: Taking Economic Rights Seriously" (2002) 33:2 Colum. H.R.L. Rev. 363 at 408.

Randal S. Jeffrey, "Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations" (1993) 27:1 Colum. J. L. & Soc. Probs. 1

Raymond S. Hartman, "The Efficiency Effects of Electricity Utility Mergers: Lessons from Statistical Cost Analysis" (1996) 17:2 Energy Law Journal 425

Richard D. Cudahy, "The Folklore of Deregulation (with Apologies to Thurman Arnold)" (1988) Yale Journal on Regulation 427

Richard D. Cudahy, "Whither Deregulation: A Look at the Portents" (2001) 58:2 New York University Annual Survey of American Law 155

Richard Green, "Regulators and the Poor: Lessons from the United Kingdom" in Policy Research Working Paper 2386, The World Bank Institute: Governance, Regulation, and Finance Department, July 2000.

Richard J. Pierce, Jr., "Antitrust Policy in the New Electricity Industry" (1996) 17:1 Energy Law Journal 29

Richard J. Pierce, Jr., "The State of the Transition to Competitive Markets in Natural Gas and Electricity" (1994) 15:2 Energy Law Journal 323.

Richard P. Keck, "Reevaluating the Rural Electrification Administration: A New Deal for the Taxpayer" (1985) 16 Envt'l Law 39

Robert J. Michaels, "Market Power in Electric Utility Mergers: Access, Energy and the Guidelines" (1996) 17:2 Energy Law Journal 401

Robert J. Michaels, "The Governance of Transmission Operators" (1998) 20:2 Energy Law Journal 233

Robert J. Michaels, "Venues and Markets: Regulating Competitive Electricity in the West" (2001) 22:2 Energy Law Journal 335.

Robert L. Bradley, Jr., "The Origins of Political Electricity: Market Failure or Political Opportunism?" (1996) 17:1 Energy Law Journal 59.

Roger Ridlehoover, "The Role of Entry in Deregulating Gas and Electricity" (1998) 19:2 Energy Law Journal 307

Satish Saini, "Deregulation in Ontario, Another Price Cap" Energy Pulse

Scott B. Finlinson, "The Pains of Extinction: Stranded Costs in the Deregulation of the Utah Electric Industry" (1998) 1 Utah Law Review 173.

Shedrack C. Agbakwa, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights" (2002) 5 Yale Human Rts. & Dev. L.J. 177

Stephen Angle & George Cannon, Jr., "Independent Transmission Companies: The For-Profit Alternative in Competitive Electricity Markets" (1998) 19:2 Energy Law Journal 229

Stephen Powell & Mary Starks. "Does Reform of Energy Sector Networks Improve Access for the Poor?" in *Public Policy for the Private Sector*, Note No. 209, New York: The World Bank, Private Sector Development Department. May 2000.

Thatcher, Mark. "Institutions, Regulation, and Change: New Regulatory Agencies in the British Privatized Utilities" (1998) 21:1 West European Politics.

Walter R. Hall II "Securitization and Stranded Cost Recovery" (1996) 18:2 Energy Law Journal 1.

William W. Hogan. "Electricity Market Restructuring: Reforms of Reforms" (2002) 21:1 Journal of Regulatory Economics 103.

Government Publications

National Council on Privatization, *National Electric Power Policy* (Presidency: Federal Republic of Nigeria, March 2001)

Newspaper Articles

"NEPA Gulps N102bn in Four Years – Imoke: Gets $100m World Bank Grant," *This Day* (Lagos) (April 27, 2004)

Ahamuefula Ogbu & Onyebuchi Ezigbo, "House Passes Power Sector Reform Bill," *This Day* (Lagos) (December 15, 2004)

Bryan Avery, "Price Spikes Fear among Alberta Power Users" *Edmonton Journal,* (April 25, 2002)

Bukky Olajide & Mathias Okwe, "Inflation Rate Rises to 17.8 Percent, Says CBN," *The Guardian* (Lagos) (June 2, 2004)

Cletus Akwaya, "FG Plans New Social Protection Policy," *This Day* (Lagos)

Cletus Akwaya, "Nigeria Ranks 151st on Human Development Index," *This Day* (July 21, 2004)

Madu Onuorah, "Atiku Lists Dangers of New Privatization Bill," *The Guardian* (Lagos) (February 20, 2004)

Mike Oduniyi "NEPA Owes N6bn on Gas Supply, Says El-Rufai" *This Day*(Lagos) (August 7, 2003)

Mike Oduniyi and Gloria Achoyamen, "Power Output Drops by 800MW," *This Day* (Lagos) (June 18, 2004)

Mike Oduniyi, "FG Approves $138m for 4 New Power Plants" *This Day* (Lagos) (June 27, 2004)

Oghogho Obayuwana, "NEPA Tariffs to Rise Soon, Says Minister" *The Guardian* (Lagos, Nigeria) (September 17, 2004)

Olushola Yusuff, "Nigeria Loses N1.7 trillion to Gas Flaring, Says Presidential Aide," *The Guardian* (Lagos) (April 15, 2003)

Onochie Anibeze, "BPE Carves 18 Firms Out of NEPA" *The Vanguard* (Lagos) (March 27, 2003)

Onyebuchi Ezigbo, "Again, FG Sacks NEPA Board" *This Day* (November 21, 2003)

Power Sector Reform Bill" (editorial) *This Day* (Lagos) (June 25, 2004)

Prisca Egede, "89m Nigerians Live Below Poverty Level, Says Minister," *The Guardian* (Lagos) (September 7, 2004

Sufyan Ojeifo and Emmanuel Aziken, "Obasanjo Sends Bill to Break NEPA's Monopoly," *The Vanguard* (Lagos) (October 11, 2001)

Sunny Ogefere, "Privatization will Check Corruption, Says Atiku" *The Guardian* (Lagos) (June 7, 2004)

Uddin Ifeanyi, "NEPA's Many Problems," *This Day* (Lagos) (July 19, 2004)

Statutes and Regulations

Constitution of the Federal Republic of Nigeria, 1999

Constitution of the Republic of South Africa, Act 108, 1996

Electricity Sector Reform Bill, Draft Version 5.0, Nigeria

Fundamental Rights Enforcement Procedure Rules, 1999, Nigeria

National Electric Power Authority Decree (No. 24) of 1972 (now National Electric Power Authority Act [NEPA Act]), Chapter 256, Laws of the Federation of Nigeria, 1990

National Electric Power Authority (Amendment) Decree 29, 1998

Public Enterprises (Privatization and Commercialization) Decree No. 28 of 1999)

International Treaties

African Charter on Human and People's Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev. 5, 21 ILM 58 (1982) (entered into force on October 21, 1986)

Optional Protocol for the Creation of an African Court on Human and People's Rights, June 10, 1998 (entered into force on January 25 2004)

Judicial Decisions

Abacha v Fawehinmi (2000) 6 NWLR 228

Alh. J. A. Adewole & Ors. V Alh. Lateef Jakande & Ors (1981) 1 NCLR 262.

Archbishop Okogie & Ors v. The Attorney-General of Lagos State (1981) 2 NCLR 337

August and Another v. Electoral Commission and Others (1999) 2 SA 91 (CC)

Ex p. Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (1996) 4 S.A 744 (CC)

Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 SA 721 (CC)

Ogugu v. The State (1994) 9 NWLR (Pt. 366) 1

R. v Mill (1999) 3 S.C.R. 668

Senate of the National Assembly & Ors v Tony Momoh (1983) 4 NCLR 269

Soobramoney v. Minister for Health (1998) 1 SA 765 (CC)

The Government of the Republic of South Africa v. Grootboom (2001) 1 SA 46 (CC)

Conference Presentations

Stephen Scott, "Energy Source and Market Structure for Efficient Electricity Production: Will Ontario Satisfy the Criteria?" (paper presented to the CRUISSE Conference on Canadian Energy Policy in the Sustainable Development Era, Ottawa, October 17-18, 2002)

Steve Thomas. "Sustainability and the British Electricity Reforms". Presentation to the Second International Panel: Energy for Sustainable Societies Bogotá, Colombia: 25-27 July 2002"

Web sites

www.eia.doe.gov

www.energy pulse.net

www.guardiannewsngr.com

www.vanguardngr.com

www.thisdayonline.com

http://ets.powerpool.ab.ca/

www.nerc.com

www.apt.ch

www.nepanigeria.org

www.bpeng.org