

**JUSTICIABLE CONSTITUTIONALISATION OF
ECONOMIC, SOCIAL AND CULTURAL RIGHTS - A
FRAMEWORK FOR ACTION**

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Table Of Contents

1. Introductory Dialectics	4
2. Current Constitutional and Statutory Positions	6
3. Nature of State ESCR Obligations	13
4. Arguments Against Justiciable Constitutionalisation of ESCR and Responses to them	17
5. The Basis for Constitutional Justiciability of ESCR	22
6. Conclusion: The Framework for Justiciable Constitutionalisation of ESCR	24

Abstract

The paper sets out to make a case for the inclusion of selected economic, social and cultural rights (ESCR) in the constitutional justiciable bill of rights. It reviewed the international affirmation of the indivisibility and interdependence of all human rights and fundamental freedoms and the misnomer of treating ESCR from the basic needs perspective. Constitutional provisions on ESCR are found in the non justiciable chapter 2 of the 1999 Constitution although they are couched as duties of state. However, the Constitution empowers the National Assembly to legislate for the regulation, promotion, enforcement and observation of the provisions of the chapter. Statutory provisions found in the African Charter on Human and Peoples Rights, the Child Rights Act, the Fiscal Responsibility Act, etc, come in handy to show that provisions of chapter 2 can be enforced if found in other statutory instruments.

The nature of states obligations on matters of ESCR especially under the International Covenant on ESCR shows three distinct layers of obligations vis, to respect, protect and fulfill and this leads to obligations of result and obligations of conduct. Further, the obligations crystallise into minimum core obligations for the state. Arguments against the inclusion of ESCR in the justiciable bill of rights and response to them are reviewed.

Finally, the framework for the inclusion of ESCR submits that the minimum core obligation of each ESCR coupled with the obligations to respect and protect can be included in the bill of rights based on the availability of resources and the development of Nigeria's productive forces.

1. INTRODUCTORY DIALECTICS

The historical marginalisation of economic, social and cultural rights (ESCR) has led in many quarters to doubts about their status as rights properly so called. Lawyers sometimes confuse the concept of rights with the concept of justiciability - a norm which entitles a litigant to maintain action in court when the right is violated or breached. Fulfillment or realization of a right goes beyond the concept of justiciability¹. In some instances, scholars have requested that attention be focused on what they consider more important rights to wit; civil and political rights². Within the ambit of the classification which has been faulted in some writings³, human rights have been classified into three major genres - the first generation civil and political liberties⁴, followed by the second generation ESCR⁵ and the third generation solidarity and collective rights.

A basic problem for ESCR is the attempt to force the basic needs⁶ approach on issues of ESCR in situations where the only feasible alternative is the human rights paradigm. This is the justification for the sudden international interest and rush to designate many ESCR as Millennium Development Goals. For purposes of clarity, the basic needs approach and the human rights paradigm differs in a number of ways. A human rights approach to ESCR introduces a normative basis, which binds the state implying that beneficiaries of development are active "subjects" and "claim holders" and stipulates the duties and obligations of those against whom such claims can be made. Such approach introduces the accountability dimension not present in the basic needs approach⁷. Further, not all human needs are recognized as rights; rights are indivisible, equal rights necessitate the elimination of inequalities and all human rights embody individual freedom. The human rights approach moves away from human development

¹ In ESCR as well as in civil and political rights, states enjoy a margin of discretion on steps to take for the fulfillment of rights. Justiciability is just but one step towards the fulfillment of a human right.

² Anthony D'Amato, *Letter from the Chair, Human Rights Interest Group*, cited with approval by Scott Leckie in *Identifying Violations of the Covenant on Economic, Social and Cultural Rights*, p.84, Human Rights Quarterly, Vol.20, No.1, February 1998.

³ The present author had argued that classification of human rights into generations is a misnomer, but if there must be a classification, it should give primacy to the most basic rights. The current classification delays the realization of ESCR and frustrates a coherent and holistic approach to the human rights paradigm. See Chapter 1, p.2 of the Manual on Housing Rights Protection Strategies, Shelter Rights Initiative, April 2000.

⁴ They include the rights to life, human dignity, personal liberty, fair hearing, private and family life, freedom of movement, of assembly and association, the right to non-discrimination and to property. These rights were all guaranteed in the 1979, 1989, the ill-fated 1995 Constitution and the 1999 Constitution of Nigeria.

⁵ They include the rights to adequate standard of living, education, food, health, housing, work, etc.

⁶ The basic needs were identified as food, clothing and shelter.

⁷ Adapted from *the Right to Food in Theory and in Practice*, Food and Agricultural Organization of the United Nations, Rome 1998; Introduction by Mary Robinson (p.vii), Former United Nations High Commissioner for Human Rights.

indicators premised on or oriented towards goals, not towards rights. Goals are something you reach for while human rights are inalienable, intrinsic. In short, they are our birth rights⁸.

These doubts on the rights bearing nature of ESCR have in many instances rendered the justiciable rights in Chapter 4 of the 1999 Constitution hollow. Adopting Justice Bhagwatti's postulations in *Minerva Mills Ltd v Union of India*⁹, it is stated:

To the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a society would sound as empty words bandied about in the drawing rooms of the rich and well to do and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio economic justice will inform all institutions of public life so that the preconditions for fundamental liberties for all may be secured.

At the international level, the following have been asserted of human rights and fundamental freedoms:

Tehran 1968

Since human rights and fundamental freedoms are indivisible, the full realization of civil and political liberties without the enjoyment of economic, social and cultural rights is impossible¹⁰.

UNGA 1977

All human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political rights and economic, social and cultural rights.

The full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development¹¹.

⁸ See Professor Virginia Dandan, former chairperson of the United Nations ESCR Committee in *Monitoring ESCR, the Phillipine Experience*, Philippine Human Rights Information Centre, Manila, Philippines 1997, p.10.

⁹ 1980 AIR SC

¹⁰ First World Conference on Human Rights, Teheran Iran 1968.

¹¹ United Nations General Assembly (UNGA) resolution 32/130 of 1977.

Vienna 1993

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis¹²

The foregoing statements reflect the principles of indivisibility, interrelatedness and interdependence of all human rights and fundamental freedoms which have been sufficiently affirmed in international human rights jurisprudence. This principle is however yet to reflect at the domestic level and has remained a lofty abstraction that Nigerian jurisprudence has not come to terms with. It needs to be noted that quite unlike civil and political rights which first developed jurisprudence at the national level, ESCR have developed more jurisprudence at the international level¹³ and with our judges not being quite versed in the rudiments of international law, a strong aversion to international standards exists in our courts particularly at the levels below the Court of Appeal and the Supreme Court.

2. CURRENT CONSTITUTIONAL AND STATUTORY POSITIONS

The Constitution of the Federal Republic of Nigeria 1999 makes extensive provisions for Fundamental Rights in its Chapter 4 and these rights approximate to civil and political rights. The Constitution goes ahead to stipulate mechanisms for legal redress in the event of breach and further action had been taking in the design of the Fundamental Rights (Enforcement Procedure) Rules. In Chapter 2, what approximates to ESCR are provided. They are couched as Fundamental Objectives and Directive Principles of State Policy including political, social, economic, educational and environmental objectives. They are not strictly couched as rights, rather as duties of state. But the baffling point is the constant use of the word “shall” in their framing. In normal interpretative parlance, this imports an obligation. And the Constitution by S. 6 (6) (c) declares them non justiciable¹⁴. The implication is that legal actions cannot be founded on Chapter 2 of the Constitution alone.

The most pertinent sections are reproduced hereunder:

¹² Vienna Declaration and Programme of Action - product of the 1993 World Conference of Human Rights, para 5.

¹³ There is quite an impressive body of jurisprudence developed by the Committee on ESCR through the examination of States Parties reports and General Comments which have been adopted in elucidation of particular articles of the International Covenant on Economic, Social and Cultural Rights (ICESCR). General comments have been adopted on such rights as adequate housing, food, education, forced evictions, the rights of older persons, etc. The International Labour Organisation has also generated a lot of jurisprudence on labour and associated rights.

¹⁴ **Archbishop Okogie v AG Lagos State** (1981) 2 NCLR 337 following the Indian case of **State of Madras v Champakan** (1951) SCR 252.

13. 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 conform to, observe and apply the provisions of this Chapter of the Constitution.

14.- (1) The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.

(2) It is hereby accordingly declared that:

(a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.

(b) the security and welfare of the people shall be the primary purpose of government.

15 (3) For the purpose of promoting national integration, it shall be the duty of the State to-

(a) provide adequate facilities and encourage free mobility of people, goods and services throughout the Federation;

(b) secure full residency rights for every citizen in all parts of the Federation;

(c)

(d)

(5) The State shall abolish all corrupt practices and abuse of power.

16.- The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution-

(a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self reliant economy;

(b) 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 and equality of status and opportunity;

(c) without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage or operate the major sectors of the economy;

(d) without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

(2) The State shall direct its policies towards ensuring

(a) the promotion of a planned and balanced economic development;

(b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

(c) 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 of a group; and

(d) that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare of the disabled are provided for all citizens.

17.- (1) The State Social order is founded on the ideals of Freedom, Equality and Justice.

(2) In furtherance of the social order:-

(a) every citizen shall have equality of rights, obligations and opportunities before the law;

(b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced;

(c) governmental actions shall be humane;

(d) exploitation of natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented; and

(3) The state shall direct its policies towards ensuring that-

(a) all citizens, without discrimination on any group whatsoever, have the opportunity of securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;

(b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;

(c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;

(d) there are adequate medical and health facilities for all persons;

(e) there is equal pay for equal work without discrimination on account of sex, or any other ground whatsoever;

(f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect;

(f) provision is made for public assistance in deserving cases or other conditions of need; an

(h) The evolution and promotion of family life is encouraged.

18. (1) Government shall direct its policy towards ensuring that there are adequate and equal educational opportunities at all levels.

(2) Government shall promote science and technology;

(3) Government shall strive to eradicate illiteracy; and to this end government shall as and when practicable provide-

(a) free compulsory and universal primary education;

(b) free secondary education;

(c) free university education; and

(d) free adult literacy programme.

20. The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

21. The State shall:-

(a) protect, preserve and promote Nigerian cultures which enhance human dignity and are consistent with the Fundamental Objectives as provided in this Chapter; and

(b) encourage development of technological and scientific studies which enhance cultural values.

Under the Second Schedule and Item No. 60 in the Exclusive Legislative List, it is within the legislative competence of the National Assembly to establish and regulate authorities for the Federation or any part thereof to promote and enforce the observance of Fundamental Objectives and Directive Principles of State Policy.

A. Analysis Of The Provisions

The 1999 Constitution declared the ESCR contained in Chapter 2 non justiciable by S (6) (c) ¹⁵ when it stated of judicial powers as follows:

...shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this Constitution.

But this is not a blanket provision because it starts with the words..."except as otherwise provided by this Constitution" This authorizes justiciability of any

¹⁵ S.6 (6) © of the 1999 Constitution.

content of Chapter 2 if the Constitution permits in another section or where statutory provisions create legal rights,¹⁶ such laws will not be affected by the non justiciability of Chapter 2. But no cause of action can be founded under Chapter 2 of the Constitution.¹⁷

It has been shown by a number of scholars that ESCR qualify as rights properly so called from every conception of the word right.¹⁸ The following statements appear apt to describe the debilitating fixation and the dilemma of the authors of the Constitution over what to do with ESCR.

A close reading of the Constitution reveals that it acknowledges ESCR as creating known legal obligations which should form part of the civil rights of the citizen. But in a conclusion inconsistent with the premises, it unilaterally penciled them off as unworthy of judicial consideration. The non provision of direct judicial remedies is not evidence that ESCR provided in Chapter 2 by their very nature cannot be subject to judicial adjudication. This position stultifies the development of ESCR jurisprudence at the national level.¹⁹

...denying an individual or group the ability to make constitutional claims against the state with respect to nutrition, housing, health and education excludes those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustices.²⁰

It appears that the framers of the Constitution were only concerned with the fulfillment bound obligations of ESCR.²¹ They looked at ESCR from the immediate perspective as against the prevailing “progressive realization” principle. For instance, they could have understood the right to adequate housing as “housing on demand” or health as free medical services or education as free education thereby misunderstanding the core and basic elements of the rights. The foregoing leads this discourse to an examination of the nature of obligations in matters of ESCR. Before examining the nature of these obligations, it is imperative to review Nigeria’s ESCR obligations under the African Charter on Human and Peoples Rights (African Charter - which is part of our domestic law) and under other statutory provisions.

¹⁶ Joseph Otteh termed the blanket statement that ESC rights are not justiciable as a “source of law misconception” in the *Challenge for Socio-Economic Rights Litigation in Nigeria, Hurdles and Prospects in ESC Rights-Developing a Training Agenda* for Nigeria (Legal Research and Resource Development Centre) Roundtable Series, 1998.

¹⁷ *Archbishop Okogie vs Attorney General, Lagos State* (1982) 2 NCLR307

¹⁸ See Professor Osita Eze in *Study on the Right to Education in Nigeria*, Shelter Rights Initiative, 1998; Osita Eze and Eze Onyekpere in *Study on the Right to Health in Nigeria*, Shelter Rights Initiative, 1998; Scott Leckie in Another Step Towards Indivisibility-Identifying the Key Features of Violations of Economic, Social and Cultural Rights in Human Rights Quarterly Vol. 20, No 1 1998.

¹⁹ Eze Onyekpere in *Justiciability of Economic, Social and Cultural Rights*, LASER Contact, Vol.2 No. 1, Shelter Rights Initiative, 1997; Also Osita Eze and Eze Onyekpere at page 36 para 62 of the *Study on the Right to Health*, supra.

²⁰ Craig Scott and Patrick Maclem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a new South African Constitution,” 141 U.P.A. REV. 1(1992)

²¹ Other obligations exist notably to respect, protect, and promote ESC rights.

B. The African Charter on Human and Peoples Rights and Other Statutes

A number of international standards have made provisions for ESCR²² but the African Charter stands out since it has been domesticated as part of our municipal laws.²³ This was done in compliance with S. 12 Of the Constitution which requires domestication before a treaty can become part of domestic laws. The Charter has made provisions for the rights to work under equitable and satisfactory conditions and to receive equal pay for equal work,²⁴ the right to enjoy the best attainable state of physical and mental health,²⁵ the right to education,²⁶ and protection of the family, women and children,²⁷ The Charter did not however provide for the predominant progressive realization clause found in the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁸ However, the provisions of its articles 60 and 61²⁹ in interpretative parlance lays it open to the adoption of the progressive realization approach.

In accordance with the relevant authorities of *Ogugu v The State*³⁰ and *Abacha v Fawehinmi*³¹ the provisions of the African Charter are justiciable and enforceable before Nigerian courts notwithstanding the provisions of Chapter 2 of the Constitution.. In *Ogugu v The State*³² it was held of the African Charter that:

...there is no lacuna in our laws for the enforcement of its provisions which like all other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto.

In *Abacha V Fawehinmi*,³³ it was held that:

The individual rights contained in the African Charter on Human and Peoples Rights are justiciable in Nigerian courts. Thus, the articles of the Charter show that individuals are assured rights which they can seek to protect and remedies can be sought and if the case is established, enforced.

²² The most prominent is the International Covenant on ESC rights.

²³ Found in Cap A9 of the Laws of the Federation, 2004.

²⁴ Article 15 of the African Charter

²⁵ Ibid article 16

²⁶ Ibid article 17

²⁷ Ibid article 18

²⁸ Article 2 of the ICESCR

²⁹ Articles 60 and 61 calls for reliance and inspiration in the interpretation of the Charter on international human rights jurisprudence and African practices consistent with international norms on human rights.

³⁰ (1994), 9 NWLR (PL 366). 1

³¹ (2000) NWLR (PL 660) 228

³² Supra

³³ Supra

Section 15 (1) of the Child Rights Act provides that every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government of Nigeria to provide such education. This provision finds anchor in section 18 of the constitution on the educational objectives of the state. The Corrupt Practices and Other Related Offences Act No.5 of 2000³⁴ which seeks to prohibit and prescribe punishments for corrupt practices and other related offences finds justification in section 15 (5) of the Constitution which enjoins the state to abolish corrupt practices³⁵. The National Health Insurance legislation seeks to ensure that there are adequate medical and health facilities for all persons³⁶.

Another Act which finds anchor in Chapter 2 of the Constitution is the Fiscal Responsibility Act (FRA) 2007. It is made as an Act to provide for prudent management of the nation's resources, ensure long term macroeconomic stability of the national economy, secure greater accountability and transparency in fiscal operations within a medium term fiscal policy framework, and the establishment of the Fiscal Responsibility Commission to ensure the promotion and enforcement of *the nation's economic objectives* and for related matters. Incidentally, the economic objectives which the FRA seeks to promote are found in the constitutional Fundamental Objectives and Directive Principles of State Policy which are stated by section 6 (6) (c) to be non justiciable.

The National Assembly is empowered under item 60 of the Exclusive Legislative List of the Constitution to make laws for the establishment and regulation of authorities for the Federation or any part thereof for the promotion and enforcement of the Fundamental Objectives and Directive Principles of State Policy. It has been stated by Supreme Court in *Attorney General Ondo State v Attorney General Federation* as follows³⁷:

The Constitution itself has placed the entire Chapter 11 under the Exclusive Legislative List. By this, it simply means that all Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to anyone of them through appropriate enactment as occasion may demand.

The Court further stated that the meaning of the word “establish” is clear enough and requires no further elaboration; it is however imperative to construe the expressions “regulate”, “promote” and “enforce” to determine their functions in item 60 (a). To regulate means to control, govern and direct the affairs of the authorities set up by the National Assembly to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in

³⁴ Cap C.31, Laws of the Federation of Nigeria, 2004.

³⁵ (2002), 6 SC (Pt.1), 1 or (2002) 9 N.W.L.R. (Pt.772) 222 at 391.

³⁶ Section 17 (3) (d) of the Constitution on the health objectives of the state.

³⁷ Per Uwaifo J.S.C. in *Attorney General Ondo State v Attorney General Federation* supra.

Chapter 2. To promote means such laws as will advance, further and contribute to the enlargement and growth of the Fundamental Objectives and Directive Principles. To enforce means to execute, make effective and compel obedience to the Fundamental Objectives and Directive Principles³⁸. Essentially, by the force of the FRA, the operationalisation of some provisions in the economic objectives has derived some measure of justiciability and indeed section 51 of the FRA adds the icing on the cake in the following words:

A person shall have the legal capacity to enforce the provisions of this Act by obtaining prerogative orders or other remedies at the Federal High Court, without having to show any special or particular interest.

Against the background of the foregoing, it can safely be stated that ESCR are not just justiciable on the basis of the Constitution but are justiciable if they are founded on the African Charter or any other justiciable national standard enacted by the National Assembly.

3. NATURE OF STATE ESCR OBLIGATIONS

In delineating the nature of state obligations in matters of ESCR, resort has to be made to the ICESCR which apparently is the most comprehensive ESCR standard that has been ratified by Nigeria. This is necessary for a proper understanding of the specific ESCR that can be tabled as candidates for constitutional recognition. The ICESCR states in article (2) 1:

Each State Party to the Present Covenant undertakes to take steps individually and collectively and through international assistance and cooperation especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means including particularly the adoption of legislative measures.

An examination of the operative phrases in this article will follow.

A. To The Maximum Of Available Resources

The phrase “maximum of available resources “ recognizes the difference in wealth and resources available to the different countries in the world who are State Parties to the ICESCR. In accordance with the Limburg Principles,³⁹ states are obligated regardless of economic development, to ensure respect for minimum subsistence rights for all. Resources include what can be sourced locally and from aid and general international cooperation. Resources could be

³⁸ See Sasegbon's *Encyclopedia of Nigerian Law and Practice*, First Edition, Vol. 4 Paragraph 185 at page 113.

³⁹ The Limburg Principles on the Implementation of ICECR, UN Document E/CN 4/1987/17

classified into different categories⁴⁰. For a state party failing to meet its obligations on ESCR to rely on lack of resources, it must show that every effort has been made to use all the resources at its disposal to satisfy the minimum ESCR obligation⁴¹. In times of grave economic crisis, vulnerable groups are still entitled to subsistence rights by the states adoption of low cost measures. The question of prioritizing the expenditure of the state becomes relevant here. It has been noted that corruption absorbs a lot of resources that could have been invested in housing, education, health, etc. In the circumstances, it would be problematic for Nigeria to plead the unavailability of resources as a reason for the non implementation of ESCR while refusing to plug the leaking pipes of corruption.

B. To Achieve Progressively The Full Realization Of ESC Rights

The progressive realization phrase is not to be interpreted to mean an indefinite postponement of action to realize ESCR. Rather it obliges states parties to move immediately and as expeditiously as possible towards the realization of ESCR. The obligation exists independently of increase in resources; requiring effective use of available resources and developing societal resources for the realization of ESCR⁴². The concept of progressive realization is a recognition of the fact that full realization of ESCR will generally not be achieved in a short time⁴³. However, the rights guaranteed by the following provisions of the ICESCR do not require progressive realization but are capable of immediate implementation⁴⁴.

Article 3 on non discrimination;

Article 7 (a) (i) on fair wages and equal remuneration for work of equal value without discrimination;

Article 8 on trade union rights including the right to strike;

Article 10 (3) on special measures for the protection of the health and morals of the child;

Article 13 (3) (a) on the right of parents to choose the kind of education suitable for their children and the right to establish and run educational institutions.

⁴⁰ Resources have been classified into human, technological, information, natural and financial resources; see Roberts E. Robertson *Measuring State Compliance with the Obligation to Devote the Maximum of Available Resources to Realising Economic, Social and Cultural Rights* (1994) 16 HUM RTS.Q 693, 695-697.

⁴¹ See General Comment No. 3 of the UN Committee on ESCR, adopted at the Fifth Session of the ESCR Committee in 1990, UN Doc E/199/123, Annex 111, para 10.

⁴² See Principles 21-24 of the Limburg Principles.

⁴³ See para 9 of General Comment No. 3 of the UN Committee on ESCR.

⁴⁴ Para 10 of General Comment No.9 of the ESCR Committee on the Domestic Application of the ICESCR adopted December 3 1998; UN document E/C.12/1998/24.

C. To Take Steps... By All Appropriate Means Including Particularly The Adoption Of Legislative Measures

The phrase recognises the need for the state to take deliberate, concrete and targeted steps which are as clear as possible towards meeting the obligation to protect ESCR.⁴⁵ It acknowledges legislation as an important step while not limiting the steps to be taken by states parties to legislation alone. It is expected that state parties before ratification or immediately after ratification of the ICESCR should bring their domestic law in conformity with the requirement of the Covenant. Other means to be adopted by the state may include administrative, judicial, economic, social and educational measures consistent with the nature of ESCR⁴⁶. The State is also under an obligation to provide an effective remedy to persons whose ESCR have been violated and this may include judicial remedies. States enjoy a margin of discretion in the selection of the means and methods for implementing obligations on ESCR under the ICESCR. This is also the case for many civil and political rights⁴⁷.

While the most appropriate means of achieving the full realization of ESCR will inevitably vary significantly from one state party to another, the ICESCR clearly requires that each state party take whatever steps that are necessary for that purpose.

It is imperative to point out that violations of ESCR whether directly perpetrated by the state (action) or by private entities which could have been prevented by the state (omission) engages the states responsibility. The state is obligated to prevent, investigate and punish any human rights violation carried out in its territory not only by the acts of public officers but also directly resulting from acts not directly imputable to officers of the state. This has been aptly captured in the following words⁴⁸:

..to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out investigations of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victims adequate compensation.

⁴⁵ General Comment No. 3 of the UN ESC Rights Committee (Supra).

⁴⁶ Principle 17 of the Limburg Principles.

⁴⁷ Guideline 8 of the Maastricht Guidelines on Violations of ESCR developed by the Experts Meeting held from January 22-26 1997 at the instance of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute of Human Rights (Cincinnati Ohio, USA) and the Centre for Human Rights of the Faculty of Law of the Maastricht University (The Netherlands).

⁴⁸ **Velasques Rodrigues** case- Inter American Court of Human Rights of July 29 1988, 1 ACHR series C, Decisions and Judgements No.4, paras 174-175 or (OAS/ser.I/V111 19, doc 13 1998, para 174. The position in this case can be rightly asserted to be *jus cogens*.

In accordance with Maastricht Guidelines, there are three layers of obligations in matters of ESC rights: obligations to respect, protect and fulfill. Like civil and political rights, ESCR impose three different types of obligations on states: the obligations to respect, protect and fulfill. Failure to perform any one of the three obligations constitutes a violation of such rights. The obligation to respect requires states to refrain from interfering with the enjoyment of ESCR. Thus the right to housing is violated if a state engages in arbitrary forced eviction. The obligation to protect requires states to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to just and favorable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation of the right to health⁴⁹.

D. The Minimum Core Content Of ESC Rights

There is a duty to satisfy what the ESCR Committee has identified as the minimum core obligations of the Covenant's articles to wit; a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights⁵⁰. The Committee went ahead to state that if the ICESCR were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. Thus, the minimum core obligation is the threshold below which no state will be allowed to descend. It is an obligation which must be met regardless of resources available to the state.

Lack of access to resources has been touted as one of the main reasons for the non implementation of ESCR. Although this argument to a great extent lacks merit since no human rights is cost free, it is pertinent to point out the duties to respect and protect ESCR can be implemented without expending too much resources. The obligation to respect is a negative duty (freedom from forced eviction requires no resources) while the obligation to protect imposes no greater burden than that incurred through the normal law enforcement mechanism. It is only fulfillment bound obligations that directly require resources to implement. In a state like Nigeria, proper management of resources and mobilization of manpower can go a long way in addressing the problems raised by lack of resources.

In accordance with the Maastricht Guidelines, there is a distinction in the minimum state obligations in obligations of conduct and obligations of result:

The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health for example, the obligation of conduct could involve the adoption and implementation of a plan of

⁴⁹ See Guideline 6 of the Maastricht Guidelines.

⁵⁰ See General Comment No. 3 (*supra*).

action to reduce maternal mortality. The obligation of result requires states to achieve specific targets to achieve a detailed substantive standard. With respect to the right to health, for example, the obligation of conduct requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference of Population and Development and the 1995 Beijing Fourth World Conference on Women.

4. ARGUMENTS AGAINST JUSTICIABLE CONSTITUTIONALISATION OF ESCR AND RESPONSES TO THEM

It is important to keep in view some conceptual biases against constitutionalising ESCR. A learned commentator⁵¹ has listed them to include allegations that these rights are expensive to implement; the courts do not have adequate information and expertise to make reasoned decisions on them; these rights are rather vague and unclear and to enforce them will open a flood gate of litigation. They have also been stated not to be real rights but mere socialist ideology and aspirations. Despite the great advocacy debunking these obvious lies and unnecessary intellectual cobwebs⁵², the arguments against ESCR came up strongly in the Great Debate for the 1979 Constitution⁵³. And the 1999 Constitution more or less reproduced the 1979 Constitutional Bill of Rights and Fundamental Objectives and Directive Principles of State Policy. These arguments have even been re-echoed from the ivory tower⁵⁴ as follows:

So much progress remains to be made around the world in securing and implementing these basic rights (civil and political) that we may have to be somewhat skeptical about other rights claims that may tend to divert attention and energy from these basic rights.

The summary of the arguments against ESCR are as follows:

⁵¹ Without affirming them to be true; See Professor Yemi Osibanjo in Chapter One of *Economic, Social and Cultural Rights: Developing a Training Agenda*; Legal Research and Resource Development Centre, Roundtable Series, 1998.

⁵² In describing the recommendations of the Constitution Drafting Committee of the 1979 Constitution's report on the Fundamental Objectives and Directive Principles of State Policy, Chief Obafemi Awolowo had stated that the quality of the social objectives are reduced to worthless platitudes and hollow admonitions which should have no place in a Constitution which is first and last, a legal document whose provisions must be *ipso facto* justiciable and legally enforceable. See the *Great Debate- Viewpoints on the Draft Constitution*, a Daily Times publication, 1976/77 edited by Walter Ofonagoro *et al*, pages 2-3.

⁵³ The Great Debate (*supra*), selections 10 and 11 by Professor Nwabueze, see generally pages 1-83.

⁵⁴ Anthony D'Amato, *Letter from the Chair, Human Rights Interest Group*, cited with approval by Scott Leckie in *Identifying Violations of the Covenant on Economic, Social and Cultural Rights*, p.84, Human Rights Quarterly, Vol.20, No.1, February 1998.

ESCR V Civil and Political Rights

Positive	v	Negative
Resource Intensive	v	Cost Free
Progressive Realisation	v	Immediate Realisation
Vague	v	Precise
Unmanageably Complex	V	Manageable
Ideologically Divisive/ Political	v	Non ideologically Divisive/Non Political
Non Justiciable	v	Justiciable
Aspiration or Goals	v	Legal Rights
Undermines Separation of Powers	v	Supports Separation of Powers

It is submitted that most of these cleavages are products of misunderstanding of the very nature of ESCR. They are more or less sweeping generalizations that do not address specific issues raised by the need to protect ESCR. In as much as resources are needed to provide free basic education, so are they needed to meet the right to speedy trial, an aspect of the right to fair hearing. Judges have to be paid, courts have to be equipped and the law enforcement agents paid and mobilized to ensure the presence of the accused in criminal trials.

In terms of the first critique, there are a number of ESCR that do not call for positive action. Recalling the three layered duty of state in ESCR, the obligation to respect is in most instances a negative obligation to refrain from the violation of existing rights. Examples include the right to trade unionism and the right to strike, refraining from the practice of forced evictions and the non discrimination provisions of ESCR. For these negative ESCR, immediate implementation as against progressive realization is required. Thus progressive realization is not required in all cases. Issues pertaining to the minimum core content of ESCR are also obligations that have to be met immediately.

The issue of ESCR being politically or ideologically divisive begs the question. Which human right or fundamental freedom is not based on a value system? Most human rights flow from an ideology of sorts that has emerged, crystallized and solidified over the years. Which right was given freely by the powers that be at any historic time? Were human rights not the products of popular struggles? Are many civil and political rights not the products of the capitalist system of

production and governance? However such an ideological misconception misses the point that most human rights including ESCR are anchored on the concept of human dignity and the need to enhance it.

To state that ESCR are non justiciable and therefore not real rights is a mistake based on what has been termed the source of law misconception⁵⁵.

When lawyers classify socio economic rights as unjusticiable, they confuse in my mind two important rights bearing normative orders - the constitution as a rights founding source on the one hand and legislation as a rights empowering source on the other.

Although fundamental rights claims are often founded on the authority of the Constitution, there is no requirement that this must invariably be so. Constitutional protection of rights may offer the best guarantees but sometimes the Constitutions themselves trail social development. New laws may sometimes be used to found new legal claims arising from a states greater capacity and ability to realise human rights.

Therefore while the justiciability scrutiny may be placed over socio economic rights claims arising qua the Constitution, it would not be relevant for socio economic rights claims founded on any other legal crucible outside the constitutional document. If any other legal instrument offers an enhanced form of rights protection than the Constitution, that instrument is unhindered by the Constitution - attaching justiciability ouster.

Although the Constitution declares its ESCR as non justiciable, there is nothing inherent in their nature that makes them non justiciable. It is not easy to fathom why a state like Nigeria which has ESCR obligations under the ICESCR after domesticating the African Charter on Human and Peoples Rights would go ahead and declare its constitutional ESCR non justiciable.

As to the argument that ESCR are vague, it is a fact that since Nigerian Constitutions failed to give justiciable status to ESCR, the development of ESCR jurisprudence has been relatively stunted when compared to civil and political rights. Bare legal provisions of constitutions and statutes do not have fixed meanings until the courts pronounce on them and the courts are charged with delineating the contours of rights. But if as obtains in Nigeria, there is a mistaken notion of the role of the judiciary in promoting ESCR and the courts refrain from their adjudicatory duty, the argument cannot blame the rights bearing normative orders. It is also pertinent to mention that this argument tends to be oblivious of the emergent jurisprudence developed by the UN Committee on ESCR through General Comments and examination of states parties' reports.

⁵⁵Joseph Otteh in *the Challenge for Socio Economic Rights Litigation in Nigeria, Hurdles and Prospects in ESCR Developing a Training Agenda* (supra).

On the allegation that enforcement of ESCR will open a flood gate of litigations, it is submitted that in a democracy, it is better to open the flood gate than to allow violent outbursts and other uncivilised methods of ventilating grievances or expressing dissent. Such uncivilized methods may lead to anarchy⁵⁶ as currently being witnessed in the Boko Haram saga, the relatively abated Niger Delta crisis, kidnappings and other sheer criminality.

There is also the allegation that judicial intervention in a constitutional ESCR order will violate the principle of separation of powers. The argument is that policy making and implementation including budgetary issues are best left to the legislature and executive respectively. And that courts lack the expertise and do not have the necessary information for such judicial intervention. However, what is required in this new constitutional framework is not for the courts to start creating new ESCR and policies or ordering the course of budgetary appropriation, but for clear duties of state and individual and collective rights to be stated in the Constitution and the courts will still be charged with their day to day adjudicatory tasks. The South African constitutional adjudicatory experience bears this out⁵⁷. Further, if there is the need for expert or technical advice, the Indian adjudicatory experience⁵⁸ has shown that there is nothing wrong with a court appointing a technical committee or experts and using their opinion and services to ensure that citizens get social justice. It is traditional in common law countries for experts to assist the courts in technical matters to arrive at just decisions.

Some scholars have stated that ESCR are not rights properly so called; it pertinent to analyse the rights framework and to determine the nature and make-up of a right. A right properly so called invariably consists of eight concurring elements to wit⁵⁹;

- ❖ A specification of the class of right holders;
- ❖ A specification of the content of the right or an account of what goods, interests or capacities the right protects;
- ❖ A specification of the class of addressees of the right, that is the class of moral agents against whom claims can be addressed or who can be said to bear responsibilities and duties correlative with the right;

⁵⁶ See Chief Justice Fatai Williams' position adopting the broad view on *locus standi* in **Adesanya v The President** (1981 NSCC, Vol 12, 146.

⁵⁷ See **Grootboom v Oostenberg Municipality** 2000 (3) BCLR 2777(c); **President of the Republic of South Africa & Anor v Hugo** 1997 (6) BCLR 708; **Soobramoney v Minister of Health (Kwa Zulu Natal)** 1997 (12) BCLR 1696 (CC).

⁵⁸ **M.C Mehta v Union of India** (1998) 6 SCC 63; **Balco Employees Union v Union of India** (2002) 2 SCC 333; **Peoples Union for Civil Liberties v Union of India** (2001) 5 SCALE 303, (2001) 7 SCALE 484.

⁵⁹ M.E. Winston, (1993), International Institute of Human Rights, Strasbourg, Collection of Lectures at page 57.

- ❖ An account of the specific duties or social responsibilities correlative with the right;
- ❖ A specification of the scope of the right, its defeasibility conditions or the range of specific cases or instances to which the right properly applies;
- ❖ Account of the weight of the right vis a vis other rights and considerations of social utility including conditions of derogability and other sources of limitation on the fulfillment of the right;
- ❖ A source of validation or justification of the right in terms of the ultimate values or interest which it serves to protect, in the case of moral rights, or its legal basis in the case of legal rights;
- ❖ An account of the right in terms of its methods and mechanisms of social implementation or fulfillment
- ❖ A right in terms of an account of the ways in which right holders can claim their right and gain recognition of their claims thereby enjoying the protection offered by the claim.

Let us examine an ESCR provision to determine whether it possesses the afore-listed attributes. Section 15 (1) of the Child Rights Act provides that every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government of Nigeria to provide such education. There is a specification of the right in terms of clear entitlements for the Nigerian child. Government is the addressee in terms of bearing obligations to fulfill the right with specific duties to make education accessible, affordable and of the right quality. The scope of the right thereby created is focused on basic education for the child. The right has a defeasibility condition found in section 15 (7) of the Act which states that the provisions of the section are not applicable to children with mental disabilities. It has a source of validation in the education policy of government and its legal basis is found in the fact that it is an Act of the National Assembly. The methods and mechanisms of social implementation can be found in the budget, the works of the various Ministries of Education and other ministries, departments and agencies of government in the educational sector. From the foregoing, it is clear that a typical ESCR possess all the qualities of a right properly so called with the exception of certain instances where constitutional justiciability has been denied.

5. THE BASIS FOR CONSTITUTIONAL JUSTICIABILITY OF ESCR

A. To implement Treaty Obligations

Nigeria has ratified a plethora of international treaties that contain ESCR and these include the International Covenant on ESCR, the Convention on the Elimination of all Forms of Discrimination Against Women, Convention on the Rights of the Child, etc. It has also ratified the African Charter on Human and Peoples' Rights which it has domesticated. Despite these ratifications, the provisions of the Fundamental Objectives and Directive Principles of State Policy which reflect the socio economic aspirations of the Nigerian people are by s.6(6) (c) of the 1999 constitution non justiciable and cannot found actions in law. This has constituted a stumbling block to the protection of ESCR in Nigeria. A State party to a treaty is barred from invoking its domestic law to defeat its international obligations as contained in a treaty - S.27 of the Vienna Convention on the Law of Treaties. If the rules were otherwise, the most simple way of avoiding treaty obligations is to enact domestic law which is inconsistent with the obligations - exactly what Nigeria has done in her Constitution.

States are expected to bring their domestic law in conformity with their international obligations either shortly before or immediately after ratification of a treaty. States are also expected to take progressive legislative, administrative and policy actions to ensure the realization of the intendments of treaty obligations as against retrogressive measures of the type found in Chapter 2 of the Constitution. S.12 of the constitution worsens matters by making cumbersome provisions for the implementation of treaties⁶⁰.

Nigeria is under obligation to modify her domestic law to give effect to treaty obligations and this chance has been offered by the constitution review process. It is against the principles of the common law doctrine of estoppels to approbate and reprobate at the same time - ratify treaties, domesticate some and make domestic laws that negate them.

B. Resolving Social Conflicts

Nigeria has been witnessing agitation of various component units of the Federation alleging marginalization and underdevelopment. What is at stake? – vital livelihood resources, access to communal and social infrastructure. There is the Boko Haram saga, the relatively abated Niger Delta crisis, the Eastern part of the country states that it is marginalized and the North is underdeveloped, yet Nigeria has been blessed with hundreds of billions of dollars realised from the sale of petroleum in the last 48 years. If education, housing, health and social

⁶⁰ No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly and it needs the ratification of a simple majority of state legislatures before it is presented for presidential assent.

security etc have been constitutionally guaranteed, these problems would have abated.

C. Setting Constitutional Responsibilities

There is so much resources lying idle at the various tiers of government, the decision on how they are to be spent is now left to the whims and caprices of the executive (and may be the legislature). Empirical evidence has shown that uncontrolled power and unguided decision making on the expenditure of state resources have led Nigeria to its present sorry state. There is therefore the need to set definite constitutional responsibilities for the legislature and the executive⁶¹. It is better for the commonwealth of Nigeria to decide priority areas than for its leaders to be left to imagine what our priorities are.

Information emerging from the probes set up by the National Assembly, the cases filed by Economic and Financial Crimes Commission against former public office holders and the monies so far recovered by the EFCC and the ICPC show that resources that should have been constitutionally delimited have been frittered away. The Fiscal Responsibility Act grounds itself in the Fundamental Objectives and Directive Principles of State Policy. However, it is set to achieve fiscal prudence while there are few laws specifically enacted to achieve social responsibility as envisaged by the Fundamental Objectives.

D. Development of Jurisprudence

In matters of justiciability of ESCR, it is imperative that the judiciary is allowed to develop jurisprudence which will ultimately improve the good governance and welfare of the people. The prevalent approach of seeking judicial enforcement of ESCR through an expansive interpretation of civil and political rights has obvious limitations and it does not work in all circumstances.

E. Full Implementation of National Laws

The Constitution framers also forgot that Nigeria has not only ratified the African Charter on Human and Peoples' rights but also domesticated it as part of our national law. To the extent that the African Charter is still part of our domestic law, it is beholden on Nigeria to ensure the fulfillment of all obligations under the charter particularly in the light of the decision of the Supreme Court in ***Abacha v Fawehinmi***⁶².

⁶¹ A government with so much constitutional responsibilities would not indulge in such wasteful spending as happened since the return to civil rule in 1999.

⁶² Supra.

F. Reflecting the Popular Will

The constitution of every nation is supposed to be the product of the popular will, reflecting the wishes and aspirations of the people, the notion of the people of the concept of a basic document to guide them and their government. In the words of a jurist, do the provisions of the 1999 constitution on ESCR reflect the spirit of the nation on the subject?⁶³ As such, if democracy is still a question of one person one vote, it is projected that if a poll were to be taken on the question of constitutional guarantee of ESCR, it would surely be returned in the positive.

The constitution should be a social document that aims at satisfying social wants - the claims, demands and expectations involved in the existence of a civilized society, by giving effect to as much as possible, with the least sacrifice, or such claims given effect by an ordering of human conduct through political organized society⁶⁴. A constitution without a proper social engineering role is a worthless document.

G. No Inherent Flaws in ESCR

There is nothing inherent in the nature of ESC rights that makes them ineligible for constitutional protection as claimable rights that can be enforced. Examples from the South African jurisdiction show this to be true. The respect and protection bound obligations of ESCR do not require progressive realization and can be made justiciable while the fulfillment bound obligations would require progressive realization and can also be justiciable. Statutory steps have already been taken for the fulfillment of ESCR; they need elevation to fundamental constitutional guarantees.

6. CONCLUSION: THE FRAMEWORK FOR JUSTICIABLE CONSTITUTIONALISATION OF ESCR

In devising a framework for identifying ESCR which would be candidates for justiciable constitutional recognition, it is important to get back to the concept of state duties in ESCR particularly, the concept of the minimum core obligation which is in essence the nature and essence of an ESCR- the essential elements without which a right loses its *righthood* and substantive significance. It is the floor below which conditions should not be permitted to fall. Below this floor, the state will be deemed to be in violation of its ESCR obligations.

⁶³ Von Savigny - *On the Vocation of our Age for Legislation and Jurisprudence* (1831) Haywood Transl, p.27 of the historical school of jurisprudence.

⁶⁴ See Dean Roscoe Pound of the social engineering jurisprudence school of thought in the *Philosophy of Law* (1954) p, 47. See further Rudolf von Jhering who asserted that the state exists to achieve social purposes which cannot be achieved by the free interplay of individuals and groups in *Law as a Means to an End* (Transl by 1 Husik) 1924,

The recommendation is that the minimum core content of ESCR should be presented for constitutional recognition. This brings us back to the duties to respect, protect and fulfill and the ensuing obligations of conduct and obligations of result.

The duty to respect enjoins states to refrain from interfering with the enjoyment of already entrenched rights. The issue of freedom from forced evictions comes in handy and the need for the state not to interfere to destroy or impede access to already existing rights. The respect bound obligations may not require the expenditure of resources and are negative obligations. As such, they can be categorized as part of the minimum state obligations. Both obligations of conduct and obligations of result related to the respect bound obligations are as such candidates for constitutional recognition. The duty to provide a judicial remedy in the event of state violation of entrenched rights is apposite here.

Non discrimination has almost assumed the status of *jus cogens* as a peremptory norm of customary international law. Therefore, issues of non discrimination in access and enjoyment of government facilities will also be part of the basic state obligations and deserve constitutional recognition.

The protection bound obligations are to an extent negative and may be notionally cost free - to prevent violations of ESCR by third parties. However, in most instances, states need to create a policy, legislative, regulatory, policing, judicial and enforcement mechanisms to ensure that third parties do not violate ESCR. In the real world, these interventions cost money and other resources. But most of them form part of the core functions of government in the sense of maintaining law and order and securing lives and property. Thus creating standards, enforcing them and preventing third parties from violating ESCR and protection bound obligations appear to be good candidates for constitutional recognition. Providing a judicial remedy in the event of violations by third parties is a basic component of this obligation. This is so both in terms of the ensuing obligations of conduct and obligations of result.

The fulfillment bound obligations appear more problematic because of the need for resources as they are seen as positive obligations. They require states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of the rights. It has some semblance with the protection bound obligations in the sense of policy, legislative, regulatory, policing, judicial and enforcement mechanisms needed for the fulfillment of rights. It is submitted that all fulfillment bound obligations that are part of the fundamental duties of a government should be candidates for constitutional recognition. It is further submitted that from Nigeria's resource profile, a number of ESCR demanding positive state intervention can be constitutionalised. For instance the right to free basic education, preventive health care and environmental health rights, essential primary health care including free

consultation in government hospitals, emergency treatment, immunization from preventable diseases, free maternal and reproductive health care, etc.

Resources for the fulfillment of ESCR need not come from existing government sources alone; taxes can be raised, private sector actors may be under obligation to pay some costs, contributory schemes can be devised, etc. Budget leakages can be plugged and corruption minimized to free resources towards the fulfillment of these rights.

On a procedural issue, for the enforcement of these rights, access to the courts should be liberalized by the Constitution as against the present restrictive *locus standi* rules adopted by the courts. Finally, selected ESCR can be constitutionalised particularly those bordering on the minimum core obligations of the state and the obligations to respect and protect the rights.