

# THE NIGERIAN JURIDICAL REVIEW

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**CLEARING THE HURDLES: A THERAPEUTIC EXAMINATION OF THE CHALLENGES TO THE PROTECTION AND ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS\*\*****Abstract**

*Experience shows that in practice, most member-States of the UN and signatories to the ICESCR treat ESC rights as inferior step-cousins of their civil and political counterparts, resulting in the second-class treatment of the former by member-States. States therefore, often fail in their treaty obligation to effectively protect and enforce these rights, canvassing a plethora of seemingly plausible arguments to justify their failure. This article critically discusses some of the obstacles militating against the effective protection and enforcement of economic, social and cultural rights with a view to proffering solutions to them. It also proposes to debunk the conventional arguments canvassed by States and some human rights scholars against the full protection and enforcement of these rights. The article posits that civil and political rights are better enjoyed in an atmosphere of full protection and enforcement of economic, social and cultural rights. Any negative treatment of ESC rights impacts on the civil and political rights as the level and quality of enjoyment of the latter is a dependent variable of the level and quality of enforcement of the former.*

**1. Introduction**

The Universal Declaration of Human Rights (UDHR), 1948, recognizes two sets of human rights: civil and political rights, as well as economic, social and cultural rights (ESC rights). The provisions of

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~ D. U. Ajah & I. Nnaji**

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this Declaration were later transformed into legally binding obligations in two separate covenants (International Covenant on Civil and Political Rights, ICCPR, and International Covenant on Economic, Social and Cultural Rights, ICESCR). These covenants, together with the UDHR, constitute the International Bill of Rights. The official position of not only the UN but also that of all the member countries of this global body, dating back to the UDHR and reaffirmed in a countless number of resolutions ever since, is that these two sets of rights are 'universal, indivisible and interdependent and inter related'<sup>1</sup>.

Experience and observation of the common practice by member countries and signatories to the Declaration and other resolutions tend to show, however, that beneath this formal consensus is a deep and enduring disagreement over the proper status of ESC rights. This has polarized the human rights world into two diametrically opposed views. At one extreme are those who hold the view that ESC rights are not even qualified to be described as rights at all and that ascribing to them that status would detrimentally affect the enjoyment of individual freedoms and provide an excuse to reduce the importance of civil and political rights. At the other extreme are those who vigorously canvass the opinion that these rights are, in fact, superior to civil and political rights both in terms of appropriate value hierarchy and in chronological terms<sup>2</sup>. According to Steiner and Alston, the majority of governments have rather taken a middle, and yet ambivalent, position in this disagreement: supporting the equal status and importance of ESC rights and civil and political rights, and, at the same time, failing to take particular steps to entrench this support constitutionally, to legislatively or administratively recognize specific ESC rights as human rights, or to provide effective means of redress to individuals or groups alleging violations of these rights. It is common knowledge, therefore, that, in spite of the apparent claim of equality between these two groups of rights, many governments today still see ESC rights as inferior step-cousins of their civil and political counterparts.

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<sup>1</sup> See para. 5 of the Vienna Declaration and Programme of Action, 1993.

<sup>2</sup> H.J. Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Clarendon Press, 1996) p. 256.

As a result of the second-class treatment of ESC rights, states and, indeed, the international community as a whole are more readily prepared to tolerate breaches of these rights than breaches of their civil and political counterparts. Yet, many states claim that they recognize and are committed to the enforcement of ESC rights, even as diseases, malnutrition, impoverishment, environmental degradation, illiteracy, homelessness and generally pitiable socio-economic conditions stare one in the face everywhere in such states. It has been rightly noted that in political terms, no group of states has consistently followed up its rhetorical support for these rights at the international level with practical and sustained domestic programs of implementation.<sup>3</sup> This poor attitude towards the protection and enforcement of ESC rights is traceable to a number of factors. These include the fallacious classification of human rights, the alleged differences in the legal nature and character of ESC rights and civil and political rights, alleged non-justiciability of ESC rights, ineffective domestic institutional mechanisms, official corruption and sheer lack of political will by governments, ambivalence and conspiracy by some industrialized countries, international financial institutions, economic globalization, and failure of non-governmental organizations. This article proposes to critically discuss these factors, prescribe the required therapies, debunking the traditional arguments usually advanced by states to explain away their unfriendly attitude towards the ESC rights.

## 2. Categorization Fallacy

One of the factors responsible for the second-class rating of ESC rights is the classification of human rights into different groups. Abdullahi A. An-Na'im<sup>4</sup> is of the view that the relegation of ESC rights to a lower class of human rights goes back to the division of the human rights proclaimed by the UDHR into two groups during a particularly hot phase of the Cold War in the early 1950s. That classification which An-Na'im describes as "clearly ideological and

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<sup>3</sup> *Ibid*, p. 267.

<sup>4</sup> Abdullahi A. An-Na'im, 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights' in Yash Ghai & Jill Cottrell(eds.) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) p. 12.



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political” was initially expressed in the adoption of two separate covenants with different formulations and implementation mechanisms, for each set of rights.<sup>5</sup> The dichotomy between these two sets of rights was given a greater impetus by the mounting Western-Eastern (Soviet) rivalry in their efforts to win over newly emerging states in Africa and Asia to their respective camps, with the Western European and North American governments and their allies emphasizing civil and political rights while the Soviet Bloc and some developing countries favoured ESC rights. Human rights scholars are of the opinion that this classification of human rights is both unjustifiable and fallacious since the original vision of the UDHR provided for an integrated, interrelated scheme of rights.<sup>6</sup> It has also been remarked<sup>7</sup> that the interdependence principle reflects the fact that the two sets of rights can neither logically nor practically be separated into entirely watertight compartments. Any attempt to draw a strict categorization or distinction between these rights definitely results in a false dichotomy as the rights and the obligations they impose form a seamless spectrum – they do not fall into different categories. The right to form trade unions, for example, is contained in the ICESCR<sup>8</sup> while the right to freedom of association (including forming or joining any trade union) is recognized in the ICCPR.<sup>9</sup> Similarly, while the right to education and the parental liberty to choose a child’s school as well as his religious and moral education are dealt with in the ICESCR,<sup>10</sup> everybody’s right to

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<sup>5</sup>*Ibid.* See also, Jack Donnelly, “Economic, Social and Cultural Rights: The Myth of Western Opposition,” (A paper presented at a Conference on “Economic, Social and Cultural Rights: Conceptual, Measurement and Policy Issues” at The Human Rights Institute, University of Connecticut, on 27 October, 2005) pp. 5 – 7.

<sup>6</sup> See for example Art. 28 of the UDHR which provides: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” For detailed information on the drafting of the UDHR see, for example, J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 2000) pp. 222 – 238.

<sup>7</sup> Steiner and Alston, above note 2, p. 263.

<sup>8</sup> Art. 8 ICESCR.

<sup>9</sup> Art. 22 ICCPR.

<sup>10</sup> Art. 13.

freedom of conscience and religion is recognized in the ICCPR.<sup>11</sup> Moreover, both Article 2 of the ICESCR and Article 26 of the ICCPR can be used in deriving the same right, namely, the prohibition of discrimination in relation to the provision of, and access to educational facilities and opportunities. The indivisibility and interdependence of human rights can be further illustrated by the fact that the right to freedom of expression will be the prerogative of the privileged few without a right to education that enables all people to benefit from that freedom. Conversely, a right to education is not meaningful unless a person also has the freedom to create knowledge and exchange information. Neither of these rights is practically useful for a person who lacks shelter or health care. This article respectfully shares the learned view of An-Na'im that the ideological and political basis of the classification of equally essential and interdependent rights tends to undermine the universality and diminish the prospects of political support for the practical implementation of all human rights, in general, and ESC rights in particular.<sup>12</sup> The indivisibility and interdependence of all human rights was also re-affirmed at the World Human Rights Conference held in Vienna in 1993.<sup>13</sup> It is gratifying to note that as the conceptual fallacy and practical difficulties in this classification became clearer over time, it was gradually abandoned in subsequent human rights treaties.<sup>14</sup>

Mario Gomez also notes that a consensus is gradually emerging in recent times among states and non-state actors that since all human rights are indivisible and interdependent, neither of the two

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<sup>11</sup> Art. 18.

<sup>12</sup> An-Na'im, above note 4, p. 12. See also The United Nations, *Economic, Social and Cultural Rights-Handbook for National Human Rights Institutions* (New York and Geneva: United Nations, 2005) pp. 7-9.

<sup>13</sup> See Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June, 1993. Available at <[www.unhcr.ch/humidocda/humidoca.nsf/\(symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/humidocda/humidoca.nsf/(symbol)/A.CONF.157.23.En?OpenDocument)>. Accessed on 15/09/2014.

<sup>14</sup> Such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1979, and the Convention on the Rights of the Child of 1990.

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categories of rights should be given priority over the other.<sup>15</sup> It is submitted, however, that these positive developments notwithstanding, the historical hangover of disregard for ESCR as a product of classification still persists like a stubborn boil and poses a serious challenge to the recognition, protection and practical enforcement of ESC rights.

**2.1 Alleged Differences in the Legal Nature of ESC Rights and  
that of Civil and Political Rights.**

Unduly overstressed, if fallacious, distinctions between civil and political rights and ESC rights with respect to their respective legal nature undermine effective action on ESC rights.<sup>16</sup> These fallacies often centre on distinctions such as the purportedly positive versus negative nature of the rights in the two categories, the allegedly cost-free nature of civil and political rights compared to the invariably resource-intensive content of ESC rights, the capacity of civil and political rights to be implemented immediately and the alleged purely progressive character of ESC rights.<sup>17</sup> Overcoming the falsehood of these arbitrary distinctions has remained a major task for ESC rights advocates.

The argument that all ESC rights are resource-intensive while civil and political rights are cost-free in implementation is misconceived.<sup>18</sup> The implementation of some civil and political rights requires financial expenditure on the part of government. The right to a fair trial and the right concerning periodic elections (that is

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<sup>15</sup> See Mario Gomez "Social Economic Rights and Human Rights Commissions" (1995) 17 *Hum. Rts. Q.*, No. 1, pp. 155-169.

<sup>16</sup> The United Nations, *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions*, above note 12, p. viii.

<sup>17</sup> See for example, E. Vierdag, "The Legal Nature of the Rights Granted by the International Convention on Economic, Social and Cultural Rights", 9 *Netha. Ybk. Int'l L.* 69 (1978) and Marc Bossuyt, "La distinction entre les droits civils et politique les droits économiques, sociaux et culturels", 8 *Human Rights. J* 783 (1975) both of which are cited and analysed in Steiner and Alston (eds.), above note 2, pp. 5-7.

<sup>18</sup> G.J.H Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of some Traditional Views" in P. Alston and K. Tomasevki (eds.), *The Right to Food* (Boston: M. Nijhoff, 1984) p. 97.

political participation) are just a few examples of such cost-implicating civil and political rights. This article respectfully associates itself with the informed opinion of Van Hoof<sup>19</sup> that the expenditure involved in, for instance, the conduct of free and secret elections or the setting up of an adequate judiciary and legal aid system are quite enormous. It has also been rightly noted that all rights(civil, political, economic, social or cultural) have cost.<sup>20</sup>

According to Nsongurua Udombana, liberty and security, arrest and detention, the rights of accused persons and the provision of fair trials all require substantial expenditure by the state in training and maintaining competent police forces, a responsible public prosecution service, and a competent, independent and impartial judiciary – as well as providing, where necessary, free legal assistance and court interpreters.<sup>21</sup> Also, the protection and enforcement of property rights require a detailed legislation and protection apparatus which the state sponsors. Furthermore, the right to free speech, which is generally regarded as immunity from intrusion, includes an obligation on the part of government to create conditions favourable to the freedom, such as police escort, police protection, *et cetera*.<sup>22</sup> In alliance with the above learned views, it is submitted that the cost-free/cost-intensive argument for which reason ESC rights are denied protection and enforcement by states does not hold water.

Akin to the above argument is the claim that civil and political rights require non-interference on the part of the state whereas the implementation of ESC rights requires active intervention by the state. The former are, therefore, said to create negative obligations whereas the latter create positive obligations. It is humbly submitted that this distinction is hardly sustainable. There exist several well-known examples of civil and political rights which require state

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<sup>19</sup> *Ibid.*

<sup>20</sup> Nsongurua Udombana, "All Rights Have Cost", *Vanguard*, 23 May, 2008, p. 54. See also K. O'Regan, "Introducing Socio-Economic Rights," *ESR Review* 1(4), 1999, p. 3. Available at [www.communitylawcentre.org.za/ser/index.php](http://www.communitylawcentre.org.za/ser/index.php). Accessed 21/11/2010; S. Holmes and C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999) p. 127.

<sup>21</sup> *Ibid.*

<sup>22</sup> Nsongurua Udombana, "All Rights Have Cost (2)", *Vanguard*, 6 June, 2008, p. 46.

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intervention.<sup>23</sup> It has also been remarked that neither ESC rights nor civil and political rights as a whole offer a single model of obligations or enforcement.<sup>24</sup> So, no particular right can be reduced to only a single kind of duty on the state, such as the duty to do, or not to do. Every human right imposes an array of positive and negative obligations. Similarly, not all the rights categorized as economic, social and cultural, fit the mould of state – intervention.<sup>25</sup>

Another constantly touted distinction between civil and political rights and ESC rights is in the nature of obligations imposed on states parties by the respective covenants. It is often argued that while the ICCPR imposes on the states parties obligations of immediate effect, the ICESCR imposes obligations of progressive realization which depend on the availability of resources.<sup>26</sup> This line of argument is further buttressed by making references to the terminologies used in describing the obligations of states in the respective covenants.<sup>27</sup> While the ICCPR contains terms like, “Everyone has the right to ...”, or “No one shall be ...,” the ICESCR in its parallel formula says, “The states parties to the present covenant realize the right of everyone to ...”<sup>28</sup> Jack Donnelly writes that the clear implication of this is that civil and political rights are immediately realizable while ESC rights only require what resources allow toward progressive realization.<sup>29</sup> This argument is not completely supportable because it is not all ESC rights that impose duties that require progressive realization. In fact, some of the

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<sup>23</sup> Such as the right to a fair trial and the others earlier on mentioned. See generally, “Classification of Human Rights” at [http://www.lincoln.edu/criminal\\_justice/hr/classification.htm](http://www.lincoln.edu/criminal_justice/hr/classification.htm) retrieved 16/04/2010.

<sup>24</sup> International Commission of Jurists, *Courts and Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experience of Justiciability* (Geneva: International Commission of Jurists, 2008). p. 10.

<sup>25</sup> For example, freedom to form trade unions.

<sup>26</sup> See Articles 2(1) and 2(2) of the ICESCR.

<sup>27</sup> See generally, Steiner and Alston (eds.), above note 2, pp. 274 – 275.

<sup>28</sup> The exceptions to this are Art. 3 ICESCR (equal rights of men and women) and Art. 8(1) ICESCR (trade union- related rights), under each of which states “undertake to ensure” the relevant rights. See also Art. 2(2) ICESCR (non discrimination) where the undertaking is “to guarantee.”

<sup>29</sup> Donnelly, above note 5, p. 6.

provisions of the ICESCR have been found to impose obligations of immediate effect. One of those obligations is the “understanding to guarantee” that relevant rights “will be exercised without discrimination ...”<sup>30</sup> Also, the undertaking in Article 2(1) of the ICESCR “to take steps” requires states parties to begin immediately to take measures towards the full enjoyment of all the rights in the Covenant by everyone.<sup>31</sup> It has been stated<sup>32</sup> that while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time<sup>33</sup> after the Covenant’s entry into force for the states concerned. Such steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the covenant. The obligation of progressive realization, it is submitted, includes an obligation not to take or permit to be taken regressive measures or what Jill Cottrell and Yash Ghai<sup>34</sup> describe as “backsliding” or deterioration standards. This argument can also be used to resist the hard conditionalities usually imposed by the West or international institutions, like the International Monetary Funds (IMF) and the World Bank, for aids or trade purposes.<sup>35</sup> With respect to the nature and extent of state’s obligations under the Covenant, the Committee on Economic, Social and Cultural Rights has also argued that despite the phraseology of “to the extent of its available resources” and “progressive realization”, there is a minimum or essential core of obligations below which the state cannot go in the realization of each

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<sup>30</sup> Article 2(2) ICESCR.

<sup>31</sup> See United Nations, *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions*, above note 12, p. 1.

<sup>32</sup> See UN Committee on Economic, Social and Cultural Rights, General Comments No. 3 (1990), UN Doc. E/1991/23, Annex III.

<sup>33</sup> The Indian Supreme Court has held in *Unnikrishnan J.P. v. State of Andhra Pradesh* (1993) 1 SSC 645, that the state which has failed to do anything about a policy directive for 40 years has violated its constitutional duty.

<sup>34</sup> “The Role of the Courts in Implementing Economic, Social and Cultural Rights” in Yash Ghai and Jill Cottrell (eds.), above note 4, p. 61.

<sup>35</sup> For a more detailed discussion on the relationship between ESCR and development activities, see Summary Record of the 20th Meeting of the UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1994.SR20. See also D. Tiirk, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Realization of Economic, Social and Cultural Rights*, UN Docs. E/C.4/Sub.2/1989/19 and E/C.4/Sub.2/1991/17.

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right.<sup>36</sup> The means which the state should use in order to satisfy the obligation to take steps are stated in Article 2(1) of ICESCR to be “all appropriate measures”, including, but by no means limited to “legislative measures.” It remains to be said that the Limburg Principles<sup>37</sup> also state that “All states parties have an obligation to begin immediately to take steps towards full realisation of the rights contained in the covenant.”<sup>38</sup> It is also important to point out that the argument in support of an alleged difference in the content and character of the two categories of rights under discussion can hardly be sustained. This argument posits that civil and political rights are invariable in their content, as minimum rights allegedly cannot vary from one country to another, and absolute in their character, reflecting natural and inherent traits in human beings. Proponents of this position argue that for civil and political rights to become rights, the state need only recognize their existence and just refrain from interfering with them. Conversely, ESC rights do not come into existence automatically. Rather, the state must act affirmatively to create them or ensure the conditions necessary for their enjoyment. This argument is debunked by G.J.H Van Hoof<sup>39</sup> who uses the experience of the European Commission and European Court of Human Rights both of which apply to a comparatively homogenous group of states, and yet cannot boast of any uniform European standard applicable in all cases to drive home his argument. Therefore, there is no uniformity in the content of civil and political rights. This article completely associates itself with the learned view of Martha Jackman who states that “once one moves beyond the most personal of human rights, such as the right to freedom of conscience or belief, the argument that the classical rights reflect

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<sup>36</sup> See General Comment No. 3 (1990), UN Doc. E/1991/23, Annex III. See also *Government of the Republic South Africa v. Grootboom and Ors* (2000) 11 BCWR 1169 at 29, (quoting General Comment No. 3 of 1991).

<sup>37</sup> See Commission of Jurists, Faculty of Law, University of Limburg and the Urban Morgan Institute for Human Rights, University of Cincinnati, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (New York: United Nations, 1986) pp. 15-16.

<sup>38</sup> United Nations, *Economic, Social and Cultural Rights Handbook for Human Rights Institutions*, above note 12., p. 11.

<sup>39</sup> Van Hoof, above note 18, p. 280.

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natural and inherent traits in human beings, that they are absolute in character, or that their recognition imposed negligible costs on the state, are hard to sustain.”<sup>40</sup>

## 2. The Non-Justiciability Argument.

One major impediment to a successful protection and enforcement of ESC rights is the practice in most jurisdictions whereby courts are debarred from adjudicating on issues concerning these rights.<sup>41</sup> The issue of the justiciability of ESC rights has for a long time generated lively debates among human rights stakeholders, lawyers, intellectuals and politicians. It has been noted that the debate about the justiciability or otherwise of ESC rights has centred around two principal concerns: the legitimacy of judicial intervention and the competence of courts to adjudicate issues in the sphere of these rights.<sup>42</sup> Other arguments advanced against the justiciability of these rights include the claim of uncertainty or imprecision in their content,<sup>43</sup> the claim that justicialization will open a floodgate of litigation, and the issue of polycentricity.<sup>44</sup>

### 2.3.1 The Question of Legitimacy of Judicial Intervention

Arguments against the legitimacy of judicial intervention in the enforcement of ESC rights are based on the principle of separation of powers. Proponents of these arguments assert, in essence, that decisions concerning ESC rights, such as decisions to prioritize assistance to certain groups or to further certain goals, to allocate budgetary resources or to design adequate measures to implement these rights are traditional functions of the executive and the legislature and should not be subject to judicial review. Lord Lester

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<sup>40</sup> “Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate” in Joel Bakan and D. Schneiderman (eds.), *Social Justice and the Constitution: Perspectives on a Social Union for Canada* cited in Steiner and Alston, above note 2, p. 303.

<sup>41</sup> Including Nigeria and India.

<sup>42</sup> See P. Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Dartmouth: Aldershot, 1996) p. 24.

<sup>43</sup> See International Commission of Jurists (ICJ), above note 24, p. 20

<sup>44</sup> Marius Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” (2004) 20 *SAJHR*p. 392.



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and Colm O’Cinneide<sup>45</sup> are of the strong view that the judiciary cannot arrogate to itself the roles of the legislature or executive branches without usurping their separate and distinctive public powers. According to these learned authors:

For reasons of democratic legitimacy, crucial resource allocation decisions are better left in the hands of the legislature and the executive, rather than being determined by an unelected judiciary whose membership usually comprised of individuals from national socio-economic elites.<sup>46</sup>

The authors are also of the opinion that ESC rights as well as civil and political rights should be adequately secured since, according to them, without securing these rights, the most deprived vulnerable and powerless peoples of the world remain excluded from the enjoyment of their essential human entitlements. They, however, caution that the appropriate choice of means of implementation varies according to the nature of the rights being protected and the political and legal culture of the particular state or region.<sup>47</sup> While admitting a role for the courts in two instances: the provision on equality and access to justice, and where there has been a complete failure to uphold socio-economic rights,<sup>48</sup> Lester and O’Cinneide conclude that the extent to which socio-economic rights should be justiciable ultimately depends on a balancing of the requirements of democratic legitimacy and expertise against the need for an ultimate safety mechanism for protecting basic rights.<sup>49</sup>

Cottrell and Ghai seem to agree that the judiciary has a limited role to play in the enforcement and protection of ESC rights for reasons of constitutional legitimacy and on grounds of inappropriateness.<sup>50</sup> On the other hand, Abdullahi An-Na’im advocates that all national constitutions should not only provide for

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<sup>45</sup> “The Effective Protection of Socio-Economic Rights” in Yash Ghai and Jill Cottrell (eds.), above note 4., p. 19.

<sup>46</sup> *Ibid.*, p. 20.

<sup>47</sup> *Ibid.*, p. 17.

<sup>48</sup> *Ibid.*, p. 21.

<sup>49</sup> *Ibid.*, p. 22.

<sup>50</sup> See Jill Cottrell and Yash Ghai, “The Role of the Courts in Implementing Economic, Social and Cultural Rights” in Ghai and Cottrell (eds.) above note 4, pp. 58 – 89.

ESC rights but should make them justiciable. According to him, this is to clarify the legal basis of these rights so as to put beyond doubt that they are like other rights, and are in no way inferior to civil and political rights.<sup>51</sup> He contends that the reason for insisting on a judicial role is simply the need to ensure that the state lives up to its affirmative obligations to provide for ESC rights beyond what the political and administrative organs of the state are prepared to concede on their own accord.<sup>52</sup> On the competence or legitimacy of the judiciary to intervene in ESCR issues, the learned professor contends that all such apprehensions about judges and the judicial process are merely speculative since judicial enforcement has not been seriously implemented. He is of the view that the judiciary can be expected to realise the limits of its own capacity and not engage in detailed determination of policy and practice.<sup>53</sup>

This article humbly associates itself with the views expressed by the proponents of justiciability of ESC rights. It particularly subscribes to the opinion of Professor Abdullahi A. An-Na'im that these rights should be incorporated into national constitutions and made justiciable to clarify their legal basis. It also agrees with Lord Lester and O'Conneide that different methods of enforcement and protection may be appropriate for different rights, be they civil and political or economic, social and cultural. It is further submitted that no system of separation of powers is absolute since a central feature of the doctrine is that its boundaries are mostly flexible and undetermined.<sup>54</sup> Deviations from the "pure" notion of separation of powers are, therefore, for administrative expedience, common.<sup>55</sup> Besides, the principle of "checks and balances" further whittles down

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<sup>51</sup> Yash Ghai "Introduction" in Ghai and Cottrell (eds.) above note 4., p. 1.

<sup>52</sup> An-Na'im, above note 4, p. 14. See also UN Committee on Economic, Social and Cultural Rights, The Domestic Application of the Covenant, E/C.12/1998/24, CESCR General Comment 9.

<sup>53</sup> An-Na'im, *ibid*, p. 14.

<sup>54</sup> See J. Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 *American Journal of Comparative Law* p. 513; M. De Blacam "Children, Constitutional Rights and Separation of Powers" (2002) 37 *Irish Jurist*, pp. 133 - 134; N.W. Barber, "Prelude to the Separation of Powers" (2001) 60 *Cambridge L. J.* pp. 71- 72.

<sup>55</sup> See J.D Van der Vije, "The Separation of Powers" (1993) 8 *South African Public Law*, p. 178.

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the doctrine allowing each arm of government to act as a check on the excesses of the other. Marius Pieterse notes that concerns about the legitimacy of judicial intervention relate to both the boundaries imposed by the separation of powers and to the ideological arguments concerning democracy, majoritarianism and judicial accountability,<sup>56</sup> but points out that these concerns are not confined to the adjudication of socio-economic rights, but apply to civil and political rights adjudication too. The question may, therefore, be asked: can civil and political rights be branded “non-justiciable” on account of these concerns? It is probably because of a perception that ESC rights cases have greater implications for state resources procurement and spending that they tend to be emphasized more in relation to these types of cases. It has been variously noted that there are mechanisms for holding the judiciary accountable and in check. These include the public nature of judicial hearings, the deliberative nature of civil proceedings, judicial reason-giving in judgments, the judicial appointment process, the doctrine of *stare decisis* as well as the possibility of appeal against a judicial decision.<sup>57</sup> From the foregoing analysis, it can be safely concluded that arguments against the justiciability of economic, social and cultural rights on the ground of separation of powers can hardly stand erect and strong.

**2.3.2 The Question of Court’s Institutional Competence to Intervene**

Proponents of non-justiciability of ESC rights on grounds of lack of institutional competence often centre their argument on either the

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<sup>56</sup> Pieterse, above note 44, p. 390; C. Scott and F. Macklem “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in New South African Constitution” (1992) 141 *Univ. of Pennsylvania L. R.* p. 37; N Hayson, “Constitutionalism, Majoritarianism, Democracy and Socio-Economic Rights,” (1992) 8 *SAJHR* 464 – 474; D. M. Davis, “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles” (1992) 8 *SAJHR* 475 – 490.

<sup>57</sup> U. Baxi, “Judicial Discourse: Dialectics of the Face and the Mask” (1993) 35 *Journal of Indian Law Institute* p. 1; A. Harel, “Rights-Based Judicial Review: A Democratic Justification” (2003) 22 *Law and Philosophy* p. 258; J. Ferejohn, “Judicializing Politics, Politicizing Law” (2002) 65 *Law and Contemporary Problems*, p. 44.

limits of judicial skills or on the problem posed by polycentricity.<sup>58</sup> “Polycentricity” is a term used by Lon Fuller to describe decisions that affect an unknown but potentially vast numbers of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision.<sup>59</sup> Because budgets are definite and fixed in nature, and because there are several seemingly valid ways in which to distribute them, decisions concerning the realization of ESC rights are, due to their society-wide impact and almost inevitable budgetary implications, typically regarded as preponderantly polycentric.<sup>60</sup> Because of several features of the litigation process, courts are thought to be ill-suited to make polycentric decisions. These features include the fact that the courts act on the basis of reasoned arguments<sup>61</sup> to come to their decisions (certain kinds of human relations are not appropriate for this process); the “triadic” nature of an average judicial proceeding, its adversarial nature, as well as the limits of the quantity and types of evidence before the court. These features, it is argued, make litigation unsuitable for the resolution of polycentric issues because all the affected parties cannot, for logistics reasons, be made part of the proceedings.<sup>62</sup> This is because all possible consequences of the decision cannot be foreseen in relation to the individual litigants between whom justice must be done, and because evidence before the court may not adequately reflect the many competing interests implicated by a polycentric matter.<sup>63</sup> In addition to the foregoing arguments, opponents of justiciability argue that courts are ill-suited to evaluate

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<sup>58</sup> Pieterse, above note 44, p. 392.

<sup>59</sup> “The Terms and Limits of Adjudication” (1978) 92 *Harvard L. R.* p. 395; Davis, above note 56, p. 478; K. O’Regan, “Introducing Socio-Economic Rights” (1999) 1(4) *ESR Rev.* p. 3.

<sup>60</sup> See C. Ngwena “Access to Anti-Retroviral Therapy to Prevent Mother-to-Child Transmission of HIV as a Socio-Economic Right: An Application of Section 27 of the Constitution” (2003) 18 *South African Public Law* p. 100.

<sup>61</sup> Lon Fuller, “The Terms and Limits of Adjudication”, (1978) 92 *Harvard L. R.* p. 371.

<sup>62</sup> Poor people who are the most affected by the judgment are the least likely to be represented in the judicial process.

<sup>63</sup> See J. Hlope, “The Role of Judges in a Transformed South Africa – Problems, Challenges and Prospects” (1995) 112 *SALJ*, p. 30.

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and choose between various equally valid and equally complex policy options,<sup>64</sup> a weakness which, they claim, is exacerbated by courts' lack of political accountability. They also argue that judges lack the economic expertise in deciding matters with budgetary consequences or matters which require specific specialist expertise in cases where the realization of a social right involves a specific technical or specialist field.<sup>65</sup> Importantly, their take on the issue of judicial intervention is based on the fact that the judiciary is usually unable to execute its decisions, depending, therefore, on executive cooperation for its judgments to have any credibility or impact in reality.<sup>66</sup> It has, however, been remarked, and that view is herein respectfully shared, that while the polycentricity of a dispute certainly calls for judicial caution and awareness of the social consequences of judgments, it cannot preclude judicial involvement in economic, social and cultural rights matters altogether.<sup>67</sup> After all, there are polycentric elements to virtually all disputes before courts,<sup>68</sup> including civil and political rights matters.<sup>69</sup> It is submitted that certain features of the court make it even better suited to handle polycentric matters, generally, and socio-economic matters, particularly, than the other branches of government and other forms of dispute resolutions such as mediation. Courts provide individualized remedies, offer comparatively speedy resolutions in

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<sup>64</sup> See S. Holmes and C.R. Sunstein, "The Cost of Rights: Why Liberty Depends on Taxes" (2000) cited in Pieterse above note 44, p. 393; Davis, above note 56, p. 483.

<sup>65</sup> See Hlope, above note 62, p. 28; Holmes and Sunstein in Pieterse, above note 44, p. 393.

<sup>66</sup> C. Scott and P. Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* p. 242. See also *August v. Electoral Commission* 1999 (3) SA 1 (CC) para. 30.

<sup>67</sup> See J.W.F Allison "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" (1994) 53 *Cambridge L J*, p. 371. Fuller, above note 61, pp. 397 - 398 acknowledges this.

<sup>68</sup> O'Regan, above note 20, p. 3.

<sup>69</sup> See H. Spector "Judicial Review, Rights and Democracy" (2003) 22 *Law and Philosophy*, p. 304. For more detailed discussion on these and other strengths of the judiciary in this regard, see R. Teitel "Transitional Jurisprudence: The Role of Law in Political Transformation" (1997) 106 *Yale LJ* p. 2031 - 2033.

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the face of executive or legislative tardiness; they are experts at legal interpretation and are peopled by well-educated and experienced judges; the legal process is rational, deliberative and tailored towards producing fair and well-reasoned results. Above all, judges know the extent to which they can go in resolving issues that bother strictly on policy and budgetary allocation.

Further, it has been remarked that courts handle real cases and thus can test more effectively the particular implications of abstract principles and discover problems the legislature could not discover.<sup>70</sup> It can, therefore, be rightly asserted that arguments that the judiciary is institutionally incompetent to adjudicate ESC rights matters are based on wrong assumptions about the nature of these rights and the complexity of litigating on them. The International Commission of Jurists (ICJ), while admitting that complex cases can pose problems, posits that complex litigation is neither a necessary feature of all ESC rights nor are they exclusively linked to these rights, pointing out that several civil and political rights present with complex litigation as well.<sup>71</sup> On the claim that judges lack expertise in social policy issues, these jurists point out that in adjudicating cases relating to ESC rights, judges do not design policies in these fields on the basis of their own initiative, but, as in any other field, on the basis of existing rules enshrined in constitutions, human rights treaties, statutes or regulations.<sup>72</sup> The argument against justiciability on the ground of want of legitimacy also fails to acknowledge that courts routinely adjudicate on matters of public policy, anyway. Apart from the fact that judges hear cases in a regulated framework that limits their discretion, their judgments are always subject to appeal. From the foregoing analysis, it is submitted that courts are as much competent to adjudicate on ESC rights issues as they are to adjudicate on those concerning civil and political rights.

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<sup>70</sup> See International Commission of Jurists (ICJ), above note 24, p. 89.

<sup>71</sup> Such as institutionally enforced racial discrimination, violation of prisoner's rights, violation of the rights of people committed to mental health facilities, massive consignees, anti-trust, bankruptcy and tax law litigations.

<sup>72</sup> International Commission of Jurists (ICJ), above note 24, p. 90.

### 2.3.3. The Alleged Vagueness and Uncertainty in the Content of Economic, Social and Cultural Rights

Another set of arguments against the justiciability of ESC rights asserts that these rights are so vague or uncertain in character that their content defies adequate definition and are therefore impossible to adjudicate.<sup>73</sup> According to this view, while civil and political rights provide clear guidance on what is required in order to implement them, ESC rights only set out aspirational and political goals which are without well defined content. The merits of this argument need careful examination. It has been observed, for instance, that this overall assumption ignores the evidence of almost a century of the functioning of labour courts, and of massive case laws in such fields as social security, health or education before courts of all regions of the world.<sup>74</sup>

Ironically, the historical role of labour in the recognition and enforcement of ESC rights has been found to also be contributory to the seeming lack of development of the content of these rights.<sup>75</sup> During the 20th century in those countries which were committed to a welfare state, great efforts were made to develop the content of labour-related rights as a result of the strong and organized position of workers in the labour market which ensured the distribution of entitlements such as housing, consumer credit, social insurance or health care services. Paradoxically, little attention was paid to the separate development, outside of the labour market, of such rights as the rights to health, food or adequate housing.<sup>76</sup> This was partly because they were just seen as supplementary workers' entitlements or ancillary to workers' position. As a result, ESC rights were subsumed within the labour movement and did not form a distinct and justiciable set of rights. This affected the development of the content of these rights.

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<sup>73</sup> See Van Hoof, above note 18, p. 280. See also Steiner and Alston, above 2, pp. 267 – 269.

<sup>74</sup> Christian Courtis, "The Role of Judges in the Protection of Economic, Social and Cultural Rights," paper presented at the South African Chief Justice's Forum Annual Meeting held at Kasane, Botswana, 7-8 August, 2009, p. 7.

<sup>75</sup> International Commission of Jurists, above note 24, p. 13.

<sup>76</sup> *Ibid*, p. 14.

It is beyond argument that a lack of specificity of content and, therefore, of the legal obligations that flow from them, would seriously impede the judicial enforcement of any right. It is, however, submitted that the question of content and scope is not a problem exclusively related to ESC rights. In fact, the determination of the content of every right, whether they are labeled 'civil', 'political', 'social', 'economic', or 'cultural' can confidently be described as being insufficiently precise. This is because many legal rules are expressed in broad terms and, to a certain extent, unavoidably general wording.<sup>77</sup> Yet, this has never led to an assertion that civil and political rights are non-justiciable. Rather, it has led to continuous efforts at specifying the content and limits of these rights through statutory law making, administrative regulations, case laws and jurisprudence. It is submitted that nothing stops this kind gesture from being extended to ESC rights.

It is gratifying, however, to note that the past deficit of jurisprudence in this area is being remedied by a growing body of more recent domestic case law as well as statutory and international efforts which have developed some innovative concepts to further specify the content of ESC rights. Some of the innovative concepts developed and applied by courts in giving content to ESC rights include: the concept of core content or minimum core duties; distinction between duties of immediate effect and duties subjected to the progressive realization of ESC rights which in turn offers grounds for the prohibition of retrogressive measures; assessment of the 'reasonableness', 'adequateness' and 'proportionality' of the measures adopted by the state as a means to fully realize ESC rights, or when limiting the rights; the three layers of state duties namely, the duties to respect, protect and fulfill human rights and the difference between them; the principle of equality; and the prohibition of discrimination in upholding economic rights. These innovative concepts are discussed in turn.

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<sup>77</sup> See generally, H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).



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**2.3.3.1 Core Content or Minimum Core Duties.<sup>78</sup>**

This conceptual element entails a definition of the absolute minimum needed to be enjoyed of a right, without which the right would be unrecognizable or meaningless. Courts in various jurisdictions of the world have variously applied this concept in their bid to give content to ESC rights and make them justiciable. The Brazilian Federal Supreme Court applied this in the area of education,<sup>79</sup> the Argentine Supreme Court in the area of health,<sup>80</sup> while the Swiss Federal Court has found that Swiss courts can enforce an implied constitutional right to a “minimum level of subsistence” both for Swiss nationals and foreigners.<sup>81</sup>

**2.3.3.2 Duties of Immediate Effects and Duties Linked with the Progressive Realisation of ESC Rights.**

The courts in interpreting Article 2(1) of the ICESCR have maintained that while some of the duties associated with ESC rights may be qualified by the concept of progressive realisation, other duties must be complied with immediately by the state and no delay is permissible.<sup>82</sup> The state’s duty of immediate effect has been demonstrated in the right to adequate housing where the courts have held that the state has an immediate negative duty to refrain from forcefully evicting persons from their houses without legal justification, and even when justified, without due compliance with procedural guarantees.<sup>83</sup> The right to work also provides some good

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<sup>78</sup> Also called minimum core content, minimum core obligations, minimum threshold or essential content. See for example, Maastricht Guidelines, Guideline 9.

<sup>79</sup> See Brazilian Federal Supreme Court *RE 436996/SP* (opinion written by Judge Celso de Mello) October 26, 2005.

<sup>80</sup> See Argentine Supreme Court, *Reynoso, Nida Noemi c/INSIP s/amparo*, May 16, 2006.

<sup>81</sup> See Swiss Federal Court, *V v. Einwohnergemeinde X und Regiemingsrat des Kanton Bern*, B9E/ATF 121/367, October 27, 1995.

<sup>82</sup> These include the duty to take steps or adopt measures directed towards the full realisation of the rights contained in the ICESCR, and the prohibition of discrimination.

<sup>83</sup> See the Supreme Court of India’s decision in *Olga Tellis & Ors. v. Bombay Municipal Council* (1985) Supp. SCR 51. See also the decision of Bangladesh Supreme Court in *Ain o Salish Kendra (ASK) v. Government of Bangladesh & Ors.* 19 BLD (1999) 488. For further comments on these cases, see COHRE, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: COHRE, 2003) pp. 30 – 47. Relate the above cases to what happened at Maroko, Lagos and Abuja, both in Nigeria sometime ago.

examples of the justiciability of duties of immediate effect.<sup>84</sup> The prohibition of forced labour, the right to fair remuneration, the right to enjoy conditions of work compatible with human dignity as well as the prohibition of discrimination are such examples.

### 2.3.3.3 Prohibition of Retrogressive Measures.

The underlying principle under this concept is that if the ICESCR requires the progressive realisation of the rights enshrined in it, while acknowledging the necessary gradual character of their full enjoyment, states cannot take steps to retard or eliminate their realisation. It entails a comparison between the previously-existing and the newly-passed legislation, regulation or practices in order to assess their retrogressive character.<sup>85</sup> The Colombian Constitutional Court has struck down retrogressive legislation regarding pension,<sup>86</sup> health coverage,<sup>87</sup> education<sup>88</sup> and protection for family and workers.<sup>89</sup> The closure of secondary schools and universities in the former Zaire also attracted this kind of decision from the African Commission.<sup>90</sup>

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<sup>84</sup> See the decision of the African Commission on Human and People's Rights in *Malawi African Association & Ors. v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 – 196/97 and 210/98 (2000), May 11, 2000, para. 135. See also Inter-American Court of Human Rights in *Ituango Massacres v. Colombia*, July 1, 2006, paras. 145 – 168.

<sup>85</sup> See for example, Portuguese Tribunal decision No. 509/2002, December 19, 2002. See also the Argentine Supreme Court decision in *Aquino, Isacio C Cargo Servicios Industriales SA s/accidents ley 9.688* of September 21, 2004.

<sup>86</sup> See Colombian Constitutional Court decision *T789/2002*, September 24, 2002.

<sup>87</sup> See Colombian Constitutional Court decision *T 671/2002*, August 20, 2002.

<sup>88</sup> See Colombian Constitutional Court decision *C – 931 – 2004*, September 29, 2004.

<sup>89</sup> See Colombian Constitutional Court decision *C – 991 – 2004*, October 12, 2004.

<sup>90</sup> See African Commission on Human and People's Rights decision on, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droit de l'Homme, Les Temoins de Jehova v. Zaira*, Comm. Nos. 25/89, 47/90, 56/91, 100/93 (joined) (1995) para. 48. Cited in United Nations, *Economic, Social and Cultural Rights – Handbook for National Human Rights Institutions*, above note 12, p. 15.

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**2.3.3.4 Assessing the Reasonableness, Adequacy and  
Proportionality of Measures Adopted by Government.**

Courts have developed the above tests in reviewing the exercise of legislative or regulatory powers by asking whether such powers have been exercised in a way that is 'reasonable', 'adequate', and 'proportionate'.<sup>91</sup> This involves a legal analysis of the goals the state purports to be aiming to achieve when justifying a certain measure, and a comparison between those goals and the means chosen to achieve them as well as finding out whether the constitution or any human rights instrument permits, requires or prohibits the goals chosen by government.<sup>92</sup> These standards have also been applied by courts in several jurisdictions in giving content to ESC rights.<sup>93</sup>

**2.3.3.5 Duties to Respect, Protect and Fulfill**

The UN Committee on Economic, Social and Cultural Rights has classified the different levels of state obligations by stating that every ESC right, as with every human right, imposes the above duties on the state. This interpretation has been reflected in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>94</sup> These duties have been applied by courts and tribunals. The duty to respect a right requires the state to refrain from interfering directly or indirectly with the enjoyment of the right.<sup>95</sup> In the *Social and Economic Rights Action/Centre for Economic and Social Rights v. Nigeria* case,<sup>96</sup> the African Commission on Human and People's

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<sup>91</sup> See Principles 49, 51, 56 and 57 of the Limburg Principles.

<sup>92</sup> International Commission of Jurists (ICJ), above note 12, p. 34.

<sup>93</sup> See for example, The Constitutional Court of the Czech Republic in *P1. US 42/04*, June 6, 2006. See also US Supreme Court decision in *US Department of Agriculture v. Moreno*, 413 US 528, June 25, 1993. See also the State Supreme Court of New York decision in *Campaign for Fiscal Equity v. State of New York et al*, 710 N.Y.S. 2d 475, January 9, 2001.

<sup>94</sup> See Guideline 6.

<sup>95</sup> M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press, 1995) p. 112.

<sup>96</sup> *SERAC and CESR v. Nigeria*, Communication No. 155/96, October 13 – 27, 2002. See also the Human Rights Chamber for Bosnia and Herzegovina's decision in CH/96/29, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*, CH/96/29.

Rights endorsed the notion of duties to respect the enjoyment of economic, social and cultural rights.

Under the duty to protect, the state is required to prevent third parties from unduly interfering in the right holder's enjoyment of a particular right.<sup>97</sup> In South Africa, the State has given effect to this duty through the enactment of statutes which protect people the tenure of whose homes is insecure and who are vulnerable to eviction.<sup>98</sup> In the case of *Etcheverry v. Omint*,<sup>99</sup> the Argentine Supreme Court held that a refusal by a private health insurance found to maintain the membership of an HIV-positive client to attend to that client amounted to a breach of the right to health. The duty to fulfill imposes on the State obligations to facilitate, provide and promote access to the rights, especially when such access is limited or non-existent.<sup>100</sup>

#### 2.3.3.6 Applying the Principles of Non-Discrimination and Equal Protection of the Law.

This is yet another lethal weapon in the arsenal of courts and tribunals in giving content to, and justicialising ESC rights. The use of this innovative concept has been demonstrated in several cases in the field of housing,<sup>101</sup> social security benefits,<sup>102</sup> and right to

<sup>97</sup> See the Inter-American Court of Human Rights decision in *Mapiripan Massacre v. Colombia*, September 15, 2005 paras. 167-189; *Ituango Massacres v. Colombia*, July 1, 2006, paras. 172 - 200. See also *SERAC and CESCR v. Nigeria* (supra) paras. 46, 61 and 65. For comment on the Nigeria case, see Coomans F. "The Ogoni Case Before the African Commission on Human and People's Rights", *International and Comparative Law Quarterly*, Vol. 52 (2003) pp. 749 - 760.

<sup>98</sup> See for example, The Extension of Security of Tenure Act, 62 of 1997 and The Prevention of Illegal Eviction from the Unlawful Occupation of Land Act, 19 of 1998.

<sup>99</sup> Attorney General's brief of December 19 1999, and judgment delivered on March 13, 2001.

<sup>100</sup> See the decision of the European Committee of Social Rights in *International Association Autism- Europe v. France*, Complaint No. 1/2002, November 7, 2003; See also the Indian Supreme Court's decision in *People's Union for Civil Liberties v. Union of India & Ors.*, May 2, 2003.

<sup>101</sup> See the UN Committee on the Elimination of Racial Discrimination, *Ms L et al v. Slovakia*, Communication No. 31/2003, March 10, 2005.

<sup>102</sup> See UN Human Rights Committee, *Zwaan de Vries v. The Netherlands*, Communication 182/1984, April 9, 1987. Also, *Brooks v. Netherlands*, Communication 172/1984, April 9, 1984. See also Constitutional Court of South Africa's decision in *Khosa and Ors. v. Minister of Social Development and Ors.* 2004 (6) SA 505 (CC) March 4, 2004.

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work.<sup>103</sup> It can therefore, be correctly asserted that the blanket claim that all ESC rights are not justiciable on account of their alleged vague and imprecise content is not founded. It is, therefore, submitted that the justiciability of each ESC right, to what extent such a right is justiciable, as well as the method best suited for the enforcement of each right are issues which should be resolved when each specific right is assessed on the merit of each case.

#### **2.4 Other Challenges.**

Other factors militating against the enforcement and protection of ESC rights include ineffective domestic institutional mechanisms, the issue of socio-economic underdevelopment, official corruption and sheer lack of political will by government, ambivalence or conspiracy by the developed or industrialised world, the influence of international financial institutions, economic globalization, and failure of the non-governmental organizations.

The commonest institutional mechanism employed by various countries for the protection and promotion of human rights is the creation of national human rights commissions. At the United Nations Human Rights Conference held in Vienna in 1993, states parties were mandated to establish national human rights institutions. A national human rights institution is a “body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.<sup>104</sup> These institutions are called by various names in various jurisdictions.<sup>105</sup> The mandate of these institutions include, among others; to submit reports concerning the promotion and protection of human rights, to

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<sup>103</sup> See UN Committee on the Elimination of Racial Discrimination, *Ylimaz Dogman v The Netherlands*, Communication No. 1/1984, September 29, 1988.

<sup>104</sup> United Nations, *A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series, No. 4, 1995, para. 39.

<sup>105</sup> For example in each of Nigeria, India and Uganda, it is called the National Human Rights Commission. In South Africa, there are the Public Protector and South African Human Rights Commission. In Namibia, there is The Ombudsman and in Ghana, the Ghanaian Commission on Human Rights and Administrative Justice.

promote and ensure the harmonization of national legislation, regulations and practices with international human rights instruments to which a state is a party, and their effective implementation, to encourage the ratification of international human rights instruments, to contribute to state's report of compliance with international treaties, to assist in human rights education and publicity.<sup>106</sup> These national human rights institutions have been known to be faced with a number of problems which work against their effective performance of their statutory duties.

Research has revealed that apart from the fact that there is low level of understanding and acceptance of ESC rights among the members and staff of national human rights institutions,<sup>107</sup> these institutions lack the capacity to deal with this category of rights due to inadequate funding, insufficient staffing,<sup>108</sup> ineffective networking with other stakeholders, as well as ineffective management co-ordination and planning. In addition to this, many national human rights institutions do not enjoy the level of autonomy and independence required by them to function effectively, with government exercising stifling control over them. The National Human Rights Commission of Nigeria for example is limited by its dependence on the executive arm of the government for the appointment of key officers.<sup>109</sup> These problems may be traceable partly to the statutes establishing the institutions.

Many authors have also made the point that socio-economic development is a necessary pre-condition for the recognition, enforcement and enjoyment of ESC rights. Governments, therefore, hide under the excuse of socio-economic underdevelopment to justify their non-recognition and non-enforcement of these rights.<sup>110</sup>

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<sup>106</sup> See The Paris Principles cited in United Nations, *Economic, Social and Cultural Rights – Handbook for National Human Rights Institutions*, above note 12, p. 31.

<sup>107</sup> *Ibid*, p. 40

<sup>108</sup> They are usually more familiar with, and experienced in, dealing with civil and political rights.

<sup>109</sup> See Stanley Ibe, "Beyond Justiciability: Realizing the Promise of Socio-Economic Rights in Nigeria", (2007) 7 *AHRLJ*, p. 248.

<sup>110</sup> See Minasse Haile, "Human Rights in Africa: Observations on the Implications of Economic Priority", 19 *Vand.J. Transnat'l L.* (1986), pp. 300 – 301 cited in Shedrack Agbakwa, "Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights." (2002) *Yale Human Rights and Development Law Journal*, Vol. 5, p. 186. p. 186.

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Shedrack Agbakwa,<sup>111</sup> however contends, and that view is hereby respectfully shared, that these often-invoked arguments usually proceed from the interrelated yet erroneous and misleading propositions, namely, the claim that ESC rights are resource-intensive and require the direct intervention of government whereas civil and political rights do not involve government expenditure,<sup>112</sup> the fallacious conclusion that states' underdevelopment is enough to justify the non-enforcement of ESC rights but not civil and political rights. The question can then be asked: if the state finds reason for the marginalization of the enforcement of ESC rights in lack of development, how then does it intend to get developed if the overwhelming majority of its citizens remain illiterate, suffer from hunger and malnutrition, live under bridges for lack of shelter, and die from curable sicknesses for lack of adequate health care services? It is submitted that even if underdevelopment is such a potent factor for the non-realization of ESC rights, it merely affects the extent to which these rights can be realised and does not justify outright non-enforcement. This paper agrees with Agbakwa that underdevelopment does not justify partial enforcement of these rights any more than poverty justifies parents consistently feeding one child to the neglect of their other children.<sup>113</sup>

The issue of underdevelopment has a close affinity with the factor of official corruption and sheer lack of political will by the rulers of some states, especially the developing countries, including Nigeria. It has been remarked that but for the poor administration and kleptomaniacal tendencies of their rulers, many of these countries should have attained a developmental level where basic survival, that is the minimum requirements for sustaining physical life, such as health, food, housing, clothing, work and literacy are

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<sup>111</sup>*Ibid*, p. 187.

<sup>112</sup> The fallacy and lameness of this argument has already been brought out in an earlier section of this chapter. For more detailed information on the resource-intensive argument, see Shedrack C. Agbakwa, "Retrieving the Rejected Stone: Rethinking the Marginalization of Economic, Social and Cultural Rights under the African Charter on Human and People's Rights"(unpublished LL.M Thesis, submitted to the Dalhousie Law School, Canada in 2000) pp. 45 – 56.

<sup>113</sup> *Ibid*, p. 188.

met.<sup>114</sup> Citing an example with the late Mobutu Sese Sekou wa Zabanga of Zaire (now Democratic Republic of Congo), Onyango writes that most African leaders are richer than their states and continue to squander available resources.<sup>115</sup> Richard Falk also argues that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs, if their policy makers were so inclined.<sup>116</sup> The ineptitude and corruption of the leaders of many countries, particularly in Africa and other developing countries, have worsened the socio-economic woes of these countries.<sup>117</sup> Resources that should have been utilized in providing basic facilities have been filched and transferred into private foreign accounts impoverishing the people and denying them the enjoyment of the ESC rights.

With the connivance and assistance of their foreign collaborators, these corrupt leaders, despite their known excellence in mismanagement, continue to receive an influx of external loans, thereby increasing their countries' debt burdens. The servicing of these debts takes a significant toll on the funding of public services such as health, education, social security and housing. Servicing these debts greatly incapacitates the states, undermining such states' provision of the most basic facilities needed to meet the ESC rights obligations.<sup>118</sup> Under the heavy burden of debts and deceptive aids, many developing countries are goaded into adopting inhuman structural adjustment policies of the International Monetary Fund (IMF) and its ally, the World Bank. These policies, more often than

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<sup>114</sup> See Frances Stewart, "Basic Needs Strategies, Human Rights and the Right to Development" 11 *Hum. Rts. Q.* (1989) p. 347 at 351.

<sup>115</sup> "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa", *California Western International Law Journal*, Vol. 26 No. 1 (1995) p. 1.

<sup>116</sup> Richard Falk, "Responding to Severe Violations", in Jorge I. Dominguez et al (eds.), *Enhancing Global Human Rights* (1979) p. 226 cited in Agbakwa, above note 110, p. 189. See also U.N.D.P Human Development Report, 1990 (1990) p. 4.

<sup>117</sup> See Robert, I Robert, "Africa's Mess, Mugabe's Mayhem," *FOREIGN AFF.* Vol. 79 (2000) p. 47.

<sup>118</sup> See Yemi Osibanjo & Olukonyisola Ajayi, "Human Rights and Economic Development in Developing Countries", *Int'l Law Journal* Vol. 28 (1994) p. 727 at 731.



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not, worsen the economic circumstances of those countries,<sup>119</sup> making them to reduce their imports, devalue their currencies, deregulate capital movements, privatize state public utilities, dismantle social programs by cutting government expenditure on social services such as education, healthcare and removing subsidies on market staples, provide “national treatment” to foreign investors.<sup>120</sup> These provisions, according to Michael Chossudovsky, are usually coupled with a bankruptcy programme under the supervision of the World Bank leading to the liquidation of competing national enterprises with the obvious loss of indigenous control of critical areas of the economy. The obvious impact of structural adjustment programmes is to reduce the capacity of the states to meet their human rights obligations, in the area of economic, social and cultural rights as well as in civil and political rights. Although the structural adjustment policies are usually sold to states as the only way to improve their economies and reduce their debt burdens, the adjustment policies have merely worsened the social and economic ruin in these countries<sup>121</sup> and these victim-states are forced to resign themselves to more borrowing and increased debt burdens to the joy as well as eco-political advantage of the industrialized countries who are usually the donor countries or home countries of the International Donor Agencies (IDAs). It can

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<sup>119</sup> *Ibid*, p. 731.

<sup>120</sup> See Michael Chossudovsky, “World Trade Organization (WTO): An Illegal Organisation that Violates the Universal Declaration of Human Rights,” Available at <http://www.derechos.org/nizkor/doc/articulos/chossudovsky.html>, accessed on 23/04/2010.

<sup>121</sup> Zimbabwe’s free education for all was killed by an IMF-induced Structural Adjustment Programme. See Maria Nzomo, “The Political Economy of the African Crises: Gender Impacts and Response”, *Int’l Law Journal*, Vol. 51, (1996) p. 789; Bharati Sadasivan, “The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda”, *Hum. Rts. Q.* Vol. 19 (1996) p. 630 at 741.; Lawrence Tshuma, “The Impact of IMF/World Bank Dictated Economic Structural Adjustment Programmes on Human Rights: Erosion of Empowerment Rights”, in Pearson Wheare & Marina d’Engelbroaner – Koff (eds.), *The Institutionalization of Human Rights in Southern Africa* (1993) p. 277 cited in Agbakwa, above note 110, pp. 198 – 199; Margaret Conklin & Daphne Davidson, “The IMF and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985”, *Hum. Rts. Q.* Vol. 8 (1986) p 277.

therefore be safe to conclude that the structural adjustment programmes of the IMF and the World Bank are vicious imperialist programmes designed by the developed countries of the North to perpetually keep the developing countries of the South under socio-economic and political subjugation. This humble view tallies with that expressed by an avalanche of learned writers cited by Agbakwa in his well articulated piece.<sup>122</sup> Just as debts and structural adjustments are veritable instruments sustaining the continued deprivation of economic, social and cultural rights of the people, there is growing apprehension that globalization further exacerbates human suffering and the erosion of ESC rights.<sup>123</sup>

It has also been noted that one of the greatest impediments to the enforcement and realization of ESC rights is the indifference and even hostility of the international community, particularly the developed countries towards the recognition and enforcement of ESC rights. This attitude eminently led to the translation of the Universal Declaration of Human Rights into two covenants instead of one.<sup>124</sup> Taken as the defeat of an ideology that emphasized ESC rights and a victory for liberal ideology (led by the United States of America) that emphasizes civil and political rights, the demise of the Soviet Union deprives the ESC the support of one super power on the international stage.<sup>125</sup> The current development of orthodoxy based on economic and political liberalism, which is being touted as the best method for maximizing global welfare is a product of the supposed victory of liberal ideology.<sup>126</sup> The historical tension between the western and eastern blocs and their allies over the

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<sup>122</sup> See S.P. Schartz, "The World Bank's Misconception in Africa", *J. Mod. Afr. Stud.* Vol. 34 (1996) p. 239. See also S.P. Schartz, "Structural Adjustment in Africa: A Failing Grade So Far", *J. Mod. Afr. Stud.*, Vol. 34 (1994) p. 679.

<sup>123</sup> For further details on the negative impacts of globalization on economic, social and cultural rights see Robert McCorguodale & Richard Fairbrother, "Globalization and Human Rights", *Hum. Rts.Q.*, Vol. 21 (1999) p. 735.

<sup>124</sup> See Steiner and Alston, above note 2, pp. 256 – 257.

<sup>125</sup> See Agbakwa, above note 110, p. 200.

<sup>126</sup> *Ibid.*, p. 201. See also Caroline Thomas, "International Financial Institutions and Social and Economic Human Rights: An Exploration," in Tony Evans (ed.) *Human Rights Fifty Years On: A Reappraisal* (1998) p. 164, cited in Agbakwa, *ibid.*, p. 201.

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recognition and protection of ESC rights has today assumed the dimension of outright hostility.

The developed States, led by America have therefore successfully marketed at home and abroad:

A mythology that economic, social and cultural rights are positively expensive, convincing less developed states that the path to economic wealth cannot include enforceable economic, social and cultural rights.<sup>127</sup>

The hostility of some Western States towards the idea of enforceable ESC rights manifests itself in their various ploys to frustrate the efforts of other States, particularly the developing States, to implement or enforce ESC rights. This undermining is usually done either directly or by proxy, using agents, multinationals and the World Trade Organizations (WTO) or other international financial institutions<sup>128</sup> such as the World Bank and the IMF, which they control and through which they perpetuate the indebtedness of such developing States and initiate catastrophic economic policies in those States. For instance, sometime ago, in a crass display of insensitivity, the United States of America fought South Africa's policies to procure cheaper generic HIV drugs, in spite of the fact that the dreaded Acquired Immune Deficiency Syndrome (AIDS) had reached an endemic proportion in South Africa. Bess-Carolina Dolmo writes that even when the US was dissuaded from undermining South Africa's health policies, it still directed its trade attacks on other nations that have enacted similar measures.<sup>129</sup>

In fact, the United States of America does not make any pretensions about her opposition to the recognition of ESC rights as enforceable human rights. Till date, America has not ratified the

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<sup>127</sup> *Ibid.*, pp. 171 – 172.

<sup>128</sup> See El Hadji Guisse *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perspectives of Human Rights*, 49th Session, United Nations Document, E/CN. 4/Sub.2/1997/8 (1997), available at <http://www.derechos.org/nizkor/impu/guisse.html> – Accessed on 22/03/2010.

<sup>129</sup> “Examining Global Access to Essential Pharmaceuticals in the Face of Patent Protection Rights: The South African Example”, 7 *Buff. Hum. Rts. L. Rev.* (2001) p. 151 cited in Agbakwa, above note 110, p. 203.

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International Covenant on Economic, Social and Cultural Rights, 1966 and at various international fora, she has continued to oppose measures designed to promote ESC rights.<sup>130</sup> It is important to note that the US had stated that:

...at least, economic, social and cultural rights are goals that can only be achieved progressively, not guarantees. Therefore, while access to food, health services and quality education are the top of any list of development goals, to speak of them as rights turns the citizens of developing countries into objects of development rather than subjects in charge of their own destiny.<sup>131</sup>

From the foregoing discussion, one would inevitably come to the conclusion that the international community not only fails to provide the necessary support for the promotion and protection of ESC rights, some influential members of the community actively undermine the development of these rights.

Development and human rights non-governmental organization (NGOs) have also demonstrated visible reluctance to focus specifically on ESC rights. It has been remarked that international development NGOs tend to assume that the language of rights would not be effective in persuading potential donor states to contribute funds, for those states might not wish to see their benevolence being merely regarded as an obligation to help meet the rights of other states.<sup>132</sup> It is common knowledge that international human rights NGOs over the years have tended to adopt primarily civil-and-political rights-driven agenda with little or no time for ESC rights.

It is, however, gratifying to note that recently, a number of international NGOs have started paying attention to issues involving economic, social and cultural rights.<sup>133</sup> It has earlier been pointed

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<sup>130</sup> See Steiner and Alston, above note 2, p. 268.

<sup>131</sup> See comments submitted by the USA, Report of the Open-ended Working Group on the Right to Development, UN DOC. E/CN.4/2001/26 cited in K. Tomasevski, "Unasked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education, (1998 - 2004)", *Hum. Rts. Q.* Vo. 27 (2005), p. 713; See also Amnesty International, "Reclaiming Economic, Social and Cultural Rights", available <http://www.amnestyusa.org.demand-dignity/report-human-right-for-human-dignity>. Retrieved 30/02/2014.

<sup>132</sup> See Steiner and Alston, above note 2, p. 269.

<sup>133</sup> For more details on this, see J. Oloka-Onyango, above note 115, p. 11. It must be noted that the realization of the dream for an optional protocol to the International Covenant on Economic, Social and Cultural Rights owes much to

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out that both international and regional instruments on ESC rights have weaknesses that make the protection, recognition and enforcement of these rights an uphill task. One serious impediment in these instruments is the absence of effective enforcement mechanisms. However, after a protracted battle, the United Nations General Assembly on December 10, 2008 adopted, by consensus, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) which provides for a complaints mechanism empowering an individual to lodge a complaint on the violation of any of his ESC rights with the Committee on Economic, Social and Cultural Rights of the United Nations.

### **3. Suggestions and Conclusion.**

This article has tried to take a general look at the various challenges confronting the recognition, protection and enforcement of ESC rights. In the course of doing that, it was found out that the classification of human rights into civil and political rights and economic, social and cultural rights creates an unnecessary dichotomy between these two categories of rights and undermines the human rights quality of ESC rights. It was also found out that this is a negation of the interdependent, indivisible and interrelated features of all human rights. The issue of non justiciability of ESC rights was also discussed and the views of learned authors analysed. The practice in a variety of jurisdictions was also presented. It was found that it is wrong to place a blanket ban on the justiciability of all ESC rights. The extent to which a court can intervene in the enforcement of any right should be determined on a case-by-case basis. In the final analysis, it was found that just as the courts enforce civil and political rights, so can they in their wisdom intervene in matters involving ESC rights. Other challenges discussed include the issue of socio-economic underdevelopment, corruption and sheer lack of political will, ambivalence or hostility of the international community and financial institutions, economic globalization, reluctance of non-governmental organizations to engage in ESC rights issues as well as the failure of both domestic and international institutional mechanisms.

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the efforts of the international NGO Coalition which fought tirelessly and lobbied for the adoption of the optional protocol. This dream was realized on 10 December 2008 and it came into force in 2009 having been ratified by the required number of states parties. See <http://www.right-to-education.org/node/571>, accessed 30/11/2011.