REALISATION OF ECONOMIC AND SOCIAL RIGHTS IN NIGERIA: THE ROLE OF NATIONAL AND INTERNATIONAL COOPERATION

By

PHILIP EBOSETALE OAMEN

A thesis submitted to the University of Birmingham for the degree of DOCTOR OF PHILOSOPHY

Birmingham Law School
College of Arts and Law
University of Birmingham
Edgbaston B15 2TT
October 2021

UNIVERSITY OF
BIRMINGHAM

University of Birmingham Research Archive

e-theses repository

This unpublished thesis/dissertation is copyright of the author and/or third parties. The intellectual property rights of the author or third parties in respect of this work are as defined by The Copyright Designs and Patents Act 1988 or as modified by any successor legislation.

Any use made of information contained in this thesis/dissertation must be in accordance with that legislation and must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the permission of the copyright holder.

ABSTRACT

The central aim of Economic and Social Rights (ESR) is to address the essential needs of people. ESR are vital to ensure that people are protected from deprivation and poverty. Therefore, this thesis designs a cooperation model, both at the domestic and international levels, as a means for States to realise the ESR of their citizens. It locates and develops this model in the context of Nigeria. To do this, the thesis provides an understanding of the role of law and legal institutions in enhancing the practical realisation of ESR, through three major lines of inquiry.

First, the thesis investigates the debate in Nigeria on whether ESR are justiciable and takes a position that they are. Contrary to popular views, ESR are not absolutely non-justiciable in Nigeria. There is a plethora of domestic and international laws which provide a normative grounding for the justiciability of ESR in Nigeria. The thesis finds that, despite these existing normative frameworks around ESR, the rights are still far from being realised in Nigeria. One of the reasons for this is the Nigerian courts' adoption of traditional adversarial method of adjudication and the failure by political branches to draw on the International Covenant on Economic, Social and Cultural Rights (ICESCR) normative architecture on international cooperation and assistance.

Second, the thesis argues that the traditional models of adjudication of ESR that seek to command and control the government sometimes impede, rather than enhance ESR realisation. Thus, this thesis argues for a more cooperative institutional relationship between courts and political branches to tap into the strengths of each institution, to enhance ESR realisation. Such a cooperative judicial approach towards ESR cases would enhance the practical impact of the rights. This thesis argues that receiving the cooperation and collaboration of the political branches would make the enforcement of judicial decisions more forceful, as the branches would receive the decisions as an outcome of an institutional dialogue and collaboration, rather than as imposed decisions.

Third, the thesis argues for an effective deployment of international cooperation and assistance to herald a *de facto* realisation of ESR. The realisation of ESR can be resource intensive and without international cooperation and assistance, the realisation will always be outside the reach of Nigeria. This thesis explores the role of a legal duty of cooperation, within the international human rights law regime, between developed and developing countries to protect ESR in Nigeria. Therefore, the thesis argues for a better commitment, on the part of developed countries and international institutions such as the Committee on Economic, Social and Cultural Rights (CESCR), to international cooperation. This commitment to cooperation should not come in the form of some charity, but as a legally binding obligation on developed countries in favour of developing countries. Drawing on several normative instruments such as the ICESCR, the thesis adopts a Third World Approach to International Law (TWAIL) to argue that, under the international human rights law regime, the developed countries have a duty to help the developing countries in meeting the ESR needs of the developing countries' citizens, in terms of provision of economic, financial, and technical cooperation and assistance as well as deployment of influence in international institutions' decision-making processes.

DEDICATION

This research is dedicated to my lovely wife, Esohe, my wonderful children, Ella, Emma and Emmitt, and my caring mum, Maria.

ACKNOWLEDGMENTS

Many persons have played key roles towards the successful completion of this doctoral research. However, for want of space, I will mention just a few here.

First, I thank God Almighty, the giver of life and strength, for giving me the wisdom, good health and supportive family and friends, leading to this success story. To Him alone be the glory in the name of Jesus Christ. Amen!

I would like to acknowledge Tertiary Education Trustfund (TETFUND) and Ambrose Alli University, Nigeria for providing me with financial sponsorship to undertake this programme.

I particularly appreciate my Supervisors, Dr Ben Warwick and Dr Meghan Campbell, for their guidance, patience and encouragement throughout the duration of this programme. They did not only effectively supervise this thesis, but they also provided useful career tips which enabled me to secure a full-time lectureship even before I completed my PhD. I will remain ever grateful to them. Similarly, I am grateful to my former PhD Supervisor, Prof. Hakeem Yusuf, who, despite having left the University of Birmingham, continues to offer me useful academic and career guidance. I appreciate my brilliant examiners, Dr Anashri Pillay and Dr Natasa Mavronicola for providing a relaxed ambience and wonderful comments at my *viva.* I also acknowledge the support of several academics at Birmingham Law School who greatly influenced my teaching and research career trajectory by providing the needed teaching, research and leadership opportunities and guidance. These persons include Prof. Robert Lee, Prof. Lisa Webley, Prof. Fiona De Londras, Prof. Mohammed Shahabuddin, Dr Katharina Móser, Dr Bosko Tripkovic, Dr Kieren McGuffin, Dr Walters Nsoh, Dr Paul McConnell, Dr Catherine Mitchell, Dr Lloyd Brown and Dr Alan Greene.

I would also like to appreciate friends and colleagues, including Prof. Ambrose Ekpu, Dr Eghosa Ekhator, Dr Emmanuel Akhigbe, Dr Monday Igbafen, Dr Anthony Coker, Dr Bridget Anthonio-Apedzi, Dr Synda Obaji, Dr Olakunle Davis Oke, Dr Eridei Amakiri, Apostle Barnabas Ohonsi, Apostle Ola Ehiremen, Pastor Henry Matthew, Pastor Frank Oamen, Pastor Emmanuel Odedeyi, Arinze Okiche, Menes Muzan, Love Alfred, Lukman Abimbola, Arebamen Obadan, Prest Aigbokhan, Charles Anebukhae, Collins Aigbokhan and many others too numerous to mention.

Lastly, I lack words to appreciate my nuclear and extended family members for putting up with my absence at critical times, owing to research commitments. I am grateful to my darling wife, Esohe, my lovely kids Ella, Emma and Emmitt for their sacrifice while this research lasted. I also appreciate my dear mum, Maria Oamen and my siblings, including Collins, Ehimen (Jalingo), Akhere, Omonedia, Francisca and Sylvester for their love and patience.

TABLE OF CONTENTS

COVER PAGE II

ABSTRACT IIII

DEDICATION IVV

ACKNOWLEDGMENTS V

TABLE OF CONTENTS VII

LIST OF STATUTES/LEGISLATIONS/INSTRUMENTS/ REGULATIONS IX

LIST OF CASES XII

LIST OF ABBREVIATIONS XIVV

CHAPTER ONE: GENERAL INTRODUCTION 1

1.1 Background to the Study 1
1.2 Statement of the Research Problem 3
1.3 Research Questions 16
1.4 Research Methodology 17
1.5 Significant Contributions to Knowledge 18
1.6 Scope and Limitations of the Study 21
1.7 TWAIL and Cooperation 21
1.8 Structure of the Thesis 35

CHAPTER TWO: CONCEPTUAL AND NORMATIVE FRAMEWORK OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 39

2.1 Introduction 39
2.2 Unpacking Economic, Social and Cultural Rights 40
2.3 The Concept of Progressive Realisation 41
2.4 The Concept of Maximum Available Resources 49
2.5 The Concept of Minimum Core Obligation 53
2.6 Concerns against Justiciability of ESR 62
2.7 The Tripartite Typology of State Obligations on ESR 76
2.6 Conclusion 82

CHAPTER THREE: THE LEGAL STATUS OF SOCIO-ECONOMIC RIGHTS IN NIGERIA 84

3.1 Introduction 84
3.2 The Political and Economic History of Nigeria 85
3.3 The Constitutional Evolution of Nigeria 87
3.4 The Legal Status of ESR under the Nigerian Constitution 90
3.4.1 Constitutional Framework on ESR in Nigeria *95*
3.5 Judicial Approach to ESR in Nigeria 100
3.6 Legislative Interventions on ESR in Nigeria 105
3.6.1 The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act *106*
3.6.1.1 Nigeria's Dualist System 106
3.6.1.2 The African Charter 109

3.6.2 Courts' Navigation of the Justiciability Challenge through the African Charter 113
3.6.3 Other Enactments on Socio-economic Rights in Nigeria *116*
3.6.3.1 The National Health Insurance Scheme Act 116
3.6.3.2 Nigerian Education Bank Act 117
3.6.3.3 The Compulsory, Free, Universal Basic Education Act 2004 119
3.7 Conclusion 121

CHAPTER FOUR: GLOBAL CONSTITUTIONALISATION AS LEGAL FRAMEWORK FOR THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS 122

4.1 Introduction 122
4.2 Conceptualising Constitutionalisation 124
4.3 Types of Constitutionalisation 126
4.4 Unpacking 'Constitution' to unveil 'Constitutionalisation' 128
4.5 The Idea of Constitutionalism 132
4.6 Global Constitutionalisation and the challenge of Sovereignty 136
4.7 Justifications for International Cooperation 142
4.8 The Normative and Jurisprudential Framework for International Cooperation and Assistance for ESR Realisation 153
4.8.1 Normative Underpinning *153*
4.8.1.1 Pre-ICESCR Instruments on International Cooperation 153
4.8.1.2 ICESCR Normative Framework on International Cooperation and Assistance 157
4.8.2 CESCR Jurisprudence on International Cooperation and Assistance *160*
4.9 The Optional Protocol Remedial Mechanism and International Cooperation 171
4.10 Realising the Third World People's ESR through International Cooperation 175
4.11 The Place of Global Legal Culture for ESR Realisation 182
4.12 Protection of ESR through Global Social Rights Constitututionalism 183
4.12.1 Global Interaction with a Domestic Order *185*
4.12.1.1 Coercion 185
4.12.1.2 Persuasion 187
4.12.1.3 Acculturation 189
4.12.2 Rationalist and Constructivist Approaches to Human Rights Compliance *191*
4.13 Conclusion 194

CHAPTER FIVE: JUDICIALISATION AS A FRAMEWORK FOR THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS 197

5.1 Introduction 197
5.2 Conceptualising Judicialisation 201
5.3 Conditions for Judicialisation 205
5.4 Legal Framework for Judicialisation 206
5.5 Impact Assessment on ESR Judicialisation 210
5.5.1 Challenges *210*
5.5.2 Metrics for Impact Assessment *215*
5.5.3 Country Impact Study: Brazil, South Africa and Colombia *225*
5.6 Towards a more effective judicialised ESR Regime: From a Coercive Control to a Cooperative Control 233
5.6.1 Coercive and Cooperative Control *236*

5.7 Conclusion 248

CHAPTER SIX: PROTECTION OF ECONOMIC AND SOCIAL RIGHTS: A DIALOGIC APPROACH TO JUDICIALISATION 249

6.1 Introduction 249
6.2 Institutional Collaboration 251
6.2.1 Types of Human Right Users 253
6.2.2 The need for Institutional Collaboration 254
5.2.3 Institutional Players in the Collaborative ESR Realisation Mechanism 258
6.2.4 Determination of Appropriate Collaborators 268
6.2.5 Outcome of Institutional Collaboration 269
6.3 Social Movements and Protests 276
6.5 Conclusion 278

CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS 280

7.1 Introduction 280
7.2 Findings 280
7.3 Recommendations 282
7.4 Areas for Future Research 284
7.5 Conclusion 284

BIBLIOGRAPHY 285

LIST OF STATUTES/INSTRUMENTS/ REGULATIONS

African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria

African Charter on Human and Peoples Rights 1981

Charter of the United Nations

Committee on Economic, Social and Cultural Rights General Comments Nos 1, 3, 4, 5, 6, 8,11, 12, 14, 15, 17, 18, 19, 21,22, 23, 24, 25.

Compulsory, Free and Universal Basic Education Act, Cap N 104 Laws of the Federation of Nigeria, 2004.

Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010

Constitution of the Federative Republic of Brazil 1988

Constitution of the Netherlands 1983

Constitution of the Russian Federation 1993

Convention on the Rights of People with Disabilities

Convention on the Rights of the Child

Covenant of the League of Nations

Freedom of Information Act 2011

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights 1966

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 2013.

National Health Insurance Scheme Act, Cap N42 LFN, 2004.

Nigerian Education Bank Act, CAP N 104, LFN 2004

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 2013

The Child Rights Act 2003

The Constitution of Romania 1991

The Constitution of the Federal Republic of Nigeria 1979

The Constitution of the Federal Republic of Nigeria, 1999 (as amended)

The Constitution of the Republic of South Africa 1996

The Discrimination against Persons with Disabilities (Prohibition) Act 2018

The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1987

The Political Constitution of Colombia 1991

Universal Declaration of Human Rights 1948

LIST OF CASES

Abacha v Fawehinmi (2000) 6 NWLR (pt 660) 228.

Afolayan Aderonke v. Skye Bank, unreported Suit No. NICN/IB/08/2015 delivered on May 17, 2017

Agala v Enwere (2010) All FWLR (Pt. 532) 1609

Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors 19 December 2003

Alhaji Sani Dododo v Economic & Financial Crimes Commission and Ors 2013) 1 NWLR (pt1336) 468.

Alhaji Sani Dododo v Economic & Financial Crimes Commission and Ors (2013) 1 NWLR (pt 1336) 464 at 510

Aloysius v. Diamond Bank Plc (2015) 58 N.L.L.R (Pt.199) 92

Archbishop Anthony Olubunmi Okojie & Ors v Attorney-General of Lagos State & Ors (1981) 2 NCLR 337

Attorney-General of Bendel State v Attorney-General of the Federation & 22 Others (1981) All NLR 85 SC.

Attorney-General of Ondo State v Attorney-General of the Federation & Ors(2002) 9 NWLR (pt 772) 2.

Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation [2019] 5 NWLR 518,598.

Connors v. UK ECHR Application No, 66747/01, 27 May 2004.

Corte Constitucion [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op, at 1)

Dr Ukaegbu v Attorney-General, Imo State 1(983) 1 SCNLR 212

Femi Falana v Attorney General of the Federation unreported) Suit No: FHC/L/CS/1122/2011 delivered on 28 May 2014.

Femi Falana v Attorney-General of the Federation (No.1) unreported) Suit No: FHC/L/CS/1121/2011 delivered on June 20, 2014.

Femi Falana v Attorney-General of the Federation Suit No. FHC/IKJ/CS/M59/2010 (unreported) delivered on January 10, 2011.

Goldberg v. Kelly 397 US 254 (1970)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169. (CC).

Ibidapo v Lufthana Airlines (1997) 4 NWLR (pt 498) 124 at 150

ICJ v. Portugal (Complaint No. 1/1999)

Internally Displaced Persons (IDP) case Ruling T-025/2004.

Jonah Gbemre v Shell Petroleum Development Company of Nigeria Ltd & 2 Ors FHC/B/CS//53/05, (unreported)delivered on November 14, 2005

Joseph Odafe & Ors v Attorney-General of the Federation & Ors (2004) AHRLR 205 118

Lagos Sharaton Hotel & Towers v Hotel and Personal Services Senior Staff Association (2014) 9 CLRN, 61.

Legal Defence and Assistance Project (LEDAP) GTE and Ltd v. Federal Ministry of Education and the Attorney General of the Federation SUIT NO.: FHC/ABJ/CS/978/15 (Unreported) delivered on 01 March 2017

Local Government Service Commission Ekiti State v Mr M K Bamisaye (2013) LPELR-20407

Lopez Ostra v Spain (1994) IIHRL 106 (09 December 1994)

Matthew v Minister of Defence (2003) UKHL 4

Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

Minister of Health & Others v Treatment Action Campaign & Others 2002 (5) SA 721 (CC) at 738 (S. Aft.).

Newfoundland (Treasury Board) v NAPE

Nkonkobe Municipality v Water Services South Africa (Pty) Ltd. & Ors Case No 1277/2001 (Unreported).

Ogugu v State (1994) 9 NWLR (pt 366) 1.

Ohakosim v COP (2009) 15 NWLR (pt 1164) 229.

Olafisoye v Federal Republic of Nigeria (2004)4 NWLR (pt.764) 580;(2005)51 WRN 52

Organ v Nigerian Liquified Natural Gas Ltd (2010) All FWLR (pt 535 293 at 338

Osaka v. United Kingdom, App. No.23452/94, para 116, European Court of Human Rights (1998)

Overcrowded Prisoners case (Ruling-153/1998)

Pheko and Others v Ekurhuleni Metropolitan Municipality 2012(2) SA 598 (CC); 2012(4) BCLR 388 (CC)

Port Elizabeth Municipality v. Various Occupiers (2005 SA 217 (CC)

R (Unison) v Lord Chancellor [2017] UKSC 51

R v Mills [1999] 3 S.C.R. 668.

R v O' Connor [1995] 4 S.C.R. 1411.

R. v Darrach [2000] 2 S.C.R. 443

R. v Seaboyer [1991] 2 S.C.R. 577)

Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria (No 1) (2009) AHRLR 331).

Sauve v Canada, [2000] 2 F.C. 117 at 148 (C.A.).

Sauve v. Canada, [2002] 3 S.C.R. 519

Schubart Park Residents Association and Others v City of Tshwane and Others 2012 ZACC 26

SERAP v. Nigeria Communication 155/96 para 63. \

Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria Communication No 155 of 1996 delivered on the 30th Ordinary Session in October 2001.

The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v Medical and Health Workers Union of Nigeria (2008) 37 WRN 1

Ubani v. Director, SSS (1999) 11 NWLR Pt 625) 129

Ubong Asangausung v. Mainstreet Bank Registrars Limited, delivered on December 12, 2019

UPAC case Ruling C-383/1999, C-747/1999 and C/700/1999.

Victoria (City) v Adams 2008 BCSC 1363

LIST OF ABBREVIATIONS

AG	Attorney-General
AHRLR	African Human Rights Law Report
AIDS	Acquired Immune Deficiency Syndrome
ALL FWLR	All Federation Weekly Law Report
ALL NLR	All Nigerian Law Report
ANC	African National Congress
ANOR	Another
Art	Article
AU	African Union
CA	Court of Appeal
CAP	Chapter
CC	Constitutional Court
CCC	Colombian Constitutional Court
CDC	Constitution Drafting Committee
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CPR	Civil and Political Rights
CUP	Cambridge University Press
ECHR	European Court of Human Rights
ESR	Economic and Social Rights
EU	European Union
FC	Canada Federal Court Reports
FHC	Federal High Court
FODPSP	Fundamental Objectives and Directive Principles of State Policy
FWLR	Federation Weekly Law Report
GC	General Comment
HC	High Court
HIV	Human Immunodeficiency Virus
HoL	House of Lords
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International Comparative Law Quarterly
ICPC	Independent Corrupt Practices and other Related Offences Commission
IDPs	Internally Displaced Persons
ILO	International Labour Organization
IMF	International Monetary Fund
LEDAP	Legal Defence and Assistance Project
Ltd	Limited
MDAs	Ministries, Departments and Agencies
N	Number
NCLR	Nigerian Constitutional Law Report
NGO	Non-Governmental Organisation
NHIS	National Health Insurance Scheme
NICN	National Industrial Court of Nigeria
NP	National Party
NWLR	Nigerian Weekly Law Report
OAU	Organisation of African Unity
ORS	Others

OUP	Oxford University Press
Para	Paragraph
SA	South Africa
SC	Supreme Court
SCNLR	Supreme Court of Nigeria Law Report
SCR	Canada Supreme Court Reports
SDGs	Sustainable Development Goals
SERAP	Socio-Economic Rights and Accountability Project
TWAIL	Third World Approaches to International Law
UBE	Universal Basic Education
UDHR	Universal Declaration on Human Rights
UK	The United Kingdom
UKSC	United Kingdom Supreme Court
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund (formerly the United Nations International Children Emergency Fund)
US	The United States
WRN	Weekly Report of Nigeria
WTO	World Trade Organization

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The central question which this thesis considers is: how can cooperation (nationally and internationally) bring about a practical realisation of Economic, Social and Cultural Rights (ESR) in Nigeria? To answer the question, the thesis first problematises the normative authority of the courts to intervene on ESR issues in Nigeria and asserts that the problem of effective realisation of ESR does not reside solely on the presence or absence of such authority. Rather, the problem finds full expression in the tensions between judicial intervention and the (negative) responses of the political branches, that is the executive and legislative arms of government on the one hand, and the non-exploitation of the normative framework for international cooperation and assistance on the other hand.

To resolve these tensions, the thesis offers an argument for cooperative interventions in Nigeria. Nationally, it proposes a 'soft', cooperative judicial approach, which is opposed to the traditional 'command and control' or 'hard' compelling nature of court's orders. Under the proposed cooperative framework, the courts are expected to facilitate an inter-institutional conversation and collaboration which would lead to a mutually agreeable scope of enforceable or realisable ESR and then pool resources to actually realise the rights. Internationally, it highlights the need for developed countries and the international community to fulfil their international human rights obligations to provide international cooperation and assistance for developing countries, for the realisation of ESR. Overall, this thesis utilises the arguments on a cooperative judicial approach and international cooperation to project a broader argument that a cooperative approach is essential for the realisation of ESR of people, especially the people of Nigeria. Such an approach will not only eliminate institutional tensions, reach agreements on national and international deployment of resources, but it would also enhance the realisation of ESR needs of people, no matter where they reside.

ESR are a set of rights recognised in international human rights instruments[1] and some national constitutions[2] which aim to empower people with the material conditions and facilities necessary to lead a decent life. According to Jung *etal,* at least 90% of the 195 constitutions across the globe recognise one ESR or the other, either in a justiciable or aspirational manner.[3] Among the ESR recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR)-which is the flagship treaty on ESR- are the right to work,[4] the right to just and favourable conditions of work, and fair remuneration[5], the right to form and join trade unions,[6] the right to social security,[7] the right to family life,[8] the right to an adequate standard of living, including adequate food, housing and clothing, and the continuous improvement of living conditions,[9] the right to enjoy the highest attainable standard of physical and mental health,[10] the right to education,[11] and the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author.[12] According to Ssenyonjo 'the effective respect, protection, and fulfilment of these rights is an important –but under-explored – component of international human rights law'.[13] Hence, there is a need to take the realisation of these rights seriously, given the impact they could have on the living conditions of people.

[1] Particularly the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).
[2] Although the Mexican Constitution of 1916 was the flagship Constitution to have recognised ESR, the Constitution of the Republic of South Africa debatably stands out as the most popular national constitution on ESR because of the South African Constitutional Court's robust engagement with it. These rights are also contained, albeit as directive principles, in Chapter II of the Constitution of the Federal Republic of Nigeria 1999.
[3] Courtney Jung, Ran Hirschl & Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *Am J Comp L* 1043-1094, 1053.
[4] Art. 6 of the ICESCR.
[5] Art. 7 of the ICESCR.
[6] Art. 8 of the ICESCR.
[7] Art. 9 of the ICESCR.
[8] Art. 10 of the ICESCR.
[9] Art. 11 of the ICESCR.
[10] Art. 12 of the ICESCR.
[11] Art. 13 and 14 of the ICESCR.
[12] Art. 15 of the ICESCR.
[13] Manisuli Ssenyonjo, 'Reflections on State Obligations with respect to Economic, Social and Cultural Rights in International Human Rights Law' (2011) 15(6) *The International Journal of Human Rights* 969-1012, 971.

1.2 Statement of the Research Problem

This thesis beams its searchlight on Nigeria regarding the status and realisation of ESR of the Nigerian people. Nigeria is a party to the ICESCR which recognises ESR within international law. However, under the domestic laws in Nigeria, there is a lack of clarity on whether or not ESR are justiciable. This is because the ESR are housed under Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (the Nigerian Constitution) under the name and style of Fundamental Objectives and Directive Principles of State Policy. Further, as discussed in chapter three of this thesis, Nigeria operates a dualist system whereby international treaties such as the ICESCR are, generally speaking, not binding domestically unless and until they have been legislatively domesticated at the national level. Thus, there are two schools of thought on the justiciability of chapter II of the Nigerian Constitution which contains ESR-related provisions.

1.2.1. The two Schools of Thought on ESR Justiciability in Nigeria

The first school of thought states that the provisions of chapter II of the Nigerian Constitution are merely State aspirations for which the Nigerian State cannot be held accountable for non-implementation.[14] The second school of thought holds the view that there is no constitutional impediment whatsoever to the enforceability or justiciability of Chapter II of the Constitution.[15] While this thesis gravitates towards the latter school of thought based on the arguments advanced in chapter three below, it contends that merely making ESR justiciable in Nigeria may not lead to a full realisation of ESR, unless a collaborative judicial approach is adopted.

[14] See Iyabode Ogunniran, 'Enforceability of Socio-economic Rights: Seeing Nigeria through the Eyes of other Jurisdictions' (2010) *JILJ* 65; A.O. Popoola, 'Fundamental Objectives and Directive Principles of State Policy: Executive Responsibility and the Justiciability Dilemma' in E. Azinge and B. Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Nigerian Institute of Advanced Legal Studies, 2010)324-368. Also see *Olubunmi Okojie v. Attorney-General, Lagos State* (1981) 1 NCLR 105.

[15] See, for example, C.A. Odinkalu, 'Lawyering for a Cause: The Femi Falana Story and the Imperative of Justiciability of Socio-economic Rights in Nigeria' being Text of Public Lecture delivered in honour of Femi Falana, SAN, at The Polytechnic, Ibadan on 10 December 2012 and P. Anyebe, 'Enforcing the Good Governance Charter: Judicial and non-judicial approaches to Economic, Social and Cultural Rights under Chapter Two of the 1999 Constitution' in E. Azinge and B. Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Nigerian Institute of Advanced Legal Studies, 2010) 376.

Put differently, this thesis argues that there is no section in the Nigerian Constitution which absolutely bars the courts from exercising jurisdiction over ESR,[16] but that there is a need to revisit how the court's power is exercised. The Supreme Court of Nigeria held in *Olafisoye v. Federal Republic of Nigeria*[17] that the provisions of section 6(6)(c) of the Nigerian Constitution, which ousts the courts' jurisdiction on the ESR provisions in Chapter II of the Constitution, would not absolutely bar the justiciability of the chapter, if there is any other provision in the Constitution that makes the chapter justiciable.[18]

Thus, Anyebe[19] argues that it is the fear of overstepping roles in the separation of powers, rather than any textual constitutional constraints, that prevents the courts from adjudicating ESR cases. Caution is, however, advised on the part of the courts in their adoption of a purely traditional adversarial method of adjudication. As Campbell observes, 'The unhappiness with conventional adversarial forums needs to be a call to reimagine how accountability mechanisms can take account of gross and widespread human rights abuses.[20]

1.2.2. Problematising Confrontational Judicial Approach

As this thesis discusses in chapter five below, courts' approach towards ESR adjudication could either be confrontational or cooperative. While the confrontational approach adopts the traditional adversarial method or a 'command and control' style to compel the political class to realise ESR, the cooperative approach seeks to adopt a collaborative and deliberative approach towards ESR realisation. This thesis argues that a confrontational judicial position may be less effective than a cooperative and collaborative position on ESR adjudication in Nigeria, and perhaps in other jurisdictions where ESR are framed in the form of Directive

[16] *Attorney-General of Ondo State v Attorney-General of the Federation & Ors*(2002) 9 NWLR (pt 772) 2.
[17] (2004)4 NWLR (pt.764) 580
[18] See *Attorney-General of Ondo State case* (n16).
[19] P. Anyebe, 'Enforcing the Good Governance Charter: Judicial and non-judicial approaches to Economic, Social and Cultural Rights under Chapter Two of the 1999 Constitution' in E. Azinge and B. Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Nigerian Institute of Advanced Legal Studies, 2010) 376.
[20] Meghan Campbell, 'Beyond the Courtroom: Accountability for Grave and Systemic Human Rights Violations' (2019) 1 *University of Oxford Human Rights Hub Journal* 55-85,56.

Principles or where they are grossly violated. This argument is hinged on the fact that a confrontational approach in such jurisdictions may be met by political resistance, which may worsen, rather than improve the state of ESR realisation. A cooperative approach would help to calibrate the stance of the political class to realise ESR, under a collaborative ambience that takes resource allocation and prioritisation into account.

To address the problems associated with the adversarial method, this thesis relies on Tushnet's 'weak courts, strong rights' model[21] to argue that the courts should design a conversational mechanism towards engaging the political branches to promote and realise ESR. The thesis argues that if ESR and indeed all rights must be taken seriously,[22] in terms of effective implementation and compliance, the courts should not issue confrontational or 'command and control' orders. Such orders may only end up as 'hollow hope'[23] for the rights claimants who may have a formal judgment without any corresponding practical impact or change in their material circumstances. The strength of the cooperative approach is that it helps to balance the tensions that exist between political constitutionalists (who argue against judicial interventions on ESR) and judicial constitutionalists (who justify judicial interventions), because the cooperation model seeks 'to provide a role for courts in interpreting rights while allowing governments to engage in robust policymaking'.[24]

Hence, while it is desirable to hold the Nigerian government to account for ESR fulfilment,[25] this thesis however advances a cooperative mechanism for effectuating such accountability. There is no doubt that ESR should enjoy equal treatment with civil and political rights (CPR) in terms of adjudication and implementation. As Hoveyda asks,

[21] See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2007).
[22] See Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977).
[23] See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991).
[24] Kent Roach, 'Dialogic Remedies' (2019) 17(3*) I•CON* 860–883, 861.
[25] See Chapter three of this thesis for a full discussion of this point.

> What, for instance, is the meaning of freedom of speech in a society where everything is sadly lacking, with no hope in sight for betterment, or freedom of speech where everybody is illiterate? without carrying out the basic needs of human beings, all other rights are mere illusion….[26]

ESR and CPR are so inter-connected that realising one without realising the other would amount to undoing both categories of rights. It is discomforting to note that Nigeria, which does not have any regulated welfare or social security package at the moment, does not take the realisation of ESR seriously.[27]

While this thesis agrees that there is a role for courts in the realisation of ESR, it, however, disagrees with Uzoukwu[28] who believes that the judiciary has a greater role to play than the executive and legislative arms of government. According to Uzoukwu, 'It is not for cosmetic reasons that the judiciary is regarded as the last hope of the common person. In most cases, it takes longer time to meet societal needs through legislation than through judicial review'. [29] The argument in this thesis is that the political branches of government should be seen as equal partners with the court, all of which should cooperate with one another for the realisation of ESR. As Klare argues, a progressive adjudicatory approach does not guarantee politically and socially transformative outcomes in a politically conservative culture.[30] Hence, recognising the justiciability of ESR needs to be complemented by collaboration between the drivers of the legal culture or adjudicatory processes and the political branches, to bring about a truly transformative social change.

The foregoing point is not unmindful of the possibility of a situation where the drivers of the judicial processes are fundamentally ideologically opposed to the drivers of the political processes. However, such ideological conflict does not attenuate the argument for a cooperative

---

[26] Fereydoun Hoveyda, 'Not All Clocks for Human Rights Are the Same' *New York Times* (USA, 18 May 1977).
[27] C.O. Adekoya, 'Navigating the Hurdle of Justiciability and Judicial Review of Socio-economic Rights in Nigeria' (2011) 1 (1) *Olabisi Onabanjo University Journal of Public Law* 2.
[28] L. Uzoukwu, 'Constitutionalization and Judicialization of Directive Principles of State Policy' in D. Olanrewaju (ed) *Law and Its Leeway*: *Essays in Honour of Emeritus Professor Isaac Oluwole Agbede* (GEN Communications Resources, 2014) 150.
[29] *Ibid*.
[30] Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146-188, 170.

judicial approach. The judiciary is not new to conflicts as their role is essentially that of conflict resolution. So, it is essential that the judiciary should approach ideological conflicts with the intention of realising, not undoing ESR. As Mouffe argues, 'Conflict, in order to be accepted as legitimate needs to take a form that does not destroy the political association'.[31] Thus, ideological conflicts in this case should be calibrated so that it could cooperatively lead to a better ESR realisation regime. In taking an ideological position, courts should not merely aim to use the position to demonstrate their legitimating power. Rather, they should also bear in mind that such ideological position can be adjusted to promote the court's emancipatory goal, that is, the 'attempts to redress instances of …inequality, injustice, exclusion, marginalization, subordination and violence'.[32] To promote this goal, courts should ensure that their ideological orientations enable them to engage in highly cooperative ESR discussions with the political branches.

It is instructive to note that whether a particular judge is liberally/progressively inclined or conservatively/traditionally inclined, the impact of their judicial decision-making would be determined both by internal and external factors. Hence, it would be tactical for a judge to take into account external factors such as the ideological disposition of the political class when making a decision, especially judicial decisions that have huge impact on resource allocation. As Manko argues, Judges' judicial discretion or 'freedom to take a "sovereign" politico-judicial decision, is a question of degree, rather than one of all-or-nothing distinction'.[33] Thus, Judges should play the role of an agonist rather than that of an antagonist in projecting their ideological leanings.[34] While antagonists propose and impose their ideas as the only winning idea, agonists respect the views of others and even admit that their views are contestable and perhaps 'deconstructable' when superior arguments are presented. Judges should thus embrace agonistic democracy which requires the collation, finetuning and use of diverse opinions from various stakeholders to inform a consensus, rather than adopting an imposed but seemingly universal consensus solely based on their interpretive functions.

According to King, 'The main engine for protecting social rights is and always will be primary legislation adopted by a representative legislature, and so any good-faith commitment begins

[31] Chantal Moufe, *On the Political* (Routledge, 2005) 20.
[32] Thomas Fossen, 'Agonistic Critiques of Liberalism: Perfection and Emancipation' (2008) 7(4) *Contemporary Political Theory* 376–394, 385.
[33] Rafal Manko, 'Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication' (2022) 33 *Law and Critique* 175-195, 181.
[34] Ibid.

here'.[35] It is the constitutional and legislative framework from a given country's legislature that normally determines the nature of justiciable rights. They also play a role in the budget making process which informs what resources are available for the realisation of ESR. It is, therefore, important that the legislature which has 'the power of the purse'[36] in a democratic setting such as Nigeria, 'should generally be represented in the key decisions about spending'.[37] The executive arm of government would be rendered powerless if the legislature does not consider and pass the annual Appropriation Bill into law. For example, section 81 of the Nigerian Constitution gives the Nigerian legislature the power to approve public spending by the executive. Similarly, a court's decision on ESR without the cooperation of the political branches may not enjoy the practical realisation that the rights deserve. For example, within the South African context, several court decisions, that touched on ESR such as entitlement to textbooks[38] and learning furniture[39] as part of the right to education, were not complied with by the government.[40] Thus, Veriava notes that 'within the context of government failing to abide by court orders in several education provisioning cases, civil society organisations are increasingly experimenting with different remedies…'.[41]

Owing to this continuous neglect by political branches of their ESR obligations, there is a need to adopt a cooperative judicialisation of ESR, to enhance the effective realisation of ESR. This cooperative approach:

> takes the view that the three primary branches of government essentially collaborate in the general promotion of commonly accepted public values such as fairness, autonomy, welfare, transparency, efficiency, and so on. Parliament,

[35] Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 41.
[36] *Ibid* 44.
[37] *Ibid.*
[38] See *Section 27 v Minister of Education* 2013(2) SA 40(GNP) (Textbooks 1); *Section 27 and Others II Case* no.24565/2012(23 December 2012) (Textbooks 3); *Basic Education for All & Others v Minister of Basic Education* 2014(4) SA 274(GP) (Textbooks 3).
[39] See *Madzodzo v Minister of Basic Education* [2014] 2 All SA 339 (ECM);2014 (3) SA 441 (ECM).
[40] Faranaaz Veriava, 'The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism' (2016) 32(2) South *African Journal on Human Rights* 321-343, 342.
[41] Ibid 342.

> the executive, and courts are on this vision part of a joint enterprise for the betterment of society.[42]

One of the advantages of this cooperation model is that it makes Judges to be more deferential than they would under the formalist approach, which is a 'compellatory' interpretative approach to ESR. Another advantage is that the vision of the distribution of decision-making functions is less compartmentalised; it is rather more fluid than under the formalist approach and seeks to harness the strength of each institution to enhance the realisation of ESR.[43] This makes it possible for functions to be carried out in a multi-institutional way rather than in a single-institutional and error-laden manner under the formalist approach or traditional adversarial method.[44] This would lead to a court decision that is less difficult to enforce, in the sense that the political branches would be more motivated to enforce such decisions in which they have played a role.

That said, one should not lose sight of views that are opposed to a cooperative judicial model. For example, it could be argued that if ESR are indeed rights, then what the courts should be seen doing is enforcement of the rights, not cooperating with the political branches on whether ESR should be realised and the manner of realisation. Thus, Spagnoli,[45] questions the justification of the use of the word 'right' in the context of ESR if they are not in fact judicially enforceable in a way that is similar to CPR. Further, there is also the fear that the parties to the dispute in a cooperative judicial model may often have unequal powers -the State being powerful and the rights victim being mostly powerless.[46] The fear has also been entertained that an amicable settlement of human rights cases could attenuate the growth of robust jurisprudence in that area of law.[47]

---

[42] *Ibid* 139.
[43] *Ibid.*
[44] *Ibid*.
[45] F. Spagnoli, 'The Horizontal Priority of Economic Rights' in N. Udombana & V. Nesirevic (eds.) *Re-thinking Social Economic Rights in an Insecure World* (Central European University Press, 2006) 21-22.
[46] P.E. Standaert, 'The Friendly Settlement of Human Rights Abuses in the Americas' (1999) 9 *Duke Journal of Comparative and International Law* 529.
[47] Victor Oluwasina Ayeni & Tajudeen Ojo Ibraheem, 'Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System' (2019)10 *Beijing Law Review* 406-422, 408.

Despite the above oppositions, this thesis argues that a cooperative judicialisation of ESR holds a better prospect for a more effective and practical realisation of the rights. First, the cooperation model will not in any way make ESR less 'rights' than their counterpart CPR. It rather seeks to make the rights 'much more realisable' instead of being rights only in abstract terms. For instance, there is some form of cooperation by the Canadian Supreme Court when dealing with the political branches as regards CPR. For example, in R. *v Mills*,[48] the Supreme Court upheld the validity of a rape shield legislation which reversed the Court's earlier decision in *R. v O'Connor*.[49] The legislation, contrary to *O'Connor,* provided that an accused person could access a complainant's confidential records in a sexual assault case. In a veiled deference to the legislature, the Court held that 'courts do not hold a monopoly on the protection and promotion of rights and freedoms'.[50] The Court recognised that there are several ways and institutions that can protect rights, because, 'if the common law were to be taken as establishing the only regime, then we could not speak of a dialogue with the legislature'.[51] The Canadian Federal Court of Appeal took a similar cooperative approach in the right to vote case of *Sauve v. Canada*,[52] where the Court, in affirming the validity of the Canada Election Act which prohibited prisoners from voting, held that the Act evidenced

> the continuing dialogue between courts and legislatures on the issue of prisoner voting. In 1993, the Supreme Court of Canada held that a blanket disqualification of prisoners from voting, contained in earlier legislation which was challenged, violated section 3 of the Charter and could not be saved by section 1 of the Charter. Parliament responded to this judicial advice by enacting legislation aimed at accomplishing part of its objectives while complying with the Charter.

Although this cooperative position was rejected when the case got to the Supreme Court[53] which held that prisoners are entitled to vote, the Court of Appeal's decision shows an

[48] [1999] 3 S.C.R. 668.
[49] [1995] 4 S.C.R. 1411.
[50] R. v Mills [1999] 3 S.C.R. 668. Also see *R. v Darrach* [2000] 2 S.C.R. 443.
[51] Ibid, para 57.
[52] *Sauve v Canada* [2000] 2 F.C. 117, 148 (C.A.).
[53] *Sauve v. Canada* [2002] 3 S.C.R. 519

interactive approach between the Canadian courts and the political branches. Under this cooperative approach and depending on a given constitution, a legislative reply to a judicial decision could be in the form of reversal, modification or outright avoidance of the judicial position.[54] So, just as CPR, ESR can benefit from the potential of this cooperation model and still remain rights.

Second, the cooperation model does not seek to use power imbalances to disempower one branch of government or one litigant in favour of another. Instead, it is interested in a court-facilitated negotiation, discussion, or conversation on ESR realisation. On the issue of attenuation of growth of jurisprudence, it is argued here that litigation is not an end in itself but it is aimed at promoting a culture of justification. According to Klare, democracy:

> is intended to be a bridge from authoritarianism to a new culture of justification, "a culture in which every exercise of power is expected to be justified" … adjudication is, or is supposed to be, the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule, and principle.[55]

ESR litigation should lead to a noticeable change in the ESR circumstances of the litigant and if it does not, an alternative model is worth exploring. In any case, the cooperative judicial model is a form of litigation, albeit in a less traditional manner. So, the outcome of the negotiation and cooperative process forms part of the court's jurisprudence which would lead to further development of the law. For example, the European Court of Human Rights has used article 39(which provides for friendly settlement) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to promote amicable settlement of human rights disputes between victims of human rights violations and States.[56] Nigeria can

[54] For a detailed discussion on this, see Peter W Hogg & Allison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 *Osgoode Hall L.J*. 75 and Christoper P Manfredi, 'The Day the Dialogue Died: A Comment on Sauve v. Canada' (2007) 45(1) *Osgoode Hall Law Journal* 105-123.

[55] Klare, 'Legal Culture' (n30) 147(footnote omitted). Also see Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32.

[56] See H Keller, M Forowics & L Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (University of Oxford, 2010) 1-330.

draw some lessons from this practice. It is important to devise 'a method of adjudication that is politically and morally engaged but that is not illicit "judicial legislation"'.[57]

Therefore, it is argued that the main concern should centre on how best to bring about a real-world realisation of ESR. Thus, if judicial cooperation leads to better ESR realisation than a confrontational or 'compellatory' judicial model, it should be welcomed rather than attract condemnation. After all, in most civil lawsuits, the courts encourage and in fact promote amicable settlement of disputes, whether in the form of negotiation, mediation, conciliation or arbitration.[58] There should, therefore, be nothing illegitimate in courts engaging in an inter-institutional cooperation with the other arms of government over ESR suits, which aims to measure and suggest the allocation of resources and enhance a positive disposition of the political branches towards ESR fulfilment.

Peaceful resolution of disputes is a legal principle that is well recognised under the United Nations (UN) legal framework.[59] It also fits into the African setting[60] 'where peaceful co-existence after legal tussles is a cherished cultural value'.[61] The cooperative judicial mechanism will not only reduce inter-institutional tensions and provide reparation for victims of human rights violation, but the agreements reached through the process can also lead to 'the adoption of measures with far-reaching structural effects across all sectors of government, including legislative reforms, implementation of public policies, and programs at the service of the community'.[62] It can also instil a culture of rights, a culture of justification into legislative and executive branches. Furthermore, since 'Judicial mindset and methodology are part of the

[57] Klare, 'Legal Culture' (n30) 150.
[58] See M.N. Shaw, *International Law* (Cambridge University Press, 2005) 918 for a detailed discussion of the various means of reaching amicable or friendly settlement of disputes.
[59] See Art. 33 of the United Nations Charter. See also J.U.C.Tinoco, 'The Friendly Settlement of Human Rights Petitions in the Universal and Regional Spheres, with Special Reference to the Inter-American System' (2005) 5 *Mexican Yearbook of International Law* 83.
[60]Hence Arts 48 and 52 of the African Charter recognize the importance of friendly settlement.
[61] Ayeni & Ibraheem'Amicable Settlement of Disputes' (n47) 406.
[62] OAS, 'Friendly Settlements', available at http://www.oas.org/en/iachr/friendly_settlements/default.asp (accessed on 11 August 2020).

law, and therefore …must be examined and revised so as to promote equality, a culture of democracy and transparent governance',[63] a cooperative judicial mechanism may lead to a 'win-win situation' for both the government, the victim of ESR violation and the court itself. This is because 'it helps in reducing the court's caseload and reduces animosity among parties whose matters have been settled…'.[64] This is particularly so where a culture of rights or a culture of justification is firmly embedded, mainstreamed and regularised into government decision-making processes. The cooperative mechanism also saves time, money and energy on the part of both parties and the court.[65]

Further, a cooperative mechanism avoids a situation where the courts are enmeshed in an inordinate judicial control of power over and above the political branches. In the words of Manfredi,

> On the one hand, rights-based judicial review is a positive element of liberal democracy because it allows courts to perform the important counter majoritarian function of safeguarding individual rights and liberties by enforcing constitutional limits on legislative and executive power. On the other hand, rights-based judicial review taken to its extreme becomes an anti-democratic power wielded by courts to alter the fundamental character of a nation's constitution without significant popular participation or even public awareness.[66]

The uncontrolled exercise of judicial power 'reduces the power of ideologically organized majorities,… to bring about significant change in any subject-matter area'.[67] There is therefore a need to arrest this 'paradox of liberal constitutionalism'[68] because, 'the purpose of a constitution is to constrain political power; rights-based judicial review is a form of political power, and therefore constitutions must constrain rights-based judicial review'.[69] If care is not taken, a strong form of judicial review which gives the courts the exclusive preserve to

[63] Klare 'Legal Culture' (n30) 156.
[64] Ayeni & Ibraheem, 'Amicable Settlement of Disputes' (n47) 406.
[65] Ibid 407.
[66] Manfredi, 'The Day the Dialogue Died' (n54), 122-123.
[67] Duncan Kennedy, *A Critique of Adjudication: {fin de siecle}* (Harvard University Press, 1997) 2.
[68] Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2d ed. (Oxford University Press, 2001) 22.
[69] Ibid

determine the meaning and extent of rights could result in the judicial power itself not being constrained by constitutional limits.[70]

1.2.3. The role of International Cooperation and Assistance

In addition to the court-facilitated institutional cooperation, this thesis argues that Nigeria should explore, and the developed States should provide international cooperation and assistance as normatively recognised in the ICESCR and CESCR General Comments. For example, Article 2(1) of ICESCR provides that,

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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.[71]

This normative framework for international cooperation is also buttressed by several of the CESCR's General Comments, discussed in chapter four below, such as General Comment No.3 which states that,

> A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance…International cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard

Therefore, drawing on the relevant provisions of ICESCR, CESCR General Comments and other international human rights instruments[72], it is argued that developed nations have a legal obligation to render international assistance and cooperation to the developing nations, in the

[70] Ibid
[71] Also see Arts. 11(1), 15(4), 22 and 23 of ICESCR.
[72] See Arts. 1(1), 55 & 56 of the Charter of the United Nations, and Arts. 22 & 28 of the Universal Declaration on Human Rights (UDHR),

latter's efforts towards realising ESR. With particular emphasis on Nigeria, while the Nigerian government should deploy national resources towards realising ESR, such resources may not be sufficient to address ESR needs, hence the need to muster international cooperation and assistance. Put differently, the need for international cooperation is reinforced by the fact that the available resources of the developing countries, even if utilised to the maximum, would be insufficient, making those countries to fall back on international cooperation, which is needed if they were to fully realise ESR within their jurisdictions.[73]

The argument has been forcefully put forward that. '…states do not exist in isolation. As members of the community of states they are dependent on international cooperation to cope with problems that go beyond national borders'.[74] The historical factor or the exploitation associated with colonialism further demonstrates the desirability of pooling national and international resources to realise the ESR of poor people in Nigeria.

Drawing on the insights of the Third World Approaches to International Law (TWAIL) to legitimise a more robust duty of cooperation, this thesis canvasses a move away from States' independence and co-existence to States' interdependence and cooperation,[75] with a view to meeting the ESR realisation of everyone, no matter their geographical location. Curtis and Darcy have argued that the obligation of international cooperation constitutes recognition of the 'power differential' that exists between rich and poor countries and 'the removal of structural obstacles to the realisation of rights that are themselves a manifestation of the existing power imbalance'.[76] Further, although it has been argued that ESR obligations are essentially domestic in nature,[77]

---

[73] Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, (Intersentia, 2006) 85.

[74] Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011)11(1) *Human Rights Law Review* 1-35, 2.

[75] See generally Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964).

[76] Josh Curtis and Shane Darcy 'The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing, 2012)13.

[77] Coomans 'The Extraterritorial Scope' (n74) 5.

and that a 'person's home state is certainly the first place to look to in terms of the protection of economic rights – and all other human rights as well',[78] this thesis argues that the provisions of ICESCR and other human right instruments on international cooperation and assistance have proved that the obligation to realise ESR is as equally international, extraterritorial and transnational as it is national.

However, while it is argued that Nigeria, and indeed other developing countries should draw on the international cooperation model to seek assistance, the point should also be made that States receiving international cooperation and assistance, including development aids, technical assistance, deployment of power and influence, should ensure that there are sustainable institutional frameworks for the absorption and utilisation of such cooperation and assistance, and that there are mechanisms to check mismanagement.[79] Thus, the international community represented by the United Nations (UN) should hold States to account as to how they utilise proceeds of international cooperation and assistance. It is contended that there is a need for cooperation across national and international levels if the ESR needs of poor people are to be met.

1.3 Research Questions

The central research question that this study seeks to answer is: can cooperation (nationally and internationally) bring about greater level of realisation of ESR in Nigeria? To answer this question, the following questions will be addressed:

(a) What is the legal status of ESR in Nigeria?

(b) Why are the current constitutional and judicial approaches towards the realisation of ESR mostly ineffective?

[78] Sigrun I Skogly & Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007) 267.

[79] Ssenyonjo, 'Reflections on State Obligations' (n13) 985. Also see CESCR, Concluding Observations: Democratic Republic of Congo, UN Doc. E/C.12/COD/ CO/4 (20 November 2009), para. 16.

(c) What approach should the courts and political branches adopt to emplace a better realisation of ESR?

(d) What is the role of international cooperation in realising ESR?

1.4 Research Methodology

This thesis adopts analytical and doctrinal methods.

The analytical method has been deployed to analyse existing human rights laws and instruments such as national constitutions, the Universal Declaration of Human Rights (UDHR) 1948, the ICESCR, the African Charter on Human and Peoples' Rights (African Charter) as well as judicial decisions. The doctrinal method has been used to review existing Nigerian and foreign literature on the subject matter.

While reference has been made to legal instruments and judicial decisions from several countries including Brazil, Canada, Colombia, India and South Africa, this thesis is not a comparative study that adopts description, comparism and explanation in country studies. The reference is made to bolster the cooperative approach argument adapted to the Nigerian context, since the countries have adopted such an approach, either in the form of meaningful engagement,[80] structural injunction[81], or public hearing.[82] Thus, this thesis has considered in chapter five a few cases from South Africa, Brazil and Colombia, to demonstrate that a confrontational judicial approach may sometimes be unhelpful towards the realisation of ESR, hence the need to adopt a more cooperative approach. However, it is apposite to state that the reference to the caselaw from these jurisdictions is not exhaustive neither is it authoritative enough to suggest that a confrontational judicial approach is *always* unhelpful. The thesis has drawn on the few caselaw solely for the purpose of problematising the issues around confrontational judicial approach. Hence, this thesis does not in any way suggest that there may

[80] South Africa.
[81] India.
[82] Colombia.

be no cases in these jurisdictions where a confrontational judicial approach has been or could be helpful for rights realisation.

Both primary and secondary sources of information such as constitutions, laws, conventions/treaties, CESCR General Comments, established texts on constitutional law, administrative law, international law, human rights, articles and commentaries in learned journals, law reports, periodicals, newspapers, unpublished works, conference papers and the Internet have been reviewed, analysed, critiqued and relied upon to arrive at the arguments reached in this study.

1.5 Significant Contributions to Knowledge

The significance of this research lies in its innovative approach to the realisation of ESR in Nigeria. It provides a contribution, through a cooperative ESR realisation model which is an uncharted course in the existing literature on ESR discourse in Nigeria.

The cooperative judicial intervention proposed in this thesis would enable the courts to identify some gaps in the body of law as regards ESR realisation, but without going ahead to intrude into the affairs of the other departments of government. The courts are to engineer a deliberative and collaborative discussion with the other branches and all key stakeholders on how to fill the gaps and realise ESR. ESR judicial decisions should not end with the court decision, but it should be fashioned in a way that goes beyond the courtroom and effect some positive change in the ESR situation of those affected.[83] So, the cooperation model proposed in this thesis would avoid a situation where litigants are handed mere paper victories by an activist judge without any corresponding post-judgment practical value. Such a cooperation model would lead to what Rodriguez-Garavito refers to as 'positive-sum litigation' where the judgment does not only positively impact on the litigant but also lead to 'a broader, favorable repercussions

[83] See Cesar Rodriguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1669-1691 for a detailed discussion on this point.

for the fulfilment of a socioeconomic right'.[84] The model would also avoid or at least minimise inter-branch conflict and tensions which usually characterise courts' ESR decisions that touch on allocation of scarce resources.

Further, the thesis makes significant contribution to knowledge by arguing that the international community and developed countries have a role to play in the realisation of ESR in Nigeria, through international cooperation and assistance. The thesis draws on the normative framework on international assistance and cooperation, as provided for in the ICESCR[85] and other international human rights instruments.[86] It argues that, owing to the influence of colonialism and neo-colonial policies on the developing States' inability to meet their ESR obligations, such countries should not be left on their own without some substantial commitment by the developed countries to providing the needed facilities for realising ESR in the developing countries. Rather than engaging in isolationism and unilateralism on matters of ESR realisation, this thesis advocates for multilateral cooperation among nation-states as a matter of a legal obligation. So, this thesis argues that nation-states should not allow unilateralism to lead to some States' national inability to meet their ESR obligations, which would in turn be 'the nails in the coffin for already frail global governance',[87] as a nation's inability to meet its citizens' ESR needs would have extraterritorial effect. This effect, which is a great challenge, would in one way or the other consume those who were in a position to help but refused or neglected to assist and cooperate internationally.[88] As a way out, the thesis argues that a global or international cooperation and solidarity will help in addressing ESR needs of those who live in

[84] Cesar Rodriguez-Gavarito, 'Beyond Enforcement: Assessing and Enhancing Judicial Impact' in Malcolm Langford, Cesar Rodriguez-Gavarito and Julieta Rossi (eds) *Social Rights Judgments and the Politics of Compliance: Making It Stick (*Cambridge University Press, 2017)79-80.
[85] See arts. 2(1), 11, 15, 22 & 23 of the ICESCR all of which are discussed in chapter four below.
[86] See for example arts. 1, 55 & 56 of the United Nations Charter and art. 28 of the Universal Declaration of Human Rights 1948 (UDHR) discussed in chapter four below.
[87] Hans Dembowski, 'Two-pronged Global Crisis', being a blog post in *Development and Cooperation* on 21 March 2020, available at: https://www.dandc.eu/en/article/covid-19-requires-global-cooperation-protect-human-health-and-prevent-economic-depression (accessed on 08 April 2020).
[88] See for example CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), paras. 13 & 14.

poorer countries. However, as argued in chapter four of this thesis, the primary duty to realise ESR lies with the immediate national government of the affected citizens and the government must be seen as maximising its resources towards such realisation before it can make a justifiable request for international cooperation and assistance.

Thus, the point being made in this thesis is that it would amount to a violation of international human rights obligations for a rich State to mobilise all of its resources and attention to its citizens' human rights protection but give zero resources and attention to the human rights of the citizens of other poorer States. States should always bear in mind that 'international obligations are not a substitute for national responsibility. International action, however, is indispensable for addressing obstacles that are beyond the capacity of national governments to tackle on their own'.[89] As argued in chapter four of this thesis, rich States have and should fulfil an international obligation to support the realisation of ESR in poorer States by ensuring a consistent contribution of the UN-approved not less than 0.7% of their Gross National Income to the Official Development Assistance (ODA), as well as deploying their influence and power at institutional levels to assist the poorer countries. This international obligation is supported by several ESR-promoting treaties, and it accords with the concept of universality of human rights. As Skogly and Gibney assert,

> Individuals enjoy human rights not because they are members of a particular society, but by simple virtue of their humanity…The entire premise behind all international human rights instruments is that Swedes are not only concerned with the wellbeing of other Swedes, and Nigerians are not solely concerned with the wellbeing of other Nigerians, and so on. Rather, in becoming a party to an international human rights treaty, the Nigerian government and the Nigerian people are proclaiming (legally and otherwise) that they are also concerned with the wellbeing of Swedes, as well as nationals of all other countries.[90]

[89] Sakiko Fukuda-Parr, 'International Obligations for Economic and Social Rights: The Case of the Millennium Development Goal Eight' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007) 293.

[90] Sigrun I. Skogly & Mark Gibney 'Economic Rights and Extraterritorial Obligations' in S. Hertel & L. Minkler (Authors) *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, 2007)267-283, 273.

However, internationally, a poor State seeking international cooperation should take steps to activate the rich States' ESR extraterritorial obligation to it. It has a duty to request for an international cooperation and assistance which should ordinarily be granted in good faith by the developed States.[91] Nationally, the citizens should place a demand on the national government to meet its ESR obligations. As the South African Constitutional Court affirmed, '…Those in need have a corresponding right to demand that this [realisation of ESR] be done'.[92] While this judicial opinion was made in the South African national context, it is argued that the duty to demand equally applies to other States.

1.6 Scope and Limitations of the Study

This thesis opens up a new discussion on the realisation of ESR in Nigeria. It has innovatively advanced an argument for a cooperative approach by identifying the different actors in the collaborative network. While it has urged that courts explore the relevant provisions of the laws that promote a cooperative model of realising ESR and amicable settlement of disputes, the thesis however has its limits. For example, an expansive discussion of the internal or administrative procedure that the Nigerian courts can adopt to enable the cooperative model that has been proposed is outside the scope of this work. Further research is required to fully analyse how the courts can calibrate their adversarial methods so as to embrace a cooperative approach with the relevant actors that have been identified in this thesis.

1.7 TWAIL and International Cooperation

This section unpacks TWAIL and cooperation by putting them in the context in which they are deployed in this thesis. The consideration of TWAIL scholarship is essential to the arguments in chapter four below, because, although there is a normative framework on international cooperation and assistance regarding ESR realisation, the practical deployment of that framework has not been fully felt in developing countries. Hence, TWAIL scholarship gives

[91] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013), paras 33,34 and 35.
[92] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para. 93.

traction to the point that, developed countries' lip-service to their extra-territorial ESR obligation should be replaced with real-world commitment to addressing extreme poverty in developing countries, especially against the backdrop that the stated poverty is part of the colonial legacy. There is a need for developed countries to show genuine commitment to their duty to cooperate, otherwise, from a TWAIL perspective, the ICESCR remains part of the imperialist project that is associated with the entire international law system.

TWAIL

As noted above, this thesis uses Third World Approaches to International Law (TWAIL) to underpin an international cooperation model for the realisation of ESR. Thus, it is pertinent to explain the concept in order to put it in proper perspective.

TWAIL is 'an expansive, heterogeneous and polycentric dispersed network and field of study',[93] which 'offers both theories of, and methodologies for, analysing international law and institutions',[94] especially with regard to Third World countries. In Mutua's view, TWAIL describes 'a response to a condition, and is both reactive and proactive. It is reactive in the sense that it responds to international law as an imperial project. But it is proactive because it seeks the internal transformation of conditions in the Third World'.[95] Hence, in the realm of ESR realisation, a TWAIL perspective reacts to a non-committal approach by developed countries and international institutions to the duty to transform the socioeconomic conditions of people in the Third World.

Further to the foregoing, a TWAIL standpoint perceives the original conception of international law as Eurocentric and undermining to the development of the Third World countries. Put differently, international law originally contained 'a set of rules with a geographical basis (it

[93] James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade L & Dev* 26, 34.
[94] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *Int'l Comm L Rev* 371, 377.
[95] Makau Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31,36.

was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law)'.[96] Mainstream international law, TWAIL perspective argues , does not take into account the historical or colonial underpinnings that inform the social and economic inequalities between the West, Global North or developed countries and the Global South, developing countries or Third World. Hence, Odumosu asserts that TWAIL seeks to 'unpack the colonial history of …the Third World, foreground colonialism's continual influence on the international system and on Third World peoples, draw upon and problematise the shared experiences of Third World peoples, and focus on achieving some form of justice for peoples of the Third World'.[97] TWAIL thus strives for an involvement of the peoples whose interests, histories and struggles have been relegated to 'the margins of international legal theory, primarily as a consequence of colonialism and imperialism'.[98] However, the reference to a past event (the colonial relationship between the West and the Third World) should not be perceived as 'crying over milk that was split many decades back but about being intuitive in understanding the systemic and structural constraints on the Third World that are heritages of a colonial legacy'.[99] It is common knowledge that colonialism and the slave trade led to the 'expropriation' of the able-bodied and economically valuable men and women from developing world to the developed world, and this has continued to gravely affect the ESR status of the former. Even today, various forms of neo-colonialism either in form of loans, military, political and economic pressures from developed countries on the developing countries have negatively impacted the realisation of ESR. There is thus a need to interrogate the First World's 'dominant social

[96] Mohammed Bedjaoui, *Towards a New International Economic Order* (Oxford & IBH, 1979) 50.
[97] Ibironke T Odumosu, 'Challenges for the (Present/) Future of Third World Approaches to International Law' (2008) 10 *Int'l Comm L Rev* 467, 468.
[98] Pooja Parmar, 'TWAIL: An Epistemological Inquiry' (2008) 10 *Int'l Comm L Rev* 363, 465.
[99] Opeoluwa Adetoro Badaru, 'The Right to Food and the Political Economy of Third World States' (2014) 1 *Transnat'l Hum Rts Rev.* 106, 116.

forces in society'[100] and how those forces feed into the non-realisation of ESR in the Third World.

Therefore, TWAIL interest is 'a political project'[101] which seeks to reconfigure international law with a view to furthering 'the interest of the peoples of the Third World…'.[102] It seeks to do this by examining international law rules or legal regime, so as to determine how they 'empower or disempower peoples in the Third World…'.[103] The intention of 'TWAILers'(TWAIL Scholars) is 'to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case'.[104] These scholars are bound together 'by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench the features of the international system that help create or maintain the generally unequal, unfair, or unjust global order'.[105] They reject the Eurocentric modernization theory of international law which seeks to reduce 'the problem of underdevelopment to backwardness vis-a-vis Western civilization', and 'the problem of development to a mere effort to become part of the "civilization of power"…'.[106]

Drawing on TWAIL as an interpretive tool to understand the duty to cooperate, it is argued that the historical or colonial impact on ESR in the Third World should be given serious thought. Hence, there is a need to rethink international law and its role in domestic realisation of ESR. It is needful to deploy the normative and jurisprudential framework on international cooperation and assistance, with a view to enforcing the extraterritorial treaty-obligation of developed countries to help the people of the Third World countries to meet their ESR needs.

---

[100] B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie *et al* (eds), *The Third World and International Order: Law, Politics And Globalization* (Brill | Nijhof, 2003) 47, 60.
[101] Antony Anghie, 'TWAIL: Past and Future' (2008) 10 Int'l Comm L Rev 479, 480.
[102] Ibid.
[103] Ibid.
[104] Obiora Chinedu Okafor, 'Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall LJ* 176-177.
[105] Ibid.
[106] Bedjaoui, *Towards a New International Economic Order* (n96) 67.

As Gathii argues, TWAIL scholarship has not only rethought international law's relationship to the colonial encounter, but has also challenged the complacency in international law to treat the colonial legacy as dead letter, overcome by the process of decolonization.[107] The effect of colonialism would continue to impact ESR realisation in the Third World until developed countries show a firm and genuine commitment to their international cooperation and assistance obligation to developing countries. Against the backdrop that the international economic system is far from being rooted on equity and distributive justice, a TWAIL perspective becomes imperative 'to transform the international economic system so that it could be an effective mechanism for the development needs of developing countries as much as it was and continues to be of the economic needs of developed countries'.[108]

The fact that ESR are not being realised in developing countries is an indictment on international law. As Badaru has argued, the absence of ESR realisation in the Third World countries should not just be discussed in terms of statistics without looking at the historical, political and economic contexts.[109] Currently, international law helps to legitimise and sustain 'the unequal structures and processes that manifest themselves in the growing North-South divide'.[110] From a TWAIL perspective, the current configuration of international law is 'predatory' as it 'legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West'.[111] This is because, 'the origins of international law lie in the relationships of power between the coloniser and the colonised, and international law has remained a means of perpetrating these relations for hundreds of year'.[112] Further, as Chimni has observed, the threat of recolonisation in terms of reconstituting State-international law

[107] James Thuo Gathii, 'Third World Approaches to International Economic Governance' in R. Falk, B. Rajagopal, and J. Stevens (eds), *International Law and the Third World: Reshaping Justice (Routledge,* 2008) 255.
[108] Ibid 259.
[109] Badaru, 'The Right to Food' (n99) 121.
[110] B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 1-27, 1.
[111] Mutua, 'What is TWAIL?' (n95).
[112] Odumosu, 'Challenges for the (Present/) Future' (n97) 473.

relationship to the disadvantage of Third World countries is real and haunting, and the globalisation process has adversely affected the welfare of Third World populace.[113]

Thus, the need to internationally cooperate to meet the ESR needs of the people of the developing countries cannot be over-emphasised. TWAIL scholarship supports the argument in this thesis because, it seeks a reconstruction of the common heritage of mankind as a principle of global solidarity which would 'require that the doctrine of common heritage of mankind be applied as a means of avoiding tragic outcomes', so that 'resources…are prioritised to address questions of hunger, disease and poverty, [in the Third World countries], and not simply to further enrich the wealthy'. [114] Although the duty to cooperate is already recognised under relevant instruments such as the ICESCR, through the lens of TWAIL, this thesis argues that developed countries should show a genuine commitment towards this duty to international cooperation and assistance in terms of realising the ESR of people of the Third World countries. Therefore, international law, organisations and financial institutions should be re-imagined in a way that would restrain neo-colonialism but foster equality among nation-states in terms of equal access to the world's goods. Such a re-configuration of international law, it is hoped, would enhance the practical realisation of ESR in Nigeria through the effective deployment of international resources. In other words, the First World, which dominate international community and thus shape international cooperation, should see, and use international cooperation as a means of balancing socioeconomic inequalities by ceding more funds, power, influence and resources for the realisation of ESR in the Third World. Third World as used in this thesis means poor countries, that is, a diverse set of countries, extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies.[115] Although 'Third World is often used

[113] Chimni 'Third World Approaches' (n110) 1.
[114] Gathii, 'Third World Approaches' (n107) 261.
[115]Nour Dados & Raewyn Connell, 'The Global South' (2012) Contexts 11(1) 12-13; Peter Worsley, *The Three Worlds: Culture and World Development* (The University of Chicago Press, 1984) 306.

interchangeably with Global South, developing, poor, low-income countries, there is complexity and controversy around the sameness of the terminologies.[116] Third World is made up of countries of Asia, Africa and Latin America.

1.8. Cooperation, Collaboration and Dialogue

This thesis does not attempt to explore the vast literature on (international) cooperation, collaboration and dialogue. Rather, what is intended here is a sketch of the concepts, with a view to giving the reader a direction to the use of the concepts in the thesis, so as to better understand their potential role in adjudication and realisation of ESR in Nigeria. This thesis advances an argument that national and international cooperation, dialogue and collaboration should exist in order to realise ESR.

Although the concepts share some similarities, cooperation, collaboration and dialogue have marked differences. While cooperation is understood as the individual work of each participant towards a common goal, collaboration is understood as working together towards a common goal in which ideas are generated by a team and tasks are set and solved together.[117] On its part, dialogue refers to verbal and non-verbal communication between people or group of people with a view to achieving some shared goals.[118] Dialogue 'entails responsive communication of a certain kind, in which one party listens to, takes seriously, and values what the other party expresses and believes[119]. While dialogue refers to ideas exchange and information-sharing in a reciprocal and multidirectional communication, collaboration means working together on a joint venture.[120] It has been asserted that collaboration almost without exception includes 'dialogue between participants and stakeholders' but it is different from

[116] Dados & Connell, Ibid.
[117] Irina G. Belyaeva, 'Dialog, Communication, Cooperation, and Collaboration: Facets of Human-Computer Interaction' (2021)2(4) *Technology and Language* 181-197, 187.
[118] Ibid,191.
[119] James J Brudney and Ethan J Leib, 'Statutory Interpretation as "Interbranch Dialogue"?' (2019) 66 *U.C.L.A L. Rev*. 346, 363.
[120] Geoffrey Cowan & Amelia Arsenault, 'Moving from Monologue to Dialogue to Collaboration: The Three Layers of Public Diplomacy' (2008) 616 *ANNALS*, 10, 12.

dialogue because it also includes 'concrete and typically identifiable goals and outcomes that provide a useful basis and structure upon which to form more lasting relationships'.[121] Collaboration is a 'fruitful conflict' that is, 'conflict that in some manner enhances or advances knowledge, understanding, meaning or capacity between different or opposing perspectives and interests'[122] Collaboration in this sense 'is not a technique for reducing or eliminating political conflict. It is a technique for structuring conflict in such a way that it is productive rather than merely antagonistic.'[123] A major distinction between collaboration and dialogue is that:

> Whereas dialogue envisages difference as a problem to be addressed, difference drives the collaborative process. The presence within the overall system of distinct perspectives based on different types of process and informed by different sources of knowledge is a prerequisite for collaboration to occur. The driving force of the collaborative process is the conflictual friction caused by the co-location of participants' shared or overlapping objectives with their distinct and differing interests. Collaboration accepts and embraces the diversity and legitimacy of institutional perspectives without implying any obligation towards compromise or concession.[124]

In this thesis, the three elements are deployed, albeit unequally, in fashioning a cooperation model for ESR realisation. While dialogue and collaboration are mostly used to discuss the intra-judicial and judicial-legislative discussions on ESR realisation as 'a coordination mechanism between courts and legislatures concerning constitutional values…'[125], cooperation

[121] Ibid,17.
[122] Christopher Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford University Press, 2011) 168.
[123] Ibid
[124]Eoin Carolan, 'Dialogue isn't working: The Case for Collaboration as a Model of Legislative– Judicial Relations' (2016)36(2) *Legal Studies*, 209–229, 225.
[125] Bob van Gestel & Jurgen de Poorter, *In the Court We Trust, Cooperation, Coordination and Collaboration between ECJ and Supreme Administrative Courts* (Cambridge University Press, 2019) 13.

and collaboration feature in the discussion on international cooperation and assistance as a mechanism for realising ESR.

On its part, cooperation refers to the 'presence of deliberate relations between otherwise autonomous organizations for the joint accomplishment of individual operating goals'.[126] It means 'working together to accomplish shared goals'.[127] Cooperation or multilateralism 'centers on the collectively agreed norms, rules, and principles that guide and govern interstate behavior'.[128] It denotes 'where parties agree to work together to produce new gains for each of the participants unavailable to them by unilateral action, at some cost'.[129] Such cooperation could simply be in terms of interactions (for example, treaty consensus on ESR international cooperation model) or those involved could go further to not just interact but to take active and joint actions towards problem-solving, whereby there is 'a mutual sense that each party's well-being depends on the well-being of the other'.[130] It is in this latter context that this thesis is situated.

Put more pointedly, cooperation means the collaborative actions of the various governmental structures, whether nationally or internationally, towards the practical realisation of ESR. In this era of globalisation and its attendant consequences on market forces and climate change, national and international cooperation has become a 'vital coping mechanism in the turbulent environments of the globalised world'.[131]

---

[126] JR Schermerhorn, 'Determinants of Interorganizational Cooperation' (1975) 18(4*) Academy of Management Journal* 846–856.

[127] David W Johnson & Roger T Johnson, 'Cooperative Learning' (Innovación Educatión, University of Minnesota, 2017) 3.

[128] Fen Osler Hampson and Paul Heinbecker, 'The "New" Multilateralism of the Twenty-First Century' (July-September 2011) 17(3) *Global Governance (Emerging Powers and Multilateralism in the Twenty-First Century) 299*-310, 300.

[129] William Zartman & Saadia Touval, 'Introduction: Return to the Theories of Cooperation' in Saadia Touval & William 1. Zartman (eds) *International Cooperation: The Extents and Limits of Multilaterism* (Cambridge University Press, 2010) 1.

[130] Ibid.

[131] Furkan A Gur, Joshua S. Bendickson & Shelby J. Solomon, 'Executive Antecedents of Interfirm Cooperation' (2020) 37(3) *Canadian Journal of Administrative Sciences*, 300-315, 305.

While distinguishing cooperation from competition, Mead notes that competition is 'the act of seeking or endeavouring to gain what another is endeavouring to gain at the same time…Cooperation: the act of working together to one end'.[132] Similarly, Maller[133] postulates that a cooperative situation is one which moves a person to strive with other persons to achieve a commonly held objective while competition makes them to strive against other persons for their own goal actualisation. Thus, Lewis has asserted that:

> A minimum requirement for cooperative behaviour is not physical togetherness nor joint action, nor even synchronous, complementary behavior, but a diminution of ego-demands so that the requirements of the objective situation and of the other person may function freely. In truly co-operative work, personal needs can function only if they are relevant to the objective situation: the common objective…is more important than any personal objective.[134]

So, diminution of ego is essential if effective cooperation is to be achieved. The underlying ingredients of cooperation, therefore, include the desire to achieve the same or complementary goals that are shareable or shared, and the understanding that people or nations perform better as a group rather than as individuals.[135] Further, drawing on the work of Johnson and Johnson[136] on 'Cooperative Learning', key elements of cooperation stand out. These are positive interdependence, promotive interaction, accountability, social skills and group processing. An effective cooperation means that members of a systems (for example political branches) are so linked that individual branch cannot succeed without the other; they either sink or swim together. This element, if well deployed nationally and internationally, can trigger a positive change for ESR realisation in that each State or State's political branch would see the other as a partner in progress.

---

[132] M Mead, *Co-operation and Competition Among Primitive Peoples* (McGraw-Hill, 1937) 8.
[133] JB Maller, 'Co-operation and Competition: An Experimental Study in Motivation' (1929) 384 *Teach. Contrib. to Educ.*
[134]Helen Block Lewis, 'An Experimental Study of the Role of the Ego in Work. I. The Role of the Ego in Coöperative Work' (1944) 34(2) *Journal of Experimental Psychology* 113–126. 115-116.
[135] MA May & LW Doob, 'Co-operation and Competition' (1937) 125 *Soc. Sci. Res. Council Bull* 17.
[136] Johnson & Johnson, 'Cooperative Learning' (n127) 3-4.

Although a cooperative approach may appear to challenge the doctrine of separation of powers, it is argued that it all depends on how one conceptualises and navigates through the doctrine or the version of the doctrine one adopts. According to Roux, there are two versions of separation of powers when it comes to judicial interpretation. One version states that when a court is faced with a question of rights interpretation, it should exercise its judicial powers or constitutional mandate independently and without consideration of whether its interpretation would intrude into areas that are reserved for the political branches.[137] The second version dictates that 'separation-of-powers concerns may be taken into account by the Court when deciding on the level of review to be applied, and that such considerations may legitimately trump arguments of principle relating to the importance of the rights at stake and their place in the constitutional normative order'.[138] This second version holds that the courts should take a more pragmatic (rather than a merely principled) approach in its adjudication where such adjudication would disrupt the political domain of the political branches.

Thus, the challenges around separation of powers can be resolved when viewed through the lens of collaboration as discussed above. The courts should adopt a cooperative approach that takes political sensitivities into account. The approach does not deny institutional differences and power differential or the separate and distinct functions of different branches of government, but it aims at a fruitful conflict, that is, harnessing differences to achieve a common goal. The proposed model recognises the differences or tensions that separation of powers could create, but it argues that inter-branch tensions and discords, when handled cooperatively, have their values in that they involve 'reciprocal respect for, and responsiveness to opposing arguments regarding the issue addressed'.[139] The aim of the cooperation model

[137] Theunis Roux, 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *I-CON* 106, 137.
[138] Ibid.
[139] Jeffrey K Tulis, 'Deliberation Between Institutions' in (James S. Fishkin & Peter Laslett(eds) *Debating Deliberative Democracy (*John Wiley & Sons, 2003) 200, 201.

proposed here is a move away from what Brudney and Leib, refer to as 'posturing and signalling' to what they call 'exchange'.[140]

To ensure an effective realisation of ESR, the judicial branch should refrain from signalling or commanding the political branches, but they should rather engage in exchanges that would promote a friendly political climate for ESR realisation. Viewed in this way, the cooperation model respects separation of powers, but it also 'supports institutions' appropriate humility, leverages their comparative institutional competence, and harnesses the benefits of deliberative engagement on matters of law and policy.[141] Drawing on the legal process theory,[142] it is argued that the understanding of separation of powers should be calibrated to recognise the fact that there are many sources of law and institutions that drive policymaking and implementation, that there is a need to draw comparative institutional strengths or competences from each branch of government, and that institutions should engage and synergise to promote a legitimate and politically flexible ESR realisation. Thus, while it is not suggested that the courts should abandon the confrontational approach altogether, it is argued that the courts should be willing to strike a compromise or adopt pragmatism in certain cases, especially in ESR cases that have resource implications. As Roux argues, such 'compromises do not necessarily damage a court's overall reputation for law-governed adjudication'.[143]

On the international plane, there exist the realist and liberal schools of thought on cooperation. The realist school takes a short term view by asserting that cooperation among States is not a sustainable and permanent project but a momentary project whereby a State cheats or 'free-rides' to draw benefits from other States.[144] Put differently, the realists believe that because States seek relative gains over others in the international space, there can be no cooperation to

[140] Brudney & Leib (n119) 365.
[141] Ibid, 390.
[142] Ibid.
[143] Roux (n137).
[144] Zartman & Touval, 'Introduction' (n129) 6-7. Also see Samuel Bowles & Herbert Gintis, 'Origins of Human Cooperation' in Peter Hammerstein (ed) *The Genetic and Cultural Origins of Cooperation* (MIT Press, 2003).

attain general gains owing to fear that States may take advantage of cooperation to advance their relative gains.[145] On the other hand, the liberal school takes a long term view which postulates that States engage in cooperation as a well-institutionalised project, not just for momentary benefits but for lasting and sustainable current and future benefits, including reciprocity, reputation and relationships, to all concerned.[146] The liberal approach seems more plausible, because, as cooperation moves from bipolarity to multipolarity through increase in membership of the cooperating body, the pursuit of relative gains is likely to diffuse and give way to the pursuit of apparently more altruistic general gains.[147]

Similarly, international cooperation has been classified into elite multilateralism and multilateralism of solidarity.[148] Elite multilateralism, views international cooperation as an elite design by developed countries to create international legal and institutional regimes that are aimed at promoting Global North interests but dominating and disempowering the interests of the Global South. On the other hand, multilateralism of solidarity views the concept as a mechanism of galvanising all States towards combining and complementing efforts to create a society that socially and materially empowers all.[149] This solidarity perspective fits well into the obligation of a State to realise ESR in other States, as discussed in chapter 4 of this thesis. Adopting the elite perspective would amount to a replacement of multilateralism with what Kahler calls 'minilateralism'[150], that is cooperation among powerful and developed States in the international sphere (such as what obtains in the UN Security Council or the Bretton Wood

[145] Joseph Grieco, *Cooperation among Nations: Europe, America, and Non-Tariff Barriers to Trade* (Cornell University Press, 1990).
[146] Zartman & Touval, 'Introduction' (n129) 6-7.
[147] Duncan Snidal, 'Relative Gains and the Pattern of International Cooperation' (1991)85(3) *The American Political Science Review* 701-726, 722.
[148] Jens Martens, 'Multistakeholder Partnerships – Future Models of Multilateralism?' (2007) Dialogue on Globalization Occasional Paper 29. Berlin: Friedrich Ebert Stiftung.
[149] Fen Osler Hampson, 'Deconstructing Multilateral Cooperation' in Saadia Touval & William 1. Zartman (eds) *International Cooperation: The Extents and Limits of Multilaterism* (Cambridge University Press, 2010) 62.
[150] Miles Kahler, 'Multilateralism with Small and Large Numbers' (1992) 46 *International Organization* 681–708. Also see Duncan Snidal, 'The Limits of Hegemonic Stability Theory' (1985) 39(4) *International Organization* 207–232.

institutions) where the voting power of the powerful States shapes agenda setting and execution. According to Watkins and Woods, 'Rich countries are ardent advocates of democracy all around the world. But when it comes to the International Monetary Fund and the World Bank, government of the many by the few is the preferred option'.[151]

Thus, already, concerns have been raised that 'the normative principles and political architecture of the Bretton Woods system are biased towards the interests and values of the North and the most powerful States'.[152] This has made developing countries to complain that 'the North has traditionally been the normative and legal trendsetter in international institutions, with the South being on the "receiving end" of those norms and rules'.[153] There is, therefore, a need to ensure that international economic governance, just as national governance, promotes greater democracy to improve the quality of policy.[154]

Further, it is apposite to state that cooperation could come in either of two forms. According to Linarelli *et al*,[155] cooperation could be *de jure* or *de facto*. While *de jure* cooperation involves 'explicit policy decisions by States to engage in particular forms of cooperation'[156] that are legally binding on them, *de facto* cooperation has to do with 'policy coordination, which may not rise to the level of binding international law but which is important for distributing resources or welfare among states…' [157] Thus, within the context of this thesis, it is argued that, whereas charitable interventions or aids from developed countries to developing countries come across as *de facto* cooperation, the *de jure* cooperation, which is arguably normatively

[151] Kevin Watkins & Ngaire Woods, 'Africa Must Be Heard in the Councils of the Rich' *International Herald Tribune* (02-03 October 2004) 8.
[152] Hampson, 'Deconstructing Multilateral Cooperation' (n 149) 66.
[153] Ibid; Edward Newman, Ramesh Thakur & John Tirman, *Multilateralism Under Challenge? International Order, and Structural Change* (United Nations University Press, 2006); Ramesh Thakur, 'Global Norms and International Humanitarian Law' (2001) 841 *International Review of the Red Cross* 19–44.
[154] Watkins &Woods, 'Africa Must Be Heard' (n151).
[155] John Linarelli, Margot E Salomon & Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press, 2018) 57.
[156] Ibid.
[157] Ibid.

and jurisprudentially embedded in the ICESCR and CESCR General Comments, has however not been given the serious attention that it deserves.[158]

As argued in chapter four below, international cooperation for the realisation of ESR has both functional and political justifications. States should understand that 'in today's complex and interconnected world, national macroeconomic, structural, and regulatory decision-making needs increasingly to be assessed in light of its international impact'[159] on the realisation of the ESR needs of people outside their territories. Also, no matter how powerful some States may be, the networked nature of today's problems, as evidenced in the COVID-19 pandemic, may make the less powerful States 'the weakest link [that] can break the chain'[160] of global progress. Thus, the North and South should 'see past their (diminishing) differences; rising powers and established powers [should] see a shared interest in direct cooperation'.[161] As Hampson has observed, 'the evolution of global governance institutions must be focused on mitigating and ameliorating economic inequalities in the developing world'.[162]

1.9. Structure of the Thesis

This thesis proceeds in seven chapters; this chapter and 6 other chapters below. Chapter two engages in analysis of the conceptual and normative framework for ESR. The chapter relies on the provisions of ICESCR, other human rights instruments and existing literature to unpack ESR and tease out the concepts of progressive realisation, maximum available resources and minimum core obligation. A discussion around these concepts is justified because, it is needful to examine the broader debates around ESR before situating it within the Nigerian context. The chapter also sets out the arguments surrounding the justiciability of ESR and takes a reasoned position on the issue. The thesis takes the position that ESR are justiciable but, the courts should

[158] See chapter four for a detailed discussion on this.
[159] Hampson & Heinbecker, 'The "New" Multilateralism' (n128) 302.
[160] Bruce Jones, 'Making Multilateralism Work: How the G-20 Can Help the United Nations', Policy Analysis Brief, Stanley Foundation, April 2010, available at www.stanleyfoundation .org/publications/pab/Jones_PAB_410.pdf (accessed on 04 November 2020).
[161] Ibid.
[162] Hampson, 'Deconstructing Multilateral Cooperation' (n 149) 67.

take a more nuanced position in ESR adjudication with a view to ensuring that judicial outcomes feed into the practical realisation of the rights, rather than being mere paper judgments.

In chapter three, the thesis examines the legal status of ESR in Nigeria. To inform a better understanding of the current constitutional framing of these rights in Nigeria, the chapter takes a scoping study of the historical, political and constitutional evolution of the country. Further, there is a detailed exploration of the provisions of Nigeria's Constitution and those of the African Charter on ESR, coupled with the judicial position on the applicable laws. A reference to the African Charter becomes important against the backdrop that it has been legislatively domesticated as part of Nigerian laws. It is argued that contrary to some judicial and scholarly opinions, ESR are indeed justiciable in Nigeria by virtue of several legislative interventions which can conveniently be accommodated as exceptions to section 6(6)(c) of the Nigerian Constitution which generally makes ESR non-justiciable. While the Constitution ousts the courts' jurisdiction, it provides that such ouster is not absolute. The thesis therefore examines what could serve as exceptions to this constitutional non-justiciability and calls for an exploitation of the exceptions to this ouster, using a cooperative and collaborative judicial mechanism.

Chapter four undertakes a critical analysis of global 'constitutionalisation' of ESR and the role it plays in the promotion of ESR realisation. The central argument in the chapter is that, while nationally constitutionalising ESR may project the protection of ESR to a certain extent, the mere constitututionalisation may not bring about an effective and deeply rooted practical realisation. It, therefore, calls for a cooperative commitment and persuasive approach among the different levels of governance to enable a better ESR delivery. Fundamentally, it advocates for the full operationalisation of the normative and jurisprudential architecture of international cooperation and assistance, as a veritable tool for realising ESR in developing countries. In

other words, drawing on TWAIL to legitimise a more robust duty of cooperation, and within the context of the impact of colonialism on the socioeconomic conditions in the Third World, it is argued that there is a legal obligation on the developed countries to internationally cooperate with and assist the developing countries in the latter's efforts to achieve ESR realisation. Although the focus of this thesis does not primarily extend to an exploration of the extent of the legal obligation to cooperate, it advances the normative justification for cooperation.

Chapter five assesses the impact of judicialisation of ESR and argues for a more nuanced approach. The chapter examines the concept of judicialisation, its conditions and approaches. It also engages in a comparative impact assessment of judicialisation across select countries, using both instrumentalist and non-instrumentalist impact metrics. It is argued that, although the judiciary has a vital role to play in the legal mobilisation for ESR realisation, its direct and structural impact may not be felt fully in a 'command and control' configuration of ESR judicialisation. The chapter thus critically assesses the practical dividends that an embracement of the traditional adversarial method herald and argues for a more collaborative approach to judicialisation of ESR. Such a collaborative approach, it is argued, will calibrate and resolve the issues around the 'myth of rights' which gives victims of rights violation the false hope that their rights will be judicially realised, without taking into cognizance that courts' decisions lack self-executing forces of social change, or are often subject to political power play among the branches of government.[163] The chapter thus concludes by urging a cooperative judicialisation which would enable the court to bring about real and transformative change, thereby avoiding a situation where the 'courts act as "fly-paper"'.[164] However, it should be noted that the chapter does not seek to under-estimate judicial role in ESR realisation. Rather,

[163] 1. Stuart Scheingold, *The Politics of Rights* (Yale University Press, 1974).
[164] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991) 341.

it is argued that, as the other branches are important, the court too is essential. That said, an inter-branch cooperation is needed for a fuller impact of judicialisation.

In chapter six, the thesis continues with the argument made in the preceding chapter by calling for a re-imagining of the concept of judicialisation of ESR. The central argument the chapter advances is an institutional cooperation, collaboration and dialogue for the realisation of ESR at the national level. The chapter designs the role of courts as that of a facilitator of dialogue and collaboration among the branches of government and other stakeholders in the ESR realisation chain. It is argued that the courts should embark on a principled dialogue and collaboration with relevant actors and then take a moderate remedial approach in deciding ESR cases. The chapter unpacks the various players or actors in the proposed collaborative network, the determination of the collaborators, the likely outcome of collaboration, among other things. The conclusion drawn is that a cooperative or collaborative judicial approach projects a stronger prospect for the practical realisation of ESR.

Chapter seven is the conclusion and recommendation chapter. It summarises the findings of the thesis and the recommendations which seek a re-imagination of the project of realising ESR by urging an adoption of national and international cooperation model. Overall, the thesis argues for a cooperative approach, both at the national and international levels, with a view to effectively realising ESR.

CHAPTER TWO

CONCEPTUAL AND NORMATIVE FRAMEWORK OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

2.1 Introduction

The central aim of this thesis is to design a cooperation model that can make the realisation of economic, social and cultural rights (ESR) innovative and more practically beneficial. Thus, the thesis canvasses for a cooperative approach both at the national and international levels. To properly situate the research discussion, it is essential to unpack what ESR are and tease out the normative framework around them. Further, there have been arguments, such as the rights classification concerns, legitimacy concerns as well as concern about the judiciary's institutional competence to adjudicate on ESR, which certain scholars have raised against the justiciability of ESR. It is pertinent to examine these arguments with a view to deconstructing them.

In this chapter, the thesis examines the above issues. This chapter consists of eight sections, and section one introduces the chapter while section two conceptualises ESR. In sections three and four, the thesis discusses the concepts of progressive realisation of ESR and maximum available resources. Section five unpacks the concept of minimum core content and how it sits within the normative framing of the entire ESR discussion, and section six explores the debate surrounding the justiciability of ESR. In section seven, the thesis discusses the typology of State obligations in the realm of ESR realisation and section eight concludes the chapter.

2.2 Unpacking Economic, Social and Cultural Rights

This thesis adopts Veerman's definition of socioeconomic rights to define ESR as '…those rights that deal with minimum conditions for welfare and wellbeing'.[1] The essence of ESR is ' to put a state under a legal obligation to utilise its available resources maximally in order to redress social and economic imbalances and inequalities'.[2] In other words, ESR are entitlements that 'give rise to the shared concern of ensuring societies where everyone has a minimum decent standard of living consistent with human dignity (the "bare necessities of life")',[3] seeking a commitment to social integration, solidarity and equality.[4] They speak directly and specifically to the daily and unavoidable needs of every human being.[5] ESR are a set of rights recognised in international human rights law[6] and many national constitutions.[7] As a matter of fact, no less than 90% of the 195 constitutions in the world have one ESR or the other, either in a justiciable or aspirational status.[8]

Part III of the ICESCR recognises ESR as including the right to work,[9] the right to just and favourable conditions of work, and fair remuneration,[10] the right to form and join trade unions,[11] the right to social security,[12] the right to family life, and marital and maternal preservation,[13] the right to an adequate standard of living, including adequate food, housing

[1] P. Veerman. *The Rights of the Child and the Changing Image of Childhood* (Dordrecht, Martinus Nijhoff Publishers, 1992) 25.
[2] J.K. Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6(4) *The International Journal of Human Rights* 29-48, 34.
[3] Frans Viljoen, 'The Justiciability of Socio-economic and Cultural Rights: Experiences and Problems' (2006) 1 (unpublished).
[4] Ibid.
[5] Avitus A Agbor, 'Shifting the Matrix from Legal Passivity to a New Domestic Legal Order: Towards the Justiciability of Economic, Social and Cultural Rights in Cameroon' (2017) 25 *Afr J Int'l & Comp L* 176,181.
[6] Particularly the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).
[7] Although the Mexican Constitution of 1916 was the flagship Constitution to have recognised ESR, the Constitution of the Republic of South Africa debatably stands out as the most promising national constitutional recognition of ESR.
[8] Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *Am J Comp L* 1043-1094, 1053.
[9] Art. 6.
[10] Art. 7.
[11] Art. 8.
[12] Art. 9.
[13] Art. 10.

and clothing, and the continuous improvement of living conditions,[14] the right to enjoy the highest attainable standard of physical and mental health,[15] the right to education,[16] and the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which a person is the author.[17]

Domestically, ESR status in a constitution may be categorised in one of three ways or models: justiciable, aspirational or 'present' ESR.[18] A given ESR could be seen as justiciable where it is judicially enforceable and remediable by domestic courts. On the other hand, aspirational ESR are those entrenched in the constitution, not as justiciable rights but as goals or 'manifesto' to be progressively and non-compulsorily realised. Constitutions that recognise ESR status as 'present' are those where the ESR maintain a hybrid status of being justiciable and at the same time aspirational (some of the rights are constitutionally justiciable while others are constitutionally non-justiciable).[19] While it may be correct that the constitutional recognition of ESR as justiciable rights can enhance the judicial enforcement of these rights,[20] this thesis, in chapter five, assesses the impact of judicial enforcement on the practical realisation of ESR. As discussed in subsequent chapters, while judicial impact could be instrumental or non-instrumental, constitutional recognition and judicial affirmation of ESR are only a first step, which is not enough in and of itself to drive a real-world realisation of ESR.

2.3 The Concept of Progressive Realisation

[14] Art. 11.
[15] Art. 12.
[16] Arts. 13 and 14.
[17] Art. 15.
[18] Jung, Hirschl & Rosevear, 'Economic and Social Rights' (n8)1050.
[19] Ibid.
[20] See generally Varun Gauri & Daniel M. Brinks. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) & Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

It has been observed that the obligation to progressively realise ESR has been a subject of critique and derision.[21] This critique stems from the high degree of flexibility which the concept gives to non-compliant States in the realisation of ESR.[22] This flexibility inherent in progressive realisation, it has been argued, is now being '… increasingly embraced as an escape hatch by recalcitrant states as the substantive provisions of the ICESCR gain greater clarity and resonance within civil society'.[23] The concept has also been criticised for assuming that States' economies are always progressively improving and thus ESR should also be progressively realised, whereas the true picture is that a State's economy may, contrary to the assumption, plummet.[24] In addition, Chapman notes that the concept lacks definitional exactitude and thus admits of multiple performance assessment criteria.[25] This point also finds ample support in Warwick's argument that there is a conceptual and structural difficulty in the progressive realisation obligation, which makes translating the obligation into a large scale enterprise difficult.[26] Consequently, this conceptual difficulty makes it problematic for courts to adjudicate ESR effectively.

The concept of progressive realisation of ESR debuted into the text of the ICESCR, after the United States staunchly promoted it, and 'following a heavy contestation along both East-

[21] Ben T.C. Warwick, 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Economic Crisis' in Gillian MacNaughton & Diane F. Frey (eds) *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, 2018) 127-149, 132.
[22] Ibid, 133.
[23] Scott Leckie, 'Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 81-124, 94.
[24] Ibid.
[25] Audrey R. Chapman AR, 'A "Violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) *Human Rights Quarterly* 23-66, 30-31.
[26] Ben T.C. Warwick, 'Debt, Austerity, and the Structural Responses of Social Rights' in Ilias Bantekas and Cephas Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press, 2018) 381-401, 396-397.

West and North-South axes in 1966'.[27] The concept, though now found in some national constitutions,[28] debuted in Article 2(1) of the ICESCR[29] which provides, among others, that:

> Each State Party to the present Covenant undertakes to take steps,… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant….[30]

As can be gleaned from the above, the concept removes the element of immediacy from the ESR obligations[31] of States under ICESCR. Thus, States are to achieve 'progressively the full realization of the rights'. This concept recognises the fact that ESR realisation is a matter for economic resources and that there could be financial constraints on the part of developing nations which make the immediate realisation of the ESR impossible.[32]

However, Beco notes that progressive realisation makes 'an excuse for States to evade their commitments, constituting something of a "monstrous serpent" in international human rights law'.[33] However, according to the Limburg Principle, 'The obligation "to achieve progressively the full realization of the rights" requires States to move as expeditiously as

[27] Katharine G. Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G. Young (ed) *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 1-30, 6 (footnotes omitted).

[28] See for example sections 26 and 27 of the Constitution of the Republic of South Africa 1996 and Articles. 21(2) and 43 of the Constitution of Kenya 2010.

[29] Interestingly, however, the African Charter on Human and Peoples Rights 1981 (the African Charter) to which Nigeria is a signatory and which contains ESR, does not expressly use the phrase 'progressive realisation'. So, it is debatable whether the ESR provisions under the African Charter are realisable immediately or progressively. Nonetheless, the African Commission (the supervisory body under the African Charter) seems to hold the view that progressive realisation applies to the Charter. See African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 2011, para 14.

[30]Note that the International Covenant on Civil and Political Rights (ICCPR) does not have an equivalent 'progressive realisation' clause, thus making Civil and Political Rights, unlike ESR, immediately realisable. See Magdalena Sepulveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 256.

[31] However, progressive realisation does not apply to some obligation such as the obligation to realise the minimum core of ESR and the obligation to realise the rights under the ICESCR without discrimination. These obligations are immediately, not progressively realisable. See Article 2(2), ICESCR and Principles 22 and 25 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1987.

[32] Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment' (2008) Economics Working Papers 200822, 6-7.

[33] Gauthier De Beco, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68(1) *ICLQ* 141-160, 156.

possible towards the realization of the rights'.[34] In other words, the concept 'constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'. [35] It is thus pertinent to note that the concept is 'a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights',[36] but it should also 'be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights…'.[37] This position is in keeping with the recognition that, owing to scarce resources, 'immediate and absolute satisfaction of the material conditions for the enjoyment of the right…is not an easy task'[38] for States to implement.

However, the above position does not suggest that States may sit back without taking some progressive steps. The progressive realisation clause does not give States the discretion to indefinitely deter or defer the full realisation of ESR.[39] As Wills and Warwick rightly argue, '…the primary obligation on states is to continue to progressively realize socioeconomic rights at a rate commensurate to the "maximum available resources" of the state'. [40] Similarly, Chenwi reasons that the concept requires States to 'strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints'.[41] This improvement means that even where ESR are already being

[34] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights 1987, Principle 21.
[35] See Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), para. 9.
[36] Ibid.
[37] Ibid.
[38] Illari Aragon Noriega, 'Judicial Review of the Right to Health and its Progressive Realisation: The Case of the Constitutional Court of Peru' (2012)1(1) UCL *Journal of Law and Jurisprudence*, 166, 170.
[39] The Limburg Principles (n34).
[40] Joe Wills and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse' (2016) 23 *Ind J Global Legal Stud* 629, 640.
[41] Lilian Chenwi, 'Unpacking "Progressive Realisation", its relation to Resources, Minimum Core and Reasonableness and some Methodological Consideration for assessing Compliance' (2013) *De Jure* 742-769, 743.

realised, the State should continue to enhance the quality of access to ESR realisation.[42] Bilchitz puts it more clearly when he argues that progressive realisation '…recognises that what the government is required to do is to provide core services to everyone without delay that meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect'.[43] Hence, the CESCR has stated that the concept of progressive realisation means that States should 'move as expeditiously and effectively as possible towards'[44] the goal of realising ESR.[45]

Put differently, while it is agreed that States (because of scarce resources) may not be able to emplace the facilities that would make the enjoyment of ESR immediately realisable, they should however be seen as taking deliberate, concrete and targeted' steps 'as clearly as possible towards meeting ESR realisation. Thus, Liebenberg describes the concept as 'both a sword and a shield'.[46] Hence, CESCR has stated clearly that 'the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content'.[47]

Thus, a State should eliminate waste, muster the needed political will and commitment to the full realisation of ESR by designing a participatory and time-bound plan of action with intermediate benchmark and ultimate target clearly defined, with a non-discriminatory prioritisation of ESR realisation.[48] Such non-discriminatory prioritisation will ensure that no one is left behind in terms of meeting ESR needs. While there is a need for clarity on the role

[42] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Company Ltd, 2010) 188.
[43] David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) *South African Journal on Human Rights*, 1-26, 12.
[44] See CESCR General Comment No. 3 (n35).
[45] But see Chapman, 'A "Violation Approach"' (n25), 32 who argues that 'However, because the Committee has not defined what moving expeditiously and effectively entails, it lacks concrete standards for evaluating the performance of governments and their compliance with the Covenant. Given these problems, it should come as no surprise that the Committee itself does not use progressive realization as the standard by which it reviews the performance of state parties'.
[46] Liebenberg, *Socio-Economic Rights* (n42).
[47] CESCR General Comment No. 3 (n35).
[48] Chenwi(n41).

and meaning of the progressive realization obligation at the State policy level, it is argued that it is equally needful that the present construction or framing of the concept is backed by States' action.

Consequently, Warwick argues that the States' obligation regarding progressive realisation requires them to 'expand their promotion and protection of economic and social rights over time to the fullest extent possible within their available resources'.[49] Thus, Fukuda-Parr, Lawson-Remer and Randolph propose 'Ratio' and 'Achievement Possibilities Frontier' approaches for measuring ESR progressive realisation. While the ratio approach judges progressive realisation by weighing the extent of enjoyment of ESR by individuals against the State's resource capacity to realise the rights, the achievement possibility approach examines the maximum level of achievement possible for realisation of each ESR and then weighs it against the highest level of achievement indicator historically, and actually, attained by a given State as regards realising that right.[50] Thus, States should prioritise their resources in favour of ESR realisation and if such realisation reduces or is at a standstill, it is the duty of States to increase their budget in favour of realising ESR.[51] It has thus been posited that to assess a State's performance in realising ESR, both the current status (actual enjoyment of ESR by its citizens and residents) and the State's capacity (in terms of economic resources) to realise ESR should be taken into account.[52] Further, Chapman contends that 'Measuring progressive realization not only requires an assessment of current performance, but also a determination of whether a State is moving expeditiously and effectively towards the goal of full implementation'.[53] In a similar vein, Noriega notes that the requirement of progressiveness

[49] Ben T.C. Warwick, 'A Hierarchy of Comfort?' (n21) 133.
[50] Fukuda-Parr, Lawson-Remer &Randolph, 'Measuring the Progressive Realization of Human Rights Obligations' (n32) 13-20
[51] Asbjorn. Eide, 'Economic and Social Rights' in Janusz Symondies (ed) *Human Rights: Concepts and Standards* (Ashgate Dartmouth UNESCO, Hampshire, 2000) 109, 126.
[52] Fukuda-Parr, Lawson-Remer & Randolph, 'Measuring the Progressive Realization of Human Rights Obligations' (n32) 7.
[53] Chapman, 'A "Violation Approach"' (n25), 33.

means that States should make great efforts demonstrably aimed at meeting the realisation of ESR by deploying appropriate legislative or other measures and mechanisms that evince a real commitment to ESR.[54] This commitment includes a commitment to an 'efficient use of available resources'[55] or a prudent allocation and efficient management of scarce resources[56] in meeting ESR needs. Further, as the South African Constitutional Court observed, the concept of progressive realisation requires that States put a comprehensive, coordinated and realistic programme of action or policies in place towards realising ESR.[57]

In addition, as some authors have argued, 'a State does not have a lesser degree of ESR obligations because it chooses to collect less government revenue; failing to collect revenue necessary to pursue policies promoting ESR fulfilment itself reflects a failure in the State's human rights obligation'.[58] According to Chenwi, 'Any measure aimed at the progressive realisation… must aim at meeting the short-, medium and long-term needs…'.[59] Thus, the concept of progressive realisation cannot be used as a pretext, by States, to limit or derogate from ESR realisation, neither does it postpone States' obligations until they have sufficient resources to realise ESR. Rather, as noted above, States should take steps to put a workable and measurable programme of action in place to achieve ESR realisation. The programme should not only be workable and measurable, but it should also 'include realistic, achievable and measurable indicators and time-bound targets, designed to assess progress in its implementation'.[60] Indicators design and benchmark setting process would not only promote robust public debate on ESR realisation, but it will also enable States to engage in ESR realisation self-assessment. That way, States would be acting reasonably and progressively to

[54] Noriega 'Judicial Review of the Right to Health' (n38) 170-171.
[55] Virginia A Leary 'The Right to Health in International Human Rights Law' (1994) 1 *Health and Human Rights* 24.
[56] The Limburg Principles (n34), Principle 23.
[57] *Government of the Republic of South Africa v Grootboom* 2001 (I) SA 46 (CC), paras 34-41.
[58] Fukuda-Parr, Lawson-Remer & Randolph, 'Measuring the Progressive Realization of Human Rights Obligations' (n32)13.
[59] Chenwi,'Unpacking' (n41).
[60] Ibid.

ensure the realisation of ESR, and that would make them accountable as regards ways they intend to realise ESR. This accountability is key to the realisation of ESR; its absence would make the States, while hiding under the 'progressive realisation' cloak, to view their obligations as directory rather than mandatory. The argument that ESR obligations are mandatory finds anchorage in the Maastricht Guidelines which provides that:

> …The fact that the full realization of most economic, social and cultural rights can only be achieved progressively…, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible…The State cannot use the "progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance….[61]

Arguably, where there is a programmatic action plan which is rigorously made and pursued, the timing (whether progressive or immediate) of realising ESR would no longer be a major concern. This is because, there would be an effective implementation, in that the States would not only concern themselves with 'the allocation of the resources necessary to reach that goal, … but must also include discussion of political arrangements in order to reach it'.[62] However, to ensure effectiveness, such action-plan and policies should be periodically reviewed and revised to meet the ESR of those subject to the States' jurisdictions.[63]

Finally on progressive realisation, the concept also requires States to protect the vulnerable and disadvantaged groups within their domains. Thus, CESCR General Comment No.5(9) provides that:

> The obligation of States… to promote progressive realization … clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation …is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.…[64]

[61] The Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para. 8.
[62] Beco, 'The Indivisibility of Human Rights' (n33) 158.
[63] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para 40.
[64] CESCR General Comment No 5 Persons with Disabilities UN doc E/1995/22 (1994) para. 9.

The above suggests that States are not only to protect the vulnerable persons, but they are also to treat them preferentially in ESR realisation. As 'individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination',[65] it is thus important that all machinery is put in place to protect the vulnerable groups by promoting equality. Thus, for example, the special needs of such persons in terms of education should be given priority consideration over and above the consideration of other persons who have no known disabilities.

2.4 The Concept of Maximum Available Resources

As seen in Article 2(1) of ICESCR above, a State is required to 'take steps, …to the maximum of its available resources, with a view to achieving progressively the full realization' of ESR. The use or meaning of the phrase 'maximum of its available resources' has not been free from controversies. However, one thing that stands out is that the ability of States to realise ESR is dependent on factors such as resources, administrative and organisational efficiency of State institutions.[66] Thus, it has been asserted that the problem in the realisation of ESR has the question of resources at its heart.[67] The problems exists partly because, although the ICESCR provides that States shall take steps to deploy 'the maximum of its available resources' to ensure the realisation of ESR,[68] there is however no clarity as to what the phrase means. Thus, Robertson reasons that the phrase 'has little more definition today than when it was first written. It is a difficult phrase-two warring adjectives describing an undefined noun', and that '"[m]aximum" stands for idealism; "available" stands for reality. "Maximum" is the sword of human rights rhetoric; "available" is the wiggle room for the state'.[69] To decipher the

[65] CESCR, 'General Comment No. 20: Non-discrimination in Economic, Social and Cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para 1.
[66] Fukuda-Parr, Lawson-Remer & Randolph, 'Measuring the Progressive Realization of Human Rights Obligations' (n32) 13.
[67] Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Right' (Nov.1994) 16(4) *Human Rights Quarterly* 693-714, 394.
[68] ICESCR, art 2(1).
[69] Robertson, 'Measuring State Compliance with the Obligation' (n67) 695.

obligation of States under this phrase, it is needful to understand what the term 'resources' means and what steps States may take in utilising available resources to meeting ESR needs. Drawing on the work of Robertson, 'resources' refers to those things upon which the realisation of ESR depend while 'steps' refers to the particular actions that States must take to realise ESR.[70] For example, where a national government makes a law or a policy that everyone is entitled to health, such a law or policy amounts to 'taking steps' but when the same government goes ahead to build modern hospitals and equip them with the needed medical personnel and equipment, these personnel and health facilities are what is referred to as resources. So, to meet the demands of Article 2(1) above, both steps and resources should be evidently present in the State concerned.[71]

According to Robertson, there are five types of resources in this regard, namely financial, natural, human, technological and informational resources.[72] While financial resources refers to the money available for the States to meet ESR needs, natural resources means the land, water, animals and other agrarian products which are relevant for meeting ESR needs(especially the right to food) and which the State should provide by ensuring equitable distribution of the resources.[73] As the name implies, human resources refers to human hands needed to meet ESR needs. For example, the State is expected to provide qualified medical personnel if it must meet the right to health demands of its population. On the other hand, technological resources denote the deployment of technological facilities to provide the housing, farming and medical needs of the population while informational resources are the details the State should provide, in an accessible and appropriate format, as it relates to what it

[70] Ibid.
[71] Ibid.
[72] Ibid 695-697.
[73] Ibid.

is doing to meet ESR needs or what adverse impact its or a third party's action may have on the peoples' realisation of their ESR.[74]

Similarly, Van Bueren groups resources into economic, human and organisational resources. While the first could be seen in the light of financial resources above, he explains that human resources include time, energy, skills, professionalism and desire of individuals or communities while organisational resources refer to both formal and informal relationships (political, family and nongovernmental organisations) through which society takes action.[75]

It is also apposite to note that resources available to the State are not restricted to only those public resources that are domestically available. Rather, the State's eligibility and ability to access foreign aids and leverage on international cooperation would also be taken into consideration in determining its resources.[76] As Alston and Quinn assert, during the drafting of the ICESCR, the French delegate, who had the support of the American and Danish delegates, argued that, 'the resources of a state should be interpreted broadly to include budgetary appropriations and also technical assistance, international co-operation and other elements'.[77] The point has also been made that States should 'create space' that would encourage private persons and sectors to use their private resources to drive ESR realisation- for example through 'the right to work in the context of the "informal sector" or the right to housing in the context of the "illegal" occupation'.[78]

---

[74] Ibid.

[75] Geraldine Van Bueren, 'Of Floors and Ceilings: Minimum Core Obligations and Children' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (Pretoria: Protea Book House, 2002) 185.

[76] Robertson, 'Measuring State Compliance with the Obligation' (n67) 698.

[77] Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *HUM. RTS. Q.* 156, 178-180. This seems to be the current position because the Limburg Principles clearly provides that '"…available resources" refers to both the resources within a State and those available from the international community through international co-operation and assistance'. See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) UN Doc E/CN.4/1987/17, Principle 26.

[78] The Realization of Economic, Social and Cultural Rights: Final Report Submitted by Danilo Turk, Special Rapporteur, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., Prov. Agenda Item 8, at 50, 11 192, U.N. Doc. No. E/CN.4/Sub.2/1992/16 (1992)

As regards deployment of maximum available resources, it has been argued that 'All that is required for compliance with the maximum available resource obligation is an awareness of the resources required for realizing each right, combined with actual development or acquisition'.[79] In other words, the States should know what resources are available to it, what resources are needed to meet ESR and then take steps to acquire the outstanding resources. Alston and Quinn are of the view that a State has a discretion to determine whether it has deployed its maximum available resources to meeting ESR, and that that decision should not suffer any interference from external bodies, provided there is evidence of a commitment to ESR.[80] However, the problem with this approach is that it leaves the States with so much power which can be abused to the detriment of ESR realisation. Leaving the determination of what amounts to deployment of 'maximum available resources' to the sole discretion of States without any organising benchmark can attenuate the progressive realisation of ESR through States' abandonment of ESR realisation. There is thus a need to have well established indicators to determine the issue at hand.

Hence, Robertson suggests that compliance with each ESR should be measured by examining the nature and amount of the five comprehensive and accessible resources (categorised above), that the State has devoted to ESR realisation.[81] Using the right to health example, this could be achieved by weighing the number of persons who need healthcare services with the number of health facilities and personnel provided by the State, with a view to determining its (in)adequacy. Although it is difficult to have a universal standard on this issue, there should be a reasonable standard for making States provide the maximum available resources needed by their population, putting their peculiar circumstances into consideration.[82]

[79] Robertson, 'Measuring State Compliance with the Obligation' (n67) 706.
[80] Alston & Quinn, 'The Nature and Scope of States Parties' Obligation' (n76) 177.
[81] Robertson, 'Measuring State Compliance with the Obligation' (n67) 704.
[82] Ibid.

Therefore, to determine adequacy, '[t]he indicator of compliance with the resource obligation would be the existence of an acceptable process for determining the manpower required, and the actual deployment of such manpower'.[83] However, this still does not support a universalised approach to determining maximum available resources. A universalised approach will itself be problematic because of the disparity in the economic wealth of different States. Hence, a better approach is to use the above indicator of compliance through the lens of comparable countries, that is, developed/rich countries should be judged comparatively while the developing/poor countries should also have a separate comparative assessment.[84] Be that as it may, it is needless to state that this suggested benchmark is not perfect but may be a promising starting point for pinning down with greater precision what 'maximum available resources' holds for ESR realisation.

Although it has been noted that States have some modicum of discretion in determining what resources are available, the appropriateness of legislative and other measures, taken by the States in pursuance to Article 2 of ICESCR, is assessed by the CESCR.[85] Thus, in its monitoring role, CESCR ascertains whether States have been taking deliberate, concrete and targeted steps towards the full realisation of ESR. This means the obligation to take steps under Article 2 is not only armed with immediacy, but it also requires that States design time-bound legislative and programmatic mechanisms aimed at meeting ESR needs of their people.[86]

2.5 The Concept of Minimum Core Obligation

The minimum core obligation is a controversial concept which has been variously referred to as minimum core content, core content, social minimum, minimum essential, essential element, core obligations or minimum state obligation.[87] Minimum core obligation bridges

[83] Ibid.
[84] Ibid 711.
[85] See CESCR General Comment No. 3 (n35) para. 4.
[86] Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2012) 527-528.
[87] Sage Russell, 'Minimum State Obligations: International Dimensions' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Protea Book House, 2002) 1; George S. McGraw, 'Defining and Defending the Right to Water and Its Minimum Core: Legal

the gap between fundamental entitlements and scarce resources.[88] Alston is credited as the person who first used the term 'core content' ever before the phrase (and the above associated terms) gained entrance into the UN human rights system.[89] Originally, it is traceable to the German Basic Law where a right has an ' essential content' which cannot be derogated from.[90] Another preliminary point to note is that the concept of minimum core has certain features. Tasioulas[91] identifies these as immediacy[92], completeness[93], and universality.[94]

Although minimum core obligation and minimum core content are related, there is a fine difference between them. On the one hand, the concept of a minimum core obligation presupposes that States have a fundamental duty to realise the minimum core content of ESR. Despite the fact that the concept is not contained in the ICESCR, the CESCR has since introduced it in its General Comments 'in order to limit the risk of governments unjustifiably invoking the principle of progressive realization …to deny health care [and other ESR] or take very little action'.[95] It has also been described as acting 'as a placeholder for the primary concerns that have troubled this right [ESR], namely to hold negligent states accountable for

---

Construction and the Role of National Jurisprudence' (2011) 8 *LOY. U. CHI. INT'L L. REV*. 127; Dimitrios Kagiaros, 'Vulnerability as a Path to a 'Social Minimum'? An Analysis of ECtHR Jurisprudence' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Oxford: Hart Publishing, 2019) 245.Reference to core content, minimum essential, essential element or minimum core content should be seen as one and the same in this thesis.

[88] Sage Russell, 'Minimum State Obligations: International Dimensions' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Protea Book House, 2002) 14.

[89] George S. McGraw,'Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence' (2011) 8 *LOY. U. CHI. INT'L L. REV*. 127, 154. See Philip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights (1987) 9 *Hum. RTs. Q.* 332, 333.

[90] Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *YALE J. INT'L L.* 113-173, 124, citing Grundgesetz flir die Bundesrepublik Deutschland [Constitution] May 23, 1949, art. 19(2) (Ger.) ('[i]n no case may the essential content of a basic right be encroached upon'). See also Esin Oriici, 'The Core of Rights and Freedoms: The Limits of Limits' in Tom Campbell *etal* (ed) *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1986) 37-59.

[91] John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now' Research Paper (Nordic Trust Fund, World Bank, 2017)20.

[92] Ibid. Immediacy means that minimum core applies immediately, not progressively.

[93] Ibid. Completeness means that States are required to ensure that the minimum core is 'fully complied with at any given time'.

[94] Ibid. Universality means that minimum core obligations bind all States.

[95] Lisa Forman, etal, 'What Do Core Obligations under the Right to Health Bring to Universal Health Coverage?' (2016) 18(2) *Health and Human Rights Journal* 23-34, 27.

their failures to realize the right … progressively enough, and their failures to use sufficient resources to protect vulnerable people'.[96]

On the other hand, minimum core content refers to the essential element or elements of ESR in the absence of which the ESR lose their fundamental significance as human rights, and without which the State would be deemed to be in violation of its ESR obligation.[97] Put differently, as the name suggests, the minimum core content is the 'core' of ESR without which the rights cannot be said to have been realised at all. It is 'the "key part" of the normative content' of ESR.[98] It is those 'minimum decencies of life consistent with human dignity' below which no one should live.[99]

Although it is difficult to determine what amounts to the minimum for a dignified human existence, it is argued that minimum core establishes a baseline legal content for 'the notoriously indeterminate claims of economic and social rights. [100] It is a '"minimalist" rights strategy, which implies that maximum gains are made by minimizing goals'.[101] In other words, minimum core content provides that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.[102]

However, the foregoing distinction fades out when one considers the view that '[i]n theory, the core elements of a right should carry directly correlative obligations'.[103] Thus, drawing on its extensive experience, the CESCR stated in General Comment No 3 that it '…is of the view

---

[96] Lisa Forman, 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights? (2016) 47(2) *OTTAWA L. REV*. 561, 572.

[97] Russell, 'Minimum State Obligations '(n88) 15.

[98] Rolf Kúnnermann, 'The Right to Adequate Food: Violations related to its Minimum Core Content' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Protea Book House, 2002) 71-98,82.

[99] *Minister of Health & Others v Treatment Action Campaign & Others* 20
02 (5) SA 721 (CC) at 738 (S. Aft.).

[100]Young, 'The Minimum Core of Economic and Social Rights' (n90) 113.

[101] Ibid, 113-114.

[102] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n43) 13.

[103] Amanda Cahill, 'The Human Right to Water - A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 *INT'L J. Hum. RTS.* 389, 399-400.

that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [ESR] is incumbent upon every State party…'.[104] The point should, however, be made that, the concept of minimum core does not dictate to States the means of achieving the core of rights. Rather, it projects the essential needs and leaves the political branches of the States to decide the means.[105]

Although the goal of the international human rights system is to progressively get to a position where all ESR are substantially and fully enjoyed by all, the realities on ground usually make the development of a minimum core concept inevitable.[106] As Bilchitz argues,

> Without protecting people's survival interests, all other interests and rights that they may have-whether civil, political, social or economic - become meaningless. The recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.[107]

In the UK case of *Matthew v. Ministry of Defence*[108] the House of Lords was of the view that 'It is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery'. However, it is argued that States are expected not to remain stagnant in the fulfilment of ESR. In other words, the minimum core is what it literally means, i.e., 'minimum' which suggests that States should not go below it in their efforts at realising ESR. Thus, as the resources of a State keep expanding, it is expected that the State shifts its rights fulfilment threshold beyond the minimum core of fulfilment.

---

[104] See CESCR General Comment No. 3 (n35) para. 10. Also see the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) UN Doc E/CN.4/1987/17, Principle 25.
[105] David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 S. AFRICAN L.J. 484, 488.
[106] Ben T.C. Warwick, 'Social Minima at the UN Treaty Bodies: Minimal Consistency?' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart Publishing, 2019) 213–228, 213.
[107] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n43) 12.
[108] (2003) UKHL 4 Para 26.

Hence, the peripheral parts (as opposed to the core content) of a right should not be treated as less important, but they should equally be treated as an important part of the right.[109]

However, there are problems associated with the concept of minimum core. As Warwick argues, there is no specific standard for determining minimum core for all ESR, rather, the CESCR determines the core content of each ESR 'on a right-by-right basis'.[110] This lack of a logical, rational and consistent general guidance undermines the prioritisation claim which forms the basis of the minimum core concept.[111] Another problem with the concept is that it may encourage States to refrain from pursuing the broader goal of maximally realising ESR within their domain.[112] The concept has also been criticised as promoting social spending on more urgent social needs over less urgent social needs, instead of promoting essential expenditure over inessential expenditure.[113] Discussion around it also tends to focus more on developing States, thereby blocking out the potential of using the concept in favour of the deprived and vulnerable persons in developed States.[114] A related issue around the concept of minimum core is whether it is universally applicable, the resources available to the States notwithstanding. While scholars such as Eide,[115] and Scott and Alston[116] seem to share the view that the minimum core obligation of a State should be country-specific considering its available resources, others such as Coomans[117] and Van Bueren[118] argue that country-

[109] Fons Coomans, 'In Search of the Core Content of the Right to Education, in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (Protea Book House, 2002) 159, 167.
[110] Warwick, 'Social Minima at the UN Treaty Bodies' (n105) 215.
[111] Ibid 218.
[112] Brigit Toebes, 'The Right to Health' in Asbjrn Eide, Catarina Krause & Allen Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (M. Nijhoff Publishers, 2001) 169, 176.
[113] Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core' (2006) 22 *AM. U. INT'L L. REV.* 163-197, 197.
[114] Matthew Craven, 'The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development' (Clarendon Press, 1995) 143-144.
[115] Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Right' in Asbjrn Eide, Catarina Krause & Allen Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (M. Nijhoff Publishers, 2001) 27.
[116] Craig Scott & Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 *S. AFR. J. ON HUM. RTS.* 206, 250.
[117] Fons Coomans, 'In Search of the Core Content of the Right to Education' (n109).
[118] Geraldine Van Bueren, 'Of Floors and Ceilings' (n75) 184.

specificity would undermine the essence of the concept, in that such a variation would erode the inherent universality of human rights. This thesis aligns with the first school of thought. While it is desirable to have a universal minimum core, it is argued that it however amounts to an inordinate disregard for resource-constraint realities to group all States under the same minimum core setting or context. It is argued that the resources available to a State should largely determine the level of minimum core obligation performance that should be expected of it. Connecting this point to the cooperation model advanced in this thesis, although States are to cooperate, it is argued that the level of a State's cooperation and assistance in terms of extra-territorial obligations to realise ESR in other States should be dependent on the resources available to it.

Despite all the above challenges associated with the concept, if carefully deployed, the concept could play a role in bringing about some innovative solution to the realisation of ESR.[119] Setting minimum core would remove the difficulty in determining a 'consistent and rigorous basis when public authorities have failed to show respect for the minimum'.[120] It would also draw the attention of States to the entitlement which they owe individuals, thereby giving the courts and other institutional bodies a clearer perspective on what the ESR core content is.[121]

As regards the minimum core during emergency, it has been suggested that the problem of indeterminacy of minimum core can be overcome by reference to four factors. These are the current available resources of the State, the nature and needs of the vulnerable groups,[122] the

[119] Pierre de Vos, 'The Essential Components of the Human Right to Adequate Housing-A South African Perspective' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Protea Book House, 2002) 23-33, 33.

[120] Colm O'cinneide 'Giving Legal Substance to the Social Minimum' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart Publishing, 2019) 183–200, 195.

[121] David Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 *International Journal of Constitutional Law* 710 –739

[122] But see David Bilchitz, 'Giving Socio-Economic Rights Teeth' (n105) 489 who criticises the court in the *Grootboom case* for restricting the minimum core concept to a specific group.

inadequacy of current State efforts to satisfy the ESR needs, and a clear intention by the State to meet the ESR.[123]

Another perspective worth noting about the concept of minimum core is that it is an exception to the concept of progressive realisation discussed above. This means '…even states with limited resources must give priority to the fulfilment of their minimum core socio-economic duties'.[124] Writing from a German perspective, Leijten describes it as an absolute social guarantee which admits of no exception.[125] In other words, States are bound to ensure the realisation of minimum core ESR, i.e. provide minimum essential of ESR immediately, not progressively.[126] They can only be excused from this obligation upon proof that all efforts have been made to use all resources at their disposal to satisfy the minimum core ESR needs of their people as a matter of priority.[127]

However, for the right to health, it appears that the minimum core obligation cannot be derogated from under any circumstances. The CESCR General Comment No.14 provides, that '…[i]t should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above[right to health minimum core], which are non-derogable'.[128] Further, while the right to food may be progressively realised, the right to be free from starvation is a core right which must be met immediately, not progressively.[129] The implication of this is that, no matter the

[123] Diane A. Desierto, 'ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises' (2012) 44 GEO. WASH. INT'L L. REV. 473, 492.
[124] Dimitrios Kagiaros, 'Vulnerability as a Path to a 'Social Minimum'? An Analysis of ECtHR Jurisprudence in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart Publishing, 2019) 245– 260, 249.
[125] Ingrid Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socieeconomic Rights Protection' (2015)16(1) *German Law Journal* 23- 48, 39. Also see the Canadian position in Ania Kwadrans, 'Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?' (2016) 25 *Journal of Law and Social Policy* 78-108.
[126] CESCR General Comment No. 3 (n35) para. 10.
[127] Ibid.
[128] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) para 47.
[129] UN Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, 2006, HR/PUB/06/12, Para. 61.

resource and financial circumstances of a State, it should fulfil its right to health and freedom from starvation obligations to its citizens and residents as a matter of immediacy.

Considering the disparity in levels of wealth among States, the practicality of this non-derogation provision remains doubtful in poor States. It would not be reasonable to claim the fulfilment of the minimum core even when its impossibility is glaring.[130] A better option will be a suspensory approach which '…preserves the idea that even under conditions of impossibility people retain their rights to have the minimum core obligation fulfilled, but that such rights cannot be realised due to current conditions. Once these conditions change, the rights must be fulfilled'.[131] This approach should not be viewed as attenuating the characteristics of the term 'right'. Rather, as Donelly notes, it should be seen as stating that the State recognises the existence of ESR but that its present resource constraints has affected its capacity to affect an immediate ESR realisation[132]. Such incapacity could manifest in the form of political impossibility (previous political errors and corruption), moral impossibility (the need to prioritise higher rights and values) and physical impossibility (resource and administrative constraints).[133] There is, therefore, a need to always distinguish between a ' 'claim for immediate satisfaction and … possession of a right'.[134] While the former could be suspended for want of resources, the latter remains constant and 'unsuspendable'. Thus, although rights are 'trumps',[135] they must however be realised within the available resources and capacities of States. The fact that rights are trumps does not mean that they wear the garment of absoluteness in all circumstances. Thus, Greene argues that ESR 'must always

[130] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n43) 18.
[131] Ibid.
[132] Jack Donnelly `Human Rights as Natural Rights' (1982) 4(3) *Human Rights Quarterly* 391-405, 393.
[133] Ibid 394.
[134] Ibid 393.
[135] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) xi and 90.

compete with other governmental imperatives and financial constraints, and so they cannot be absolute'.[136]

Seeking the realisation of ESR within the States' available resources and capacities could demand the emplacement of a culture of justification, thereby ensuring that a deviation from the rights is justified by evidence of a lack of resources.[137] However, while the courts may rely on the culture of justification to hold the political branches to account, this does not mean that the courts should not give some margin of appreciation to the political branches who are more equipped to take ESR decisions. Thus, Móller argues that 'If a court is hampered by its lack of empirical or, probably less relevant, normative understanding of the issue, then some measure of deference may be entirely appropriate'[138].

That said, as Van Bueren reasons, 'a minimum core approach . . . should be viewed as a springboard for further action'.[139] The concept should not be used in a way as to make States complacent about ESR realisation. Realising the minimum core without attempting or actually realising ESR fully or maximally is not a complete realisation. Thus, while States are to ensure that 'priority must be given to those in a condition',[140] of minimal needs, they are, in the process, not permitted to neglect the ESR needs of those who aspire to the maximum realisation of their ESR needs.

[136] Jamal Greene, 'The Supreme Court 2017 Term-Foreword: Rights as Trumps?' (2018) 132 *Harvard Law Review* 28, 48.
[137] See Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146-188, 147. Also see Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights 31*, 32.
[138] Kai Móller, 'Justifying the Culture of Justification' (2019) 17(4) *I-CON* 1078-1097,1096.
[139] Geraldine Van Bueren, 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 59.
[140] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n43) 13.

2.6 Concerns against Justiciability of ESR

Since the formal recognition of human rights at the UN level, there has been the 'dichotomisation' of human rights into civil and political rights (CPR) and ESR.[141] However, several concerns have been raised particularly about the propriety of conferring a justiciability status on ESR.

The concept of justiciability of a right has to do with whether the right confers a judicially enforceable or procedurally reviewable entitlement on an individual, or whether it imposes a sufficiently specific obligation on the State to realise the right.[142] It presumes 'the existence of a review mechanism to determine non-compliance with the terms of the legal regime'.[143] In other words, the concept of justiciability is not restricted to the judicialisation of rights. Rather, review processes, such as the CESCR processes are part of what makes a right justiciable. Thus, as Mapulanga-Hulston argues,

> While judicialism may entail justiciability, not all justiciability is judicial. This is because judicialism is directed to the court system, while justiciability essentially inheres in the idea of review, though this of itself does not exclude court processes…for rights to be justiciable, they do not necessarily have to be dealt with in the courts of law, or to be judicial. The review process can afford the necessary justiciability of rights.[144]

However, the debate around the justiciability of ESR, rightly or wrongly, largely turns on whether they can be judicialised. This restrictive approach to the issue of justiciability attenuates the value that is inherent in the 'inquisitorial justiciability'[145] of other supervisory bodies, in the sense that the outcomes of their review process are not viewed through the same lenses used for judicial justiciability.

---

[141] Mapulanga-Hulston, 'Examining the Justiciability'(n2), 31; P. Stiegart, 'International Human Rights Law: Some Current Problems' in Robert Blackburn & John Taylor (eds) *Human Rights for the 1990s: Legal, Political and Ethical Issues* (Mansell, 1991) 26.
[142] F.G. Jacobs, 'The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights' (1978)3(3) 172.
[143] Mapulanga-Hulston, 'Examining the Justiciability'(n2), 37.
[144] Ibid.
[145] Ibid 38.

While the concept of justiciability within the domestic forum is rights-based, individual-focused and (judicially) adversarial in the common law system, the term in the international forum is largely obligation-based, redress or review-driven, persuasive and collective-focused.[146] It is unfortunate that the critics of the justiciability of ESR usually focus on the domestic conception of the term without critically examining the justice and value that come with the international conception.[147] Instead of criticism, what is expected or needed is a reform of the national accountability processes.

As far as anti-justiciability scholars are concerned, ESR should not enjoy the same justiciability status with their sister rights (CPR) in courts. Although it has been observed that, '…the understanding of economic and social rights as directive rather than justiciable was shared by all states [during the drafting of the ICESCR]' and that 'No state, Western or non-Western, seriously proposed… to adopt [ESR] as a matter of enforceable national law...',[148] the current debate on the matter has gone beyond whether or not ESR are justiciable. More recently, it is mostly conceded that they are justiciable, but the question turns on how best to realise them. Thus, this thesis develops an understanding of institutional cooperation as a way forward on the thorny issue of ESR justiciability. However, it is pertinent to examine the arguments surrounding justiciability at this point. Below, the thesis discusses some of the debates around the justiciability of ESR.

a. The Political Matter Argument

According to the proponents of the political matter argument, the court lacks the legitimacy to adjudicate ESR cases, since such adjudication would lead to the politicisation of the judiciary and the judicialisation of policy issues. Put in another way, ESR issues are seen as political

[146] Michael K Addo, 'The Justiciability of Economic, Social and Cultural Rights' (1988) 14 *Commw L Bull* 1425, 1426.
[147] Agbor, 'Shifting the Matrix' (n5) 176.
[148] DJ Whelan and J Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908-949.

matters for the executive and legislative arms of governments to decide and act upon, which should not be subject to judicial scrutiny. These critics therefore argue that it is 'politically insensitive and sociologically illiterate'[149] to seek to realise ESR through the court process. These proponents perceive ESR not in terms of individual rights but as a broadly formulated programme of governmental policy in the economic and social realms, which are political matters, not matters of law or judicial process.[150] They usually predicate their arguments on three major grounds: illegitimacy of judicial power in this sphere, separation of powers, and the judiciaries' institutional deficiencies.[151]

First, the critics of justiciability of ESR maintain that the judicial adjudication of ESR would amount to an anti-democratic practice and judicial usurpation of the majoritarian powers duly given to the elected political branches.[152] This argument holds that when courts use their judicial powers to defeat the ESR preferences of majorities represented by the executive and legislature, the legitimacy of the exercise of such judicial powers becomes questionable and intrusive of the powers of the political branches.[153] In other words, this school of thought argues that the idea of ESR lies mainly in the political arena where the value of the rights can be best concretised or fruitfully deployed.[154] Hence, the school argues that 'administration of public purse or formulation of social or economic policy should only be carried out by elected

[149] Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty & Virginia Mantouvalou (eds), *Debating Social Rights* (Bloomsbury, 2010) 2.
[150] E.W. Vierdag, 'The Legal Nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law 73.*
[151] See generally DM Davis 'The Case against the Inclusion of Socio-economic Demands in a bill of Rights except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475.

[152] Ibid.
[153] Ruth Gavison, 'On the Relationship between Civil and Political Rights, and Social and Economic Rights'in Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner (eds) *The Globalization of Human Rights* (United Nations Publications, 2003) 27.
[154] Gearty, 'Against Judicial Enforcement' (n149)1.

representatives of the people.,[155] In their view, it is less effective to deploy legal processes to secure the realisation of ESR.[156]

However, the proponents of this argument fail to realise that the same argument holds true for CPR. That is to say, it can be argued against their position that issues relating to CPR should be left for the political branches, without any intervention from the judiciary. As will be seen below, the inter-connectedness which exists between CPR and ESR supports an argument that the non-realisation of the latter adversely affects the former. This thesis argues that leaving ESR realisation at the whims of political branches does not add any greater value to the realisation of the 'freed' CPR. Those who oppose ESR on this strand of argument fail to appreciate the fact that there is a need to use judicial constraints on democratically elected organs, especially on issues relating to human rights, to prevent an abuse of power.

The democratic legitimacy of judicial intervention can be justified or anchored on the need to ensure that the rights of minorities or politically powerless groups are not violated by the majoritarian decision makers.[157] Seen from this perspective, judicial review of government actions or inactions, to ensure human rights protection, would seem to be as legitimate in the ESR realm as in other spheres of governmental actions.[158]

Perhaps, it is the belief that ESR have greater resource implications that triggers the democratic legitimacy concerns about their justiciability.[159] However, as will be argued on the subsequent pages, it is not in every case that ESR incur more financial implications than CPR; financial

[155] Aoife Nolan, Bruce Porter & Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (2007) Centre for Human Rights and Global Justice Working Paper Number 15, available at http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf (last accessed on 26 September , 2020).
[156] Gearty, 'Against Judicial Enforcement' (n149)1.
[157]Nolan, Porter & Langford, 'The Justiciability of Social and Economic Rights (n155)
[158] Ibid.
[159] Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Social and Economic Rights', (2004) 20 *South African Journal of Human Rights* 38,390-391.

implication depends on the right , the nature of the duty to fulfil that right and the circumstances surrounding it.[160]

Second, closely related to the first strand above, another strand of the political matter argument is that judicial adjudication of ESR amounts to a violation of the settled principles of separation of powers, wherein the respective branches of government have been given clearly stated and delineated powers, with the expectation that one should not encroach on the realm of the other.[161]

According to this separation of powers argument, issues of budgetary allocation and expenditure policies are within the exclusive preserve of the executive and legislative arms of government.[162] It is further argued that issues of budgetary allocation and prioritisation of expenditure are bound to crop up from judicial adjudication, thereby disrupting the traditional balance of separation of powers, by giving the judiciary more powers than it would normally have.[163]

The argument on separation of powers does not have strong legal foundation in many jurisdictions. It is not true that judicial adjudication of ESR would confer additional powers on the courts, as the proponents of the above argument suggest. On the contrary, the courts have already been imbued with the interpretative power under the constitutions and statutes of various nations,[164] and this power generally includes a review of governmental decisions and actions, with a view to making sure that they comply with human rights provisions.

---

[160] See J.K. Mapulanga-Hulston 'Examining the Justiciability' (n2) 29-48.

[161]Jon D. Michaels, 'An Enduring, Evolving Separation of Powers' (April 2015)115(3) *Columbia Law Review* 515-597,525.

[162] Gerard Hogan, 'Directive Principles, Social and Economic Rights and the Constitution' (2001)36 *Irish Jurist* 174 ,189.

[163] Gerard Hogan, 'Judicial Review and Social and Economic Rights' in Binchy and Sarkin (eds), *Human Rights, the Citizens and the State: South African and Irish Approaches* (Roundhall Sweet and Maxwell, 2001) 1, 8.

[164] For example, section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) confers judicial powers on the courts. However, subsection 6(c) of the section ousts courts' jurisdiction on ESR cases, except as otherwise provided. See Chapter 3 of this thesis for a detailed discussion on the Nigerian context.

Therefore, excluding judicial adjudication on ESR would amount to removing a duly recognised judicial power from the courts and transferring it to the other arms of government, thereby creating a possible situation where the law-maker also becomes the law interpreter.[165] In any case, the principle of separation of powers cannot be discussed or applied in isolation. Its application to ESR justiciability has to be situated within the context of the equally important principles of the rule of law and constitutional supremacy. For example, section 1(1) & (3) of Nigeria's Constitution expressly provides that the Constitution is supreme and that it shall have binding force on all persons, authorities and governments, and that any law or decision that is inconsistent or in conflict with the provisions of the Constitution shall be null and void to the extent of the inconsistency.[166] Also, although providing a restrictive jurisdiction on ESR as discussed in the next chapter, section 6 of the Nigerian Constitution gives the courts the judicial powers to entertain and determine legal matters between individuals themselves, between individuals and governments or between branches of government.[167]

It is therefore apposite to argue that the Constitution has reconfigured the principle of separation of powers within the Nigerian context. The constitution or law has given interpretative powers to the courts and to them should matters of ESR implications go for settlement. In the case of *Newfoundland (Treasury Board) v NAPE*,[168] the Canadian Supreme Court was of the view that:

> The Charter has placed new limits on government power in the area of human rights… but judicial review of those limits involves the courts in the same role in relation to the separation of power as they have occupied from the beginning, that of the constitutionally mandated referee.

[165] Nolan, Porter & Langford, 'The Justiciability of Social and Economic Rights' (n155) 14.
[166] See the case of *Attorney-General of Bendel State v Attorney-General of the Federation & 22 Others* (1981) All NLR 85 SC.
[167] See the case of *Attorney-General of Ondo State v Attorney-General of the Federation* [2002] 9 NWLR (Pt. 772) 22; *Agala v Enwere* (2010) All FWLR (Pt. 532) 1609, where the Supreme Court held that by section 6(1) & (5) of the Constitution of Nigeria, the court and nobody else possesses judicial powers under the Constitution.
[168] (2004) 3 SCR para105.

However, this does not suggest that the other arms of government do not have power or rights over policy direction of ESR. Rather, the argument is that their decisions on ESR should be capable of being challenged before the courts when and if any person feels aggrieved by such decisions. The court, as the 'constitutionally mandated referee',[169] has the constitutional duty to ensure that the national and international obligations that are imposed on the political branches are carried out by them and in line with the law. Further, while it sounds convincing that 'human rights are always most effectively inculcated into modes of behaviour when they are reached through, rather than in spite of, politics',[170] the courts can however facilitate or direct the political inculcation of ESR through the creation of an inter-branch collaboration. The principle of separation of powers is not cast in stone but it is flexible enough to accommodate a conversational engagement among the various arms of government.

Third, the political matter argument suggests that the courts are institutionally incompetent to determine ESR cases. The proponents of this argument such as Fuller, contend that the judiciary lacks the basic information to deal with ESR issues on budgetary allocation or the expert knowledge, qualification and experience to handle such issues.[171] They also argue that the courts lack the skills to deal with polycentric issues that may arise from any judicial pronouncement on ESR , while also lacking the tools and remedies to handle ESR issues.[172] It is thus often argued that issues of social and economic policy should be left for political branches and their experts, given that 'such issues often generate complex and "polycentric" considerations relating to resource allocation that have the potential to impact widely on the common life of society'.[173]

---

[169] Ibid.
[170]).
[170] Gearty, 'Against Judicial Enforcement' (n149)22.
[171] See Lon Fuller, 'The Forms and Limits of Adjudication'(1978) 92 *Harvard Law Review* 353 where he argues that the issue of polycentricity cannot be fully addressed by mere judicial adjudication.
[172] David Horowitz, *The Courts and Social Policy* (The Brooking Institute, 1977) 25-32.
[173] Colm O'Cinneide, 'The Constitutionalisation of Social and Economic Rights' in Helena Alviar Garci´a, Karl Klare & Lucy A. Williams (eds) *Social and Economic Rights in Theory and Practice* (Routledge, 2015) 258-276, 259.

In response to these concerns, it has been argued, that the courts do not necessarily lack the information needed to deal with ESR.[174] Many jurisdictions operate an adversarial judicial system in which the courts are expected to not scout for evidence by themselves but to receive and evaluate evidence adduced by the parties to a lawsuit. The implication of this is that it is the duty of the parties, through their legal representatives, to provide all material evidence before the courts on the subject matter for adjudication. Thus, the issue of the courts not having relevant information is not a function of judicial incapacity or incompetence. Rather, it could be a sign of the parties' lawyers' lack of industry. In any event, the courts can invite *amici curiae* to help provide relevant information or provide further guidance on a given matter.

On the issue of lack of expertise, it is not a requirement of the law that a Judge must have expertise on every case presented before them. As noted above, it is the parties' primary duty to unravel any technical issue by calling expert witnesses that would give the courts the details of the case before them. Nolan *et al* state that 'If the courts are considered capable of evaluating and drawing conclusions on the basis of complex technical and medical evidence, in …a criminal case or tort law context, then there can be no presumption that they are unable to do so in a social and economic rights context'.[175]

Further, it amounts to generalisation to state that Judges lack expert knowledge on ESR issues. Some Judges were experts in some aspects of the law during their private practice before joining the Bench. Others, upon assumption of office as Judges, have gone for specialist training and retraining courses to enable them to acquire expert knowledge needed to discharge their duties. For example, every year, the National Judicial Institute organises conferences and seminars for Nigerian Judges to bring them up to date and to imbue in them expert knowledge on policy formulation and implementation. This is further bolstered by the law and practices

[174] Nolan, Porter &Langford, 'The Justiciability of Social and Economic Rights' (n155) 16.
[175] Ibid.

which permit Judges to use experts as assessors where the matter before them is highly technical and beyond their knowledge.

Regarding polycentricity, it is not always true that the political branches are better intellectually and materially equipped to deal with issues that have polycentric implications.[176] The competence of any arm of government in this regard is determinable on a case-by-case basis rather than on a blanket generalisation.[177] It would be safe to state that Judges have the needed power to balance the conflicting societal interests in the cases before them. According to a South African High Court in the case of *Rail Commuter Action Group & Ors v. Transnet Limited & Ors*[178]*:*

> The problem of polycentricity must clearly act as important constraints upon the adjudication process particularly when the dispute has distributional consequences. But polycentricity cannot be elevated to a jurisprudential mantra, the articulation of which serves, without further analysis, to render courts impotent to enforce legal duties which have unpredictable consequences.

So, the concept of polycentricity should not serve as a tool to remove judicial powers where they exist. At best, any discussion around the concept should be geared towards making the courts to be cautious in the exercise of their powers.

b. The Positive Versus Negative Rights Debate

The concern of the positive versus negative rights argument is that CPR are, by classification as negative, justiciable while ESR are not. Those who oppose ESR justiciability on this strand assert that CPR create and impose negative obligations on the government, thereby making it easy for the rights to be enforced, in that the rights do not require any positive action or expenditure to enforce them. CPR largely impose obligations of non-interference on States by checking the use and abuse of power by the States. The rights relate to what the States ought not to do and that any action of States should not lead to losing rights, and it follows violations

[176] In a judicial context, a polycentric situation is one in which a judicial decision will have complex implications that will extend beyond the parties and the factual situation before the court. Ibid 18.
[177] Ibid 19.
[178] Case No.10968/2001, 6 February 2003.

approach.[179] Unlike CPR, the argument goes, ESR create an imposition of positive action on the government, requiring a positive and resource-drawing action.

Negative elements or 'defensive rights', as Alexy calls CPR, relate to prohibitions.[180] The addressee of the right is prohibited from destroying, adversely affecting, and so on the enjoyments of the right by the rights holder.[181] Every act that would have this effect is prohibited.[182] In contrast to this, positive elements, be they protective rights or entitlements, require action by the addressee but not every possible act, nor is a particular single act needed.[183]

However, Nolan *et al* argue that while it is true that some ESR give rise to positive governmental obligations, it is not the case in every situation.[184] So, it is not in their classification that rights find positive or negative obligations. It is a matter of degree, rather than of kind, as to whether ESR impose more positive governmental action than CPR.[185] In other words, the 'relevant question to pose is not whether any particular kind requires positive state action but rather the extent to which it can subsist as a meaningful right without such active state support'.[186] For example, the realisation of the right to a fair trial (which is a CPR), requires huge and positive financial commitment because it demands the existence of effective judicial, policing and correctional facilities.[187] Similarly, though the right to vote is a CPR, it involves the imposition of a positive duty on the government, i.e., the duty to provide the

[179] Programme on Women's Economic, Social and Cultural Rights, *Human Rights for all international Covenant on Economic, Social and Cultural Rights a Handbook* (Programme on Women's Economic, Social and Cultural Rights, 2015), 5.
[180] Robert Alexy, *A Theory of Constitutional Rights,* translated by Julian Rivers (Oxford University Press 2002), 308.
[181] Ibid.
[182] Ibid.
[183] Sanna Hyttinen, 'A Second View from Elsewhere - The EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse' (2006) 24 *Nordisk Tidsskrift* for *Menneskerettigheter* 1.
[184] Nolan, Porter & Langford, 'The Justiciability of Social and Economic Rights' (n153) 9.
[185] Alston & Quinn, 'The Nature and Scope of States Parties' Obligation' (n77) 183-186.
[186] Ibid 184.
[187] Ibid.

necessary machinery to ensure a smooth electioneering process.[188] These examples, it is argued, deconstruct the argument that CPR do not impose positive duties.

Further, it should be noted that it is not every ESR that imposes a positive duty. For example, the duty on government not to interfere with a person's right to live in their own house or the right against unlawful or illegal eviction is a negative one, as inaction, rather than action is required. Hence, Green has asserted that some ESR are essentially negative in nature, requiring only that a government refrains from violating the rights, and that some CPR are positive in nature, requiring for instance the provision by a government of a functioning judicial system.[189] So, there is a need to treat all human rights as indivisible and universal.

It has been argued that 'The idea that human rights are indivisible, interconnected and interdependent has travelled from the legal philosophical and political sphere to the sphere of rights adjudication'.[190] Thus, all human rights, are universal[191], indivisible, inter-dependent on each other.[192] So, they should not be rigidly classified to nullify their justiciability or make them what Feinberg refers to as merely 'manifesto rights'[193] which lack binding force. All major international human rights instruments impose on the States the duties to respect, protect and fulfil all rights, whether CPR or ESR. All human rights require a combination of negative and positive conduct from States and varying levels of resources.[194] So, the fact that ESR are

[188] Nolan, Porter &Langford, 'The Justiciability of Social and Economic Rights' (n155)9.
[189] Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23 *Human Rights Quarterly*1062–1097 ,1076.
[190] Ingrid Leijten, 'Potential and Pitfalls of Indivisible Judicial Protection of a Social Minimum: From Inflation to Procedural Protection?' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart Publishing, 2019) 229–244, 229.
[191] But see the powerful comment in Donnelly `Human Rights as Natural Rights' (n132) 398 that the fact that '…rights are universal certainly was not meant to imply that they were in fact universally recognized and implemented, but only that all humans possess them and therefore may press especially strong claims for their implementation…. If the world or particular societies are structured in such a way that enjoyment of the right is regularly denied or frustrated -that is, if the right is not widely implemented - that is a regrettable, even deplorable, shortcoming. However, it is a shortcoming of social and political institutions and practices and does not entail that one does not have the right…'.
[192] See Article 5 of the Vienna Declaration and Programme of Action of 1993 and paragraph 13 of Proclamation of Tehran of 1968.
[193] Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice Hall, Inc 1973) 55-97.
[194] Sandra Lienbenberg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *South Africa Journal on Rights* 359,362.

currently being less favourably enforced does not deprive them of their legal efficacy, since the minimum core concept requires States to provide a minimum realisation of ESR for their people. Rather, to use Donnelly's words, 'The problems are more accurately seen as lying in the world than in the rights. These rights are only less easily realized, not less truly rights, or even necessarily less important rights than are other rights'.[195]

Thus, owing to the interconnectedness of rights, it is argued that a violation of ESR has a negative implication on the enjoyment of CPR. As Mapulanga-Hulston notes, 'one category of human rights will have an impact on the other category of human rights'.[196] For example, the CPR to life cannot be fully appreciated or enjoyed unless the ESR to health and adequate standard of living are provided, promoted and protected. There is, thus, a need to give both classes of rights equal attention, since, to use the words of former US President Franklin Delano Roosevelt, '…true individual freedom cannot exist without economic security and independence. Neccessitous men are not free men…'.[197]

Hence, the CESCR General Comment No.9[198] states that there should be no rigid classification of rights in such a way as to make the enforcement of ESR way beyond the reach of the courts, as that would negate the principles of inter-dependence and indivisibility of rights. It would also adversely affect the capacity of the courts to protect the vulnerable and disadvantaged members of society in whose favour the ESR mostly exist.[199]

In addition, the positive versus negative argument states that ESR draw a lot from the States' scarce resources, unlike the CPR that require little or no resources to enforce. In other words, while CPR are cost-effective, ESR are not. Thus, this argument posits that the implementation

[195] Donnelly `Human Rights as Natural Rights' (n132) 403.
[196]Mapulanga-Hulston, 'Examining the Justiciability' (n 2) 32.
[197] 90 CONG. REC. 55, 57 (1944), cited in Philip Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990)84(2) *The American Journal of International Law* 365-393.
[198] CESCR General Comment No. 9: The Domestic Application of the Covenant (19th session, 1998).
[199] Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', (1989)27, *Osgoode Hall LJ*, 769, 779 – 790.

of ESR is too costly, and owing to this resource-intensive nature of the rights, they should be treated as non-justiciable.[200] The proponents maintain that 'judicial enforcement of SER [ESR] is democratically inappropriate if it involves courts ordering public expenditures that have not been legislated'.[201] This is on the basis that the elected political branches are best suited to make informed decisions on resource allocation, as courts lack the institutional capacity to make such decisions, since they (courts) do not have the requisite budgetary information and expertise that would enable them to make the necessary trade-offs.[202] Thus, justicialising ESR, these proponents argue, may lead to an affirmation of 'so-called human rights which are not human rights at all…to push all talk of human rights out of the clear realm of the morally compelling into the twilight world of utopian aspiration'.[203]

However, embedded in this argument is a deep-rooted misconception that ESR are resource-intensive while CPR are costless. This is not always the case. There are some ESR that are costless and there are some CPR that are costly. For example, while the right to a fair hearing, though a CPR, may draw huge financial commitment from the State in terms of provision of facilities like court rooms, court officials, security and prisons officials, and interpreters, the right to housing may simply require the State to refrain from forced eviction or not to interfere with a person's right to a continued stay in a particular place, without more.[204] Thus, cost-effectiveness and resource-intensiveness of a right realisation is not dependent on a right classification, but on the peculiar obligation which such a right creates. In the final analysis, all categories of rights draw resources, and this bolsters the argument that 'a clear-cut dichotomy between civil and political rights requiring "abstention" or non-interference on the

[200] Mapulanga-Hulston, 'Examining the Justiciability' (n 2) 39-40.
[201] Lucy A. Williams, 'Resource Questions in Social and Economic Rights Enforcement: A Preliminary View' in Helena Alviar Garci´a, Karl Klare & Lucy A. Williams (eds) *Social and Economic Rights in Theory and Practic*e: Critical Inquiries (Routledge, 2014) 43-64, 43.
[202] Ibid
[203] Maurice Cranston, 'Human Rights, Real and Supposed' in D.D. Raphael (ed) *Political Theory and the Rights of Man* (Macmillan, 1967) 172.
[204] Mapulanga-Hulston, 'Examining the Justiciability' (n 2) 41.

one hand, and economic, social and cultural rights requiring positive action on the other hand, cannot be maintained…. all human rights require, to a varying degree, a combination of negative and positive action from the state.'[205]

c. Indeterminacy Argument

The core of this anti-justiciability argument is that while CPR are largely precise in scope and definition, ESR are vague and ambiguous. According to this view, it would be difficult to confer justiciability on a right that is indeterminate. Put differently, the argument states that ESR are 'highly indeterminate and cannot be construed as imposing specific duties upon others'[206] and that they are 'generally unable to establish what exactly must be done by whom'[207] to satisfy the realisation of the rights. The argument further posits that because of this normative vagueness, ESR cannot be viewed as 'rights' properly so called, capable of imposing enforceable obligations on the State or non-state actors.[208] Thus, ESR are seen as 'replete with claims about abstract rights to goods and services,… but often muddled or vague, or both, about the allocation of the obligations without which these rights not merely cannot be met, but remain undefined'[209]

While it is true that definitional and normative specificity of a law promotes its value, the above argument against the justiciability of ESR is an overkill. In the first place, lack of specificity is not limited to ESR, but it cuts across various categories of rights. As a matter of fact, some ESR are more precise than CPR. Take for example the right to education under the ICESCR. This right is quite precise in that it specifically mentions that there should be a compulsory education up to primary school level. In Nigeria, the Compulsory, Free Universal Basic Education Act expressly provides that there shall be a free and compulsory education up to

[205] Ibid 41.
[206] O'Cinneide, 'The Constitutionalisation of Social and Economic Rights'(n173) 259.
[207] Ibid.
[208] Onora O'Neill`, 'The Dark Side of Human Rights' (2004) 8(2) *International Affairs* 427-439.
[209] Ibid 428.

junior secondary school level, and even criminalises any failure to abide by the law.[210] Further, the right to health, under Article 12(2)(c) of ICESCR expressly lays out the factors that would determine whether the right has been or is being fulfilled by any State, by referring to such indices as environmental and industrial hygiene, treatment and control of epidemic, endemic, occupational and other diseases.[211] On the contrary, the CPR to life, privacy and human dignity are vague, and until interpreted by the courts, they remain so vague.[212]

In any case, the vagueness of a right should not stop its enforcement or implementation. After all, the courts were established for the purpose of interpreting and giving life to constitutional and statutory provisions. It is argued that the process of adjudication is one which continually provides some clarity to the outer boundaries of rights. As Liebenberg notes, subjecting ESR to adjudication will cure any vagueness and promote greater clarity. Such greater clarity will also help the States to better understand their ESR duties.[213] Vagueness of a right should not deprive it of justiciability, because 'the process of defining and elaborating the content of …rights is an ongoing and dynamic one'.[214]

2.7 The Tripartite Typology of State Obligations on ESR

Human rights correspond to obligations borne by the State, which obligations can be categorised as the duties to respect, protect and fulfil.[215] Shue[216] conceptualised and compartmentalised human rights duties into the obligations to avoid, protect and aid. This categorisation has also been adopted by several human rights bodies, including the CESCR.

---

[210] See sections 2 and 3 of the Compulsory, Free Universal Basic Education Act, Cap C52, Laws of the Federation of Nigeria 2004.
[211] Nolan, Porter & Langford, 'The Justiciability of Social and Economic Rights' (n155).
[212] Sandra Liebenberg, 'The International Covenant' (n194), 359-378.
[213] Sandra Lienbenberg, 'Social and Economic Rights' in M. Chaskalson *etal* (eds) *Constitutional Law of South Africa*(Juta, 1996) 41.
[214] Mapulanga-Hulston, 'Examining the Justiciability' (n 2) 42.
[215] Inga T. Winkler, 'Respect, Protect, Fulfil: Implementation of the Human Right to Water in South Africa', Water Law at the Crossroads in India, 423, available at http://www.ingawinkler.com/uploads/4/8/6/0/48601803/respect_protect_fulfill.pdf , (accessed on 10 April, 2020).
[216] Henry Shue, *Basic Rights: Sustenance, Affluence and U.S. Foreign Policy* (Princeton University Press, 1980). Also see Henry Shue, *Basic Rights*, 2nd edn. (Princeton University Press, 1996)52.

The States have the tripartite obligations to respect, protect and fulfil ESR in their respective jurisdictions. Though the analytic breakdown of governmental duties into these three types is usually referred to in the context of ESR, it, in fact, applies to all human rights.[217] That said, the evaluation mechanism by which one can determine whether each of these obligations has been met might differ. The obligation to respect a certain right might entail the drafting of new legislation, the training of service providers or reform of the bureaucracy and this can be evaluated in terms of action taken immediately. The obligation to protect might require looking at mechanisms by which State and non-state actors are regulated in relation to a right. By contrast, the obligation to fulfil will require looking at changes in budgetary allocations and at the review of resource priorities.[218]

More pointedly, the obligation to respect means that the State shall refrain from anything that would interfere with the citizens' enjoyment of ESR. The duty to protect requires the State to take measures that would ensure that third parties do not interfere with the citizens' enjoyment of ESR. On its part, the obligation to fulfil provides that the State shall take reasonable steps to facilitate the citizens' enjoyment of ESR and that when there are impediments to such enjoyment, the State shall provide what is necessary to remove such impediments. Hence, the duty to fulfil is a three-layered duty (duty to facilitate, promote and provide). These duties are further explained below.

i. The Duty to Respect

The duty of States to respect human rights is the most familiar and the least controversial.[219] It states that States may not act in ways that deprive individuals of their rights.[220] This duty provides that the government must not embark on any action that directly adversely affects or

[217] Maria Green, 'What We Talk About' (n189) 1071.
[218] Andre Francovits & Patrick Earle, 'The Rights Way to Development: Manual for a Human Rights Approach to Development Assistance', in the Human Rights Council of Australia, INC. 68 (1998).
[219] Daniel Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues' (2010) 38 *Ga. J. Int'l & Comp. L*. 511 ,519.
[220] Ibid.

has the probability of adversely affecting the enjoyment of human rights. Obligation to respect is a paradigmatic obligation not to violate rights.[221] In the realm of ESR, for example, it is the duty of government to respect the human right to water by not directly or indirectly doing anything that would cause water pollution or deprive people of access to potable water. A direct government's breach of this duty may be in terms of using its oil exploration facilities to pollute a source of drinking water. On the other hand, an indirect violation may come in the form of neglect or failure to implement some control mechanism, by way of regulations, to check individual conducts of persons and corporate entities regarding polluting such source of water.

Various national, regional and international judicial bodies have pronounced on this duty to respect human rights, especially in cases of procedural fairness, water disconnection, eviction from homes and social security benefits. For example, in the case of *Goldberg v. Kelly,*[222] a US court affirmed the right to procedural due process in an application relating to social security benefits which was terminated without according to parties concerned due process. Further, in *Port Elizabeth Municipality v. Various Occupiers,*[223] the South African Constitutional Court held that while it is true that there is no constitutional requirement that the State should provide housing to any evicted household, , 'a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.' In the case of *Connors v. UK,*[224] the European Court of Human Rights awarded 15,000 Euros as compensation for the distress caused by the eviction

[221] Monica Hakimi, 'Human Rights Obligations to the Poor', in K.N. Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor*, (Cambridge University Press, 2013), 395-407,396. (Condensed and slightly modified version of M. Hakimi, 'State Bystander Responsibility', *Eur. J. Int'l L.*, 21, no. 2 (2010)341-85).
[222] 397 US 254 (1970)
[223] 2005 SA 217 (CC) paras 18-28.
[224] ECHR Application No, 66747/01, 27 May 2004.

carried out by a local housing authority, finding that it was done without adequate justification or procedural fairness. Also, in *SERAP v. Nigeria*,[225] the African Commission on Human and Peoples Rights endorsed CESCR General Comment No. 7 on Forced Eviction which protects citizens against forced eviction.

ii. The Duty to Protect

As earlier mentioned, this duty requires the State to take steps that would prevent third parties' interference with the citizens' enjoyment of human rights. In *SERAP v Nigeria,*[226] the African Commission found Nigeria liable under this duty, for its failure to prevent the Shell Petroleum Development Company from polluting the environment. The Commission asserted that it is the duty of the Nigerian State to "protect [its] citizens ... from damaging acts that may be perpetrated by private parties". Also, in the case of *Lopez Ostra v Spain*,[227] the European Court of Human Rights held the Spanish government liable for failing to protect the right to home, family and private life by not regulating industrial pollution. In *Nkonkobe Municipality v Water Services South Africa (Pty) Ltd. & Ors,*[228] a South African high court set aside a 6-year-old water privatisation contract for non-compliance with necessary consultation and public participation requirements.[229]

It is also important to note that, if a private employer is holding workers in slavery-like conditions, with no rescue intervention by the government, the lack of legal or regulatory system to identify and redress instances of forced labour could be viewed as the government's violation of human rights that has taken on the duty of protecting the right to decent working conditions.[230] The CESCR has stated that the right to health imposes a duty to formulate and

[225] Communication 155/96 para 63.
[226] *Supra*.
[227] (1994) IIHRL 106 (09 December 1994).
[228] Case No 1277/2001 (Unreported).
[229] Also see ICJ *v. Portugal* (Complaint No. 1/1999) where the European Committee on Social Rights held that a law which regulated child labour had not sufficiently addressed children working in the agricultural sector and that the number of labour inspectors was too low to ensure compliance by employers.

[230] See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

implement policies to promote health. Thus, the duty to protect could include a duty to regulate private emissions that contribute to climate change as well as a duty to undertake adaptation measures to limit the harms caused by global warming.[231]

There are certain issues that the duty to protect throws up. According to Bodansky, [232]there are questions around the extent to which a State may balance protecting human rights against other important societal objectives and whether the duty has any geographical limitation in terms of its application. Although Bodansky did not proffer an answer to the first question he raised, it is argued that every right that is created under a duty to protect is, or should be, subject to the overriding public interest of the State, since every right is justifiably limitable. For instance, in a period of public emergency, it would be unreasonable to demand a full compliance of the government's duty to protect human rights, whether CPR or ESR. However, this argument does not detract from the fact that the government has the onerous duty to always strive to ensure that the minimum core or essential level of every right is always respected, protected and fulfilled.[233]

Regarding the question whether the duty to protect rights is geographically limited, Bodansky appears to be ambivalent, but the inference that can be drawn from his statement, is that he answered the question in the affirmative. Contrary to his position, it is argued here that the duty to protect a right is both territorial and extra-territorial. Going by the international cooperation obligation in Article 2(1) of ICESCR, it is argued that States have the obligation to protect ESR extraterritorially. As Skogly and Gibney assert, the international obligation to cooperate with other States does not end with the duty to provide or fulfil ESR but also extends to the duty to protect (e.g. by restraining foreign companies from taking actions that may

[231] Bodansky, 'Introduction: Climate Change and Human Rights' (n219) 520.
[232] Ibid.
[233] See the above discussion on the concept of minimum core.

adversely affect ESR realisation).[234] The normative and jurisprudential framework on extra-territorial and international ESR obligations is discussed in detail in chapter four of this thesis. It should be noted that while it is true that States have the obligation to protect their residents from human rights abuse by private actors, the States should take the rights of those private actors into account as well.[235] It should not use methods that would undermine the human rights of those actors, as that would amount to using a wrong to fight a wrong. Therefore, the State's obligation should be measured with a test of reasonableness, through the lenses of the ordinary and objective person in the street. The reasonableness of a State's action in carrying out the obligation to protect would be defined by the circumstances of each case, the relationship that exists between the State and the human rights abuser, the degree of discretion given to the State, the scope of the problem or the severity of the harm caused by the rights violation.[236]

iii. The Duty to Fulfil

Among the tripartite duties of States on ESR realisation, the duty to fulfil appears to be most controversial. The controversy is understandable in the sense that this is the duty that requires a major positive action from the States; the duty to take reasonable measures or steps to make maximum resources available for the enjoyment of ESR. According to Craven, this duty requires the State to take necessary measures that are directed towards the full realisation of

[234] Sigrun I. Skogly & Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007) 267, 278-279. Also see Langford M., Coomans F. and Gomez Isa F., 'Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2012).

[235] *Osaka v. United Kingdom,* App. No.23452/94, para 116, European Court of Human Rights (1998) cited in Monica Hakimi, 'Human Rights Obligation to the Poor' (n221), 398 where the court was reported to have held that the obligation must be defined 'in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of [police] action'.

[236] Monica Hakimi, 'Human Rights Obligation to the Poor' (n221) 405.

human rights.[237] This obligation aims to ensure that all people who do not currently have access have unhindered access to the enjoyment of human rights.[238]

The duty to fulfil can be disintegrated into the obligations to facilitate, promote and provide.[239] While facilitation requires States to take positive measures to assist individuals and communities to enjoy ESR, promotion requires them to take steps to ensure that there is appropriate education concerning ESR, protection of ESR sources, and provision requires them to fulfil or provide means of fulfilling ESR when individuals or a group are unable, for reasons beyond their control, to realise those rights themselves by the means at their disposal.[240] This duty to fulfil is not only dynamic (as it aims at eventual full realisation of ESR), but it is also procedural in that it requires States to emplace procedures and schemes for realising ESR and monitoring fulfilment.[241] In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors*,[242] the Indian Supreme Court held that 'it is the duty of the state to construct houses at reasonable rates and make them easily accessible to the poor. The state has the constitutional duty to provide shelter to make the right to life meaningful'.[243]

2.6 Conclusion

There is no doubt that ESR come with some value which is aimed at enhancing human living conditions. However, what is not certain are the contours and the various ways States can calibrate through them. This chapter has been devoted to examining some of the essential normative talking points around ESR. It has unpacked the nature and scope of some concepts such as progressive realisation, minimum core and typology of obligations. A section of the

[237] Matthew Craven, '*International Covenant on Economic, Social and Cultural Rights'* (n176) 109.
[238] Inga T. Winkler, 'Respect, Protect, Fulfil' (n215), 425.
[239] CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, available at: https://www.refworld.org/docid/4538838d11.html (accessed 24 June 2020), paras. 25-29.
[240] Ibid.
[241] Olivier De Schutter, *International Human Rights Law* (n86) 531.
[242] 19 December 2003
[243] See Cohin Gonsalves, 'The Right to House-The Preserve of the Rich' (2005) 1(2) *Housing and Economic, Social and Cultural Rights Litigation Quarterly* 1-3.

chapter has equally been devoted to discussing the concerns that are often raised against the justiciability of ESR, but this is done with a corresponding argument to de-construct those concerns. The values of justiciability of ESR has been well captured by Bilchitz and these include the fact that it puts the government on its toe to meet the ESR needs as soon as practicable and it influences the behaviour of people and foreign entities who may want to offer aid.[244] The deconstruction of the anti-justiciability arguments that has been undertaken in this chapter will hopefully give the discussion some traction which would further help to bolster one of the overarching arguments in this thesis. That argument is that ESR should be recognised as justiciable rights, but with a rider that the court should exercise their judicial power, in this regard, in a dialogic and collaborative manner. The essence of collaboration is to bring the other arms of government into confidence, thereby enhancing the possibility of implementation of court-inhered realisation of ESR. Since this research mainly focuses on Nigeria, the next chapter discusses the legal and institutional framework of ESR within the Nigerian context.

[244]Ibid.

CHAPTER THREE

THE LEGAL STATUS OF SOCIO-ECONOMIC RIGHTS IN NIGERIA

3.1 Introduction

This chapter is devoted to examining the legal status of Economic and Social Rights (ESR) in Nigeria. The chapter argues that ESR are justiciable in Nigeria, but that the realisation of these rights is being impeded by the absence of cooperation at the national and international levels. Thus, as argued in chapter four below, a broad cooperation model or approach is feasible and desirable to promote the effective realisation of ESR in Nigeria. While it is tempting to conclude that due to the general resistance to ESR, there is no incentive to adopt any approach (whether confrontational or cooperative) in the realm of ESR realisation, it is contended that national and international pressures from civil society could be harnessed to drive a cooperation model that would make ESR to be truly realised.

Nigeria happens to be among the nations that have not expressly given constitutionally enforceable recognition to ESR. Just like the Indian Constitution, the Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution) frames ESR as mere governmental aspirations. Thus, these ESR are housed under Chapter II of the Constitution as 'Fundamental Objectives and Directive Principles of State Policy' (FODPSP). In the words of a popular Nigerian lawyer, Falana, the Fundamental Objectives are 'regarded as ideals "towards which the nation is expected to strive whilst the Directive Principles lay down the policies which are expected to be pursued in the efforts of the nation to realize the national ideals."'[1] To clear doubt on the status of these FODPSP, section 6(6)(c) of the Constitution states that the judicial power vested in the Nigerian courts does not extend to issues relating to whether the FODPSP have been observed or complied with. However, this thesis argues below that the bar to

[1] Femi Falana, *Nigerian Law on Socioeconomic Rights*, (Lagos: LegalText Publishing Company Limited, 2017)1.

justiciability of ESR is not absolute, that is, ESR can be justiciable under the constitutionally permitted condition discussed in this chapter.

In order to carry out the task of unravelling the legal status of ESR in Nigeria, section 2 of this chapter lays the building pillars by discussing, albeit briefly, the political and economic history of Nigeria. Section 3 explores the constitutional evolution of Nigeria. After this historical overview, section 4 examines the constitutional design or legal status of ESR in Nigeria. What follows is section 5 which analyses judicial approach towards ESR under the Nigerian jurisprudence. Section 6 assesses the impact of the African Charter on Human and Peoples Rights (the African Charter) which has long been domesticated into Nigerian laws.[2] Section 7 explores national legislations that protect ESR in Nigeria. Section 8 concludes the chapter by arguing that it would take a multi-institutional collaboration to engender an effective ESR realisation regime in the country.

3.2 The Political and Economic History of Nigeria

Although Nigeria's history is usually discussed in stages of pre-colonial era, colonial era, postcolonial/military era and modern democratic era in most literature, this section shall be restrictive in discussion since the focus of the chapter is not essentially on Nigeria's history. Therefore, it is pertinent to state that the essence of the discussion here is to enable the reader to appreciate the political evolution of Nigeria, not to engage in a detailed historical venture.

Nigeria, which was named after the River Niger can be found on the southern coast of West Africa and it shares boundaries with Benin Republic on the west, Cameroon and Chad on the east, Niger on the north, Gulf of Guinea on the south, and it has been a federal system since it gained political independence from Britain in 1960.[3] As a federal system, it consists of the

[2] By virtue of section 12(1) of the Nigerian Constitution, no international or regional treaty shall be binding on Nigeria unless it has first been domesticated by the federal legislature (National Assembly). The African Charter was domesticated by the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004.

[3] Ignatius Akaayar Ayua & Dakas C.J. Dakas, 'Federal Republic of Nigeria', in Kincaid John & Tarr G. Alan (eds.), *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press, 2005) 240-279, 240.

Federal Government, 36 states (and the Federal Capital Territory) and 774 local government councils.[4] The official language of Nigeria is English which it inherited from its colonial masters. Nonetheless, there are well over 200 distinct ethnic or language groups in Nigeria; the dominant or major groups being the Hausa-Fulani, the Igbo and the Yoruba.[5] The other minor groups include the Edo, Tiv, Ijaw, Nupe, Igala, Urhobo and Ibibio/Efik. The major groups dominate the political and economic space of Nigeria, though the relatively recent election of former President Goodluck Jonathan (2011-2015) is a sign that other minority groups are beginning to get accepted into the Nigerian political space.[6]

The diversity or heterogeneity of the Nigerian nation has tended to make a majority of Nigerian political leaders to base their decisions on ethnic lines and this is no doubt one of the 'definitive causes of social crisis, injustice, inequality and religio-political instability in Nigeria'.[7] For example, in the area of ESR, Nigerian politicians tend to provide amenities for those of their own ethnic extraction and places where they get a majority of votes, to the detriment of other sections of the nation.

The current President of Nigeria, Muhammadu Buhari was reported to have stated that the regions who did not vote for him should not expect the same government attention as those that overwhelmingly voted for him.[8] This kind of political attitude not only promotes division, it also leads to deprivation of socio-economic dividends simply on the basis of one's community voting pattern. It amounts to crass nepotism which Yusuf describes as having 'contributed,

[4] See section 3 and First Schedule of the Constitution.
[5] Wayne E. Nafziger, 'The Political Economy of Disintegration in Nigeria'(1973) 11(4) *The Journal of Modern African Studies* 508. Also see 'National Conference 2014: Final Draft of Conference Report' available at https://www.premiumtimesng.com/national-conference/wp-content/uploads/National-Conference-2014-Report-August-2014-Table-of-Contents-Chapters-1-7.pdf , 52. (last accessed on 20 February, 2019) which states that the ethnic groups in Nigeria are now over 350.
[6] Jonathan is of the Ijaw extraction which is a minority ethnic group.
[7] Odeyemi Jacob Oluwole, 'A Political History of Nigeria and the Crisis of Ethnicity in Nation-Building', (2014) 3(1) *International Journal of Developing Societies* 87-95, 1.
[8] 'Buhari's Statement At The US Institute Of Peace That Made Everyone Cringe', available at http://saharareporters.com/2015/07/25/buhari%E2%80%99s-statement-us-institute-peace-made-everyone-cringe-0 (last accessed on 21/02/2019).

both directly and subtly, to maintaining the status quo of unaccountability for gross violations of human rights and limiting the ambit for reforms…'.[9]

Nigeria operates a fiscal federalism whereby the three tiers of government-federal, state and local government- exercise or are supposed to exercise some modicum of revenue generation and resource allocation powers. Thus, whereas it is the Federal Government that makes provisions for public services that are wide in scope and importance such as defence or security apparatus, the state governments are charged with the responsibility of providing physical infrastructure, health care and secondary and tertiary institutions, while the local government councils are charged with primary education and chieftaincy affairs.[10]

3.3 The Constitutional Evolution of Nigeria

This section of the chapter examines Nigeria's constitutional evolution. The relevance of this section to the argument in this thesis is that it helps to put the problems surrounding the justiciability and realisation of ESR in context. As would be demonstrated below, ESR have not always been present in the Nigerian Constitution, whether as a Fundamental Rights or Directive Principles. The historical non-recognition of ESR in the Constitution might have contributed to the present near-absent realisation of the rights in Nigeria. Hence, there is a need to unpack this historical underpinning in an attempt to project a better future realisation of the rights.

There have been several constitutions under which Nigeria has been governed over the years. Adele has observed that the 'evolution of the Nigerian Constitution dates back to the British annexation of Lagos in 1861 and the establishment of the Legislative Council in June 1862…'.[11] This confirms Ajomo's position that:

---

[9] Hakeem O. Yusuf, 'Colonialism and the Dilemmas of Transitional Justice in Nigeria' (2018) 12 *International Journal of Transitional Justice* 257-276, 274.

[10] James Alm & Jameson Boex, 'An Overview of Intergovernmental Fiscal Relations and Subnational Public Finance in Nigeria' (2002) *ISP Working Paper* Number 02-1. Andrew Young School of Policy Studies, Georgia State University.

[11] Jinadu L. Adele, 'The Constitutional Situation of the Nigerian States' (Winter 1982)12(1) *Publis, State Constitutional Design in Federal Systems* 155-185, 156.

> Since the emergence of the geographical entity known as Nigeria, it has had several constitutions introduced into its legal archives. Some of these were foisted on her by the colonial government while others were fashioned out with the participation of diverse interests in Nigeria.[12]

However, the discussion in this thesis will be restricted to constitutional evolution from 1960 when Nigeria gained independence. Thus, a detailed discussion of the constitutional evolution of Nigeria (which may include the 1922 Clifford Constitution, 1946 Richards Constitution, 1951 Macpherson Constitution and the 1954 Lyttleton Constitution which were all enacted under British government) is beyond the scope of this thesis.

Since the political independence from Britain in 1960, there have been the 1960 Independence Constitution, the 1963 Republican Constitution, the 1979 Presidential Constitution, the aborted 1989 Constitution and the extant 1999 Constitution (which has been amended with the First, Second, Third and Fourth Alterations Acts of 2010, 2011, 2016 and 2018 respectively). It bears querying whether 'the ends so far achieved [in Nigerian constitutional evolution] justify the means deployed'.[13] Despite the human and financial resources committed to the processes that led to these constitutions(for example, in Nigeria, there are always huge cost implications for convening constitutional conferences where many delegates are catered for from the Government coffers), it does appear that they (the constitutions) have still not engendered a truly people-centric or socioeconomic development-oriented goal.

The major highlights of the 1960 and 1963 Constitutions of Nigeria were that they not only created regional governments but also gave the governments the permission to enact regional constitutions, Coat of Arms and Motto, establish semi-autonomous Mission in the UK under the leadership of an Agent-General. The constitutions also allocated some residual powers to

[12] M.A. Ajomo, 'Human Rights under the Nigerian Constitutions' in Y. Osinbajo and A. Kalu (eds.), *Democracy and the Law*, (Federal Ministry of Justice Law Review Series, 1991)106-107, cited in Jacob Abiodun Dada, 'Human Rights under the Nigerian Constitution: Issues and Problems', (2012) 2(12) *International Journal of Humanities and Social Sciences* 33, 35.

[13] Nsongurua J. Udombana, 'Constitutional Restructuring in Nigeria: An Impact Assessment' (April 25, 2017) 5, available at SSRN: https://ssrn.com/abstract=2960030 or http://dx.doi.org/10.2139/ssrn.2960030 (last accessed on 28 February 2019).

them over matters not stated under the exclusive or concurrent legislative lists, as well as ensuring fiscal policy that gave sufficient resources to the regions to manage their affairs.[14] In fact, under the said Constitutions-which also introduced a British-style cabinet government headed by the Queen of England (at least until the 1963 Constitution which broke off the colonial ties), the regional governments were 'politically and economically stronger than the federal government'.[15]

The 1960 and 1963 constitutions also protected the interest of the minority groups by not only incorporating fundamental rights into the constitutions, but also engendering a mechanism that reflected the heterogeneity of the Nigerian State. They ensured that each region had a representative at the nation's Supreme Court.[16] However, it has been observed that 'the contemptuous disregard of the Federal Constitution of 1963 and flagrant violations of its fundamental guarantees resulted in what has aptly been described as the bloody holocaust which brought the nation to the edge of the precipice'.[17]

On its part, the 1979 Constitution, apart from ushering in a presidential system of government in Nigeria, also heralded some commendable constitutional features in the Nigerian jurisprudence, among which was the formal recognition of FODPSP. Thus, the 1979 Constitution signified 'an essay on a new political contract' between the people and the government in that its provisions in Chapter II provide for FODPSP thereby 'embodying the philosophy that animates this new contract'.[18] According to the Constitution Drafting Committee (CDC) which was set up to draft the 1979 Constitution, the noble contract that the 1979 Constitution envisaged was the one which, 'as a charter of government and the

[14] 'National Conference 2014: Final Draft of Conference Report' available at https://www.premiumtimesng.com/national-conference/wp-content/uploads/National-Conference-2014-Report-August-2014-Table-of-Contents-Chapters-1-7.pdf , 52. (last accessed on 28 February 2019).
[15] Ayua & Dakas, 'Federal Republic of Nigeria' (n3).
[16] Ibid.
[17] B. Obinna Okere, 'Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution' (1983) 32(1) *International and Comparative Law Quarterly 214-228, 214.*
[18] Ibid.

fundamental law of the land, the Constitution should make it clear that powers are bestowed upon the organs and institutions of government, not for the personal aggrandisement of those who wield them from time to time, but for the welfare and advancement of society as a whole'.[19]

As shown below, the CDC had hope of using an express constitutional statement of these objectives and directive principles to secure the welfare and advancement of the Nigerian society. Whether that hope has translated into any real benefit to the welfare needs of Nigerians is debatable. A discussion on the legal status of these objectives and directive principles would help one to take an informed position on the debate.

3.4 The Legal Status of ESR under the Nigerian Constitution

As noted earlier, Nigeria is one of the nations that frame ESR as mere governmental inspirations in respect of which the courts cannot adjudicate. Put differently, Nigeria dichotomises between civil and political rights (CPR) which are constitutionally perceived as binding[20] and ESR which are constitutionally looked down on as non-justiciable. In an attempt to provide a reason for this dichotomisation of human rights in Africa or Nigeria, Eze opines that:

> The reason for the marked absence of socioeconomic rights in African constitutions is often based on the fact that unlike political and civil rights which attempt to limit the encroachment of states and its [sic, their] instruments on human rights they require states to provide material means for their enjoyment…since African countries are undeveloped, it will be futile to encourage litigation on the infraction of socioeconomic rights.[21]

However, it is argued here that the above reason is not valid enough to relegate ESR to the background. There is no evidence that there is absence of the material means needed to satisfy the ESR needs of the African people. For example, Nigeria is blessed with abundance of natural

[19] The Report of the Constitution Drafting Committee, Vol. I, (Federal Ministry of Information Printing Division, 1976) v- vi.
[20] See Chapter IV of the Nigerian Constitution.
[21] Osita Eze, *Human Rights in Africa: Some Selected Problems* (Nigerian Institute of International Affairs and Macmillan Publishers, 1984) 31.

resources, which, if well harnessed and with the right political will, national and international cooperation, will meet the ESR needs to a good extent. What is thus needed in the African continent, is an efficient economic management and political will, devoid of corruption. It has been observed that this 'categorization [of rights] has created an imaginary and indeed practical hierarchy of rights that places civil and political rights over socio-economic rights.'[22] It is argued that this categorisation is not altogether justifiable as it serves as a cloak of excuse for political leaders to trample upon ESR.

Before 1979, there was no constitutional recognition of ESR in Nigeria, either in form of justiciable or non-justiciable rights. However, the Nigerian Constitution of that year introduced a non-justiciable set of ESR in the form of FODPSP.[23] This was fashioned after the Indian constitutional position on these rights.[24] The aim of including the ESR was perhaps to ensure that the military were prevented from coming back after a long period of military incursion into the political landscape of Nigeria.[25]

The intention was that the inclusion of these rights in the Constitution would serve as a blueprint for good governance and social justice for everyone which would prevent further military intervention in politics.[26] Military officers had always justified successive military coups in Nigeria from 1966 to 1999 under the guise of bad governance and corruption among the ruling class. However, this goal of using the FODPSP as a blueprint never saw the light of the day as the military again struck in the post-1979 Constitution era.

The Muhammadu Buhari military administration of 1983-1985, the Ibrahim Babangida Military regime of 1985-1993, the Sani Abacha regime of 1993-1998 and the Abdulsalam

[22] Wahab O. Egbewole & Taofeeq N. Alatise, 'Realising Socio-Economic Rights in Nigeria and the Justiciability Question: Lessons from South Africa and India' (2017) VIII (8.3) Quarter III, *International Journal of Politics and Good Governance* 2.
[23] See Chapter II of the 1979 Constitution of Nigeria.
[24] The Indian Constitution itself was equally fashioned after the Irish Constitution of 1937 which provides for ESR in the form of directive principles.
[25] Ainul Jaria Maidin, et al, 'Sustaining Development Through Socio-Economic Rights: Prospects and Challenges in Selected African Countries' (2011) 7(13) Journal *of Applied Sciences Research* 2366-2376, 2367.
[26] Ibid.

Abubakar military regime of 1998-1999 all took place when the FODPSP had already been incorporated into the Constitution. The explanation one could possibly give for this is that it was either that the civilian regime of the then President Shehu Shagari of 1979-1983 and the successive military regimes that followed did not implement policies that promoted the FODPSP or that the mere constitutional incorporation of FODPSP was/is not a guarantee to help keep the military in the barracks. As it turned out, the post-1979 Constitution military regimes subjected Nigerians to untold hardship which was a direct opposite of what the FODPSP sought to achieve.

These FODPSP have also now been replicated in Chapter II of the extant 1999 Constitution.[27] This chapter contains some governmental objectives aimed at ensuring the social and economic wellbeing, and educational and cultural needs of the Nigerian citizenry. The CDC justified the inclusion of these FODPSP in the Constitution where it stated that:

> The need for such provision in Nigerian Constitution is all the greater because of the heterogeneity of the [Nigerian] society, the increasing gap between the rich and the poor, the growing cleavage between the social groupings, all of which combine to confuse the nation and bedevil the concerted march to orderly progress, only an express statement of objectives and directive principles which clearly set out the parameters of Government and informs its policies and actions can generate a spirit of cooperation, peace, unity and progress.[28]

However, it is doubtful whether this inclusion has justified the above rationale or brought about the practical realisation of ESR in Nigeria. It is apposite to highlight the fact that these ESR, having been described in the Constitution as FODPSP, were meant to have a lesser force than the CPR which the Constitution refers to as Fundamental Rights.[29] The two concepts differ from each other.

On the one hand, fundamental human rights 'can be said to be certain, essential, basic, natural and inalienable rights or freedoms which the State protects through the force of law in order

[27] See sections 13-24 of Chapter II of the Constitution.
[28] See the Report of the Constitution Drafting Committee, Vol. I (Federal Ministry of Information Printing Division, 1976) vi.
[29] See Chapter IV of the Constitution.

that human dignity, liberty may be preserved and protected'.[30] Put differently, fundamental rights are rights that:

> may not be violated by any oppressive Government; they can only be taken away by formal process of constitutional amendment….they are essential for the protection of private and public rights, they are Fundamental because they are essential for the attainment by the individual of the full intellectual, moral and spiritual stature; these rights are entrenched in the Constitution as extant features and are enforceable by the courts; the courts are bound to declare as void any law that is inconsistent with any of the Fundamental rights.[31]

On the other hand, Directive Principles have been referred to as directives that are not judicially enforceable or which cannot create a jusiticiable right in favour of any person except by an express implementation by legislative stamp.[32] Thus, as far as there is no existing legislation that is supportive of implementation of a policy laid down in a directive principle, neither the State nor an individual can be said to have violated any constitutionally protected right presumed to have emanated from such directive principles.[33] Regarding Fundamental Objectives, the court held in *Archbishop Okojie v The Attorney General of Lagos State*[34] that they are 'the ultimate objectives of the nation' as opposed to the Directive Principles which lay down the 'policies which are expected to be pursued in the efforts of the nation to realise the national ideals'.[35]

The above judicial opinion was apparently in reference to the Nigerian CDC's position which drew a distinction between Fundamental Objective and Directive Principles of State Policy in their Report. According to the CDC,

> By Fundamental Objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate the paths which lead to those objectives. Fundamental Objectives are ideals towards which the Nation is expected to strive whilst Directive Principles lay

[30] Hakeem Olasunkanmi Ijaiye, *Judicial Approach to Interpretation of Constitution: A Study of Nigeria, Australia, Canada and India,* (Malthouse Press Limited, 2017) 165.
[31] J.N. Pandey, *Constitutional Law of India* (Central Law Agency, 1982) 208.
[32] Durga Das Basu, *Introduction to the Constitution of India* (Prentice Hall of India, 1993).
[33] Ijaiye '*Judicial Approach to Interpretation of Constitution'* (n31) 163.
[34] (1981) 2 NCLR 350.
[35] *Supra.*

> down the policies which are expected to be pursued in the efforts of the Nation to realise the national ideals.[36]

The CDC, headed by the renowned Prof. Ben Nwabueze, therefore recommended that the Fundamental Objectives be made justiciable just like the Fundamental Rights while the Directive Principles should be made non-justiciable. Unfortunately, at the final stage of drafting the 1979 Constitution, the two items (Fundamental Objectives and Directive Principles) were lumped together and made expressly not justiciable, and they suffer the same constitutional status under the extant 1999 Constitution.[37]

However, before the 1999 Constitution, there was a Constitutional Conference of 1994-1995 which was convened by the then military administration of Sani Abacha. The Conference briefly reviewed the Directive Principles contained in the 1979 Constitution. Despite the fact that there had been some talks in the 1980s about making the Directive Principles justiciable,[38] the 1994-95 Conference dismissed this idea of justiciability, and also rejected a suggestion that they should be expunged from the Constitution completely.[39] Thus, apart from retaining the Directive Principles in the Constitution as mere guidelines on issues relating to good governance, one other positive outcome of the 1995 Conference was its recommendation that the right to education (which was and still is part of the FODPSP) be removed from where it was housed and added to the Fundamental Rights that are clearly justiciable under the Constitution.[40] This inclusion of the right to education as a fundamental right, though done under the 1995 Draft Constitution, was omitted under the extant 1999 Constitution without any reason given for the omission.

---

[36] Report of the Constitution Drafting Committee (n19) v.
[37] Maidin, *etal,* 'Sustaining Development Through Socio-Economic Rights' (n25) 2367.
[38] See the Political Bureau Report of 27th March,1987 which recommended that ESR be made justiciable but the report was not acceptable to the government.
[39] Nigerian Constitutional Conference Report of the Constitutional Conference Containing the Resolutions and Recommendations 48-55 (1995)105 cited in Atudiwe P. Atupare, 'Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria' (2014) 27 *Harvard Human Rights Journal* 71, 89.
[40] Atudiwe P. Atupare, 'Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria' (2014) 27 *Harvard Human Rights Journal* 71, 89.

A critical review of the above conceptualisation of fundamental rights and directive principles would reveal that the underlying difference is essentiality of the rights concerned. If that is the case, it is argued that the differentiation is misplaced or totally unnecessary. The plank of this argument is that nothing could be more essential than the contents of the rights encapsulated under ESR or FODPSP. For example, it is unarguable that food and clothing are more essential than freedom of movement. A person who is famished may not be able to stand up to exercise his right to move about freely.

Interestingly, the above classification of rights gives more pre-eminence to the right to freedom of movement (fundamental right) over and above the right to food (directive principle). As Udombana[41] notes '…free speech, free press, free assembly, free worship, etc.-is important, but that true freedom cannot exist without economic security and independence, because "[n]ecessitous men are not free men"'.[42] It is therefore advocated here that rights should be treated as inter-dependent, inter-related and indivisible if ESRs are to be given any effective protection. It has been observed that the impoverishment of people, and their inability to access ESR have more to do with ideology, politics and corruption and less to do with law or lack of resources.[43] It is therefore argued that ESR are as essential as CPR and may in fact be more immediately important than CPR in certain cases.

3.4.1 Constitutional Framework on ESR in Nigeria

It has been asserted that constitutions are the prime domestic instruments used to express agreed human rights values.[44] This means, in the search for how rights have been protected in a given nation, a recourse to its constitutional provisions should be a primary port of call. This

[41] Nsongurua J. Udombana, 'Keeping the Promise: Improving Access to Socioeconomic Rights in Africa' (2012) 18 *Buffalo Human Rights Law Review*135,152.
[42] Also see Franklin D. Roosevelt, 'State of the Union Message', 90-91 Cong. REC. 55, 57, cited in Udombana, 'Keeping the Promise' (41) 152.
[43] See Flavia Piovesan, 'Social, Economic and Cultural Rights and Civil and Political Rights' (2004) 1 *SUR-Int'l J. Hum. Rts.* 21,26; Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20(1) *Human Rights Quarterly* 81, 86-87.
[44] Udombana, 'Keeping the Promise' (n41) 144.

however does not detract from the fact that recourse could also be had to other legislative instruments which are not inconsistent with the constitution, in the search for human rights recognition and protection. It is necessary to look at the constitutional provisions on these ESR in Nigeria.

Section 13 of the Constitution states that the government and its organs as well as all persons exercising executive, legislative and judicial powers have a duty to conform to, observe and apply the FODPSP. By section 14(2)(b), the welfare and security of the people shall be the primary purpose of government while section 14(2)(c) states that the participation by the people in their government shall be ensured in accordance with the Constitution. While it is conceded that these sections recognise some principles upon which the Nigerian democratic setting is laid and sustained, it is however not clear how this would be achieved without an effective enforcement mechanism.[45]

Further, section 15(3)(a)-(d) of the Constitution state that there shall be provisions for adequate facilities for the movement of people, goods and services throughout the length and breadth of Nigeria, and that the State shall secure full residence rights for every citizen anywhere in Nigeria, encourage inter-marriage among persons from different ethnic, religious or linguistic groupings and promote the formation of associations that cut across ethnic, linguistic, religious or other sectional loyalties.

According to section 16(1) (a), it is the duty of the State to harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy. This is an economic objective aimed at eliminating poverty. Thus, section 16(1)(b) provides that the State shall control the national economy in such a manner as to ensure the maximum welfare and happiness of every Nigerian on the basis of social justice and equality of status and

[45]Stanley Ibe, 'Beyond Justiciability: Realising the Promise of Socio-economic Rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225, 240.

opportunity. Another interesting feature in section 16(2) is that the State is obligated to direct its policy 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, and unemployment, sick benefits and welfare of disabled are provided for all citizens.

Moreover, section 17 of the Constitution also beautifully captures some ESR. Thus, section 17(3)(a) obliges the State to direct its policy towards ensuring that there is equality of employment opportunities or other opportunity for the purposes of securing adequate means of livelihood. Section 17(3)(b) directs the State to ensure that the conditions of work are just and humane and that adequate facilities are provided for leisure and for social, religious and cultural life.

On their part, sections 17(3) (c) & (e) provide for the rights of safety, health and welfare of workers. The subsections require the State to ensure that the health, safety and welfare of workers are safeguarded and not endangered or abused; and that there is equal pay for equal work without discrimination on account of sex or any other ground whatsoever. Section 17(3)(d) provides for right to health when it states that the State shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons.

Section 17(3)(f) makes provisions for the ESR of children, young persons and the aged by stating that the State policy should ensure that these set of vulnerable persons are not exploited

or subjected to neglect, whether morally or materially. Sections 17(3)(g) & (h) provide that the State policy should be directed towards making provision for public assistance to deserving persons and promotion or encouragement of family life.

Furthermore, section 18 of the Constitution makes provisions for the right to education. Thus, section 18(1) obliges the government to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels. Section 18(3) goes further to state that the government shall endeavour to eradicate illiteracy and shall *as and when practicable*[46] provide free, compulsory and universal primary education, free secondary education, free university education and free adult literacy programme. It should be noted that the Nigerian Government has made some commendable efforts in a bid to comply with this constitutional provision. Hence, the Compulsory, Free and Universal Basic Education Act[47] provides for compulsory, free universal basic education for all children of primary and junior secondary school age in Nigeria and criminalises parental failure to comply with the law. This law was inspired by the World Declaration on Education for All and Framework for Action to meet Basic Learning Needs prepared by the Women Conference on Education for All held in Jomtienm Thailand from 5th to 9th March 1990.[48]

Innovatively, the 1999 Constitution provides for the right to a clean and healthy environment. According to section 20, the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.

Section 21(a)-(b) provides for what can be referred to as right to culture. The section states that the State shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the FODPSP as provided in Chapter II of the Constitution. The

[46] Emphasis mine. This phrase reinforces the fact that ESR are to be realised progressively, in line with the recommendation of the United Nations Committee on Economic, Social and Cultural Rights.
[47] Cap C52 Laws of the Federation of Nigeria, 2004.
[48] DI Denga, 'Evolving a New Education Culture: The Universal Basic Education Focus' , available at https://www.researchgate.net/publication/313559647_Evolving_a_new_education_culture_The_Universal_Basic_Education_focus (last accessed on 06 March, 2020).

section further provides that the State shall encourage development of technological and scientific studies which enhance cultural values.

While section 22 gives the press and mass media the freedom to uphold the fundamental objectives and uphold the responsibility and accountability of government to the people, section 23 provides that the national ethics of Nigeria shall be discipline, integrity, dignity of labour, social justice, religious tolerance, self-reliance and patriotism.

Lastly on the FODPSP, section 24 states the duty of citizens towards meeting these objectives. It provides that every citizen shall abide by the Constitution and respect its ideals, help to enhance the power and good name of Nigeria and respect the dignity of other citizens and the rights and legitimate interests of others. It also requires them to make positive and useful contribution to the advancement, progress and well-being of their immediate community; render assistance to appropriate and lawful agencies in the maintenance of law and order; and declare their income honestly to appropriate and lawful agencies and pay their tax promptly.

Notwithstanding the above constitutional coverage of ESR under the name and style of FODPSP, a provision in the same Constitution makes them generally not justiciable in any court of law. Thus, section 6(6)(c) provides:

> The judicial powers vested in accordance with the foregoing provisions[49] of this section-
>
> Shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

The implication of these constitutional provisions is that it has eroded the rights of individuals to approach courts for enforcement of the FODPSP or ESR. However, as can be gleaned from the above provisions, the only exception would be where another section of the Constitution provides otherwise (reference to the opening statement in section 6(6(c), 'shall not except as

[49] That is, sections 6(1)-(5) which name and vest judicial powers on courts of the Federation and States of Nigeria.

otherwise provided by this Constitution'). It could be argued that section 13 of the Constitution seems to satisfy the activation of this exception, when it provides that:

> It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter [chapter on Fundamental Objectives and Directive Principles] of this Constitution.

Such an argument is, however, not cogent, compelling and convincing enough.

The reason for this position is that section 13 forms part and parcel of the Chapter dealing with FODPSP which section 6(6)(c) has unambiguously made non-justiciable. In other words, section 13 suffers the same constitutional ailment that has afflicted other provisions of chapter II on ESR or FODPSP and so, it cannot apply as an appropriate remedy. Thus, it is contended that section 6(6)(c) supersedes section 13 of the Constitution as far as the issue of justiciability is concerned. Commenting on this unfortunate constitutional situation, Shehu describes it as 'the constitution stabbing itself in the back'.[50] A review of judicial decisions in Nigeria on some of these provisions would help drive the point home.

3.5 Judicial Approach to ESR in Nigeria

It has been observed that 'judicial attitude to socio-economic rights litigation in Nigeria is characterised by great caution and subtle passivity'.[51] This is owing to the rather disturbing stringent or unbending literal interpretation that the Nigerian courts give to the above provisions of section 6(6)(c). The section has been strictly interpreted by the courts to the effect that it radically displaces any argument for justiciability of ESR in Nigeria.

Thus, in *Femi Falana v Attorney-General of the Federation,*[52] the applicant sought to enforce the right to health as provided in Article 16 of the African Charter on Human and Peoples Right (the African Charter) by asking the court to compel the Federal Government to repair and upgrade medical facilities across the country. The trial court struck the suit out on the ground

[50] Shehu, 'The Enforcement of Social and Economic Rights in Africa' (n51)110.
[51] Ibe, 'Beyond Justiciability' (n51) 241.
[52] Suit No. FHC/IKJ/CS/M59/2010 (unreported) delivered on January 10, 2011.

that the court's jurisdiction to entertain any suit relating to chapter II of the Constitution (of which the right to health section 17 is part) has been ousted by section 6(6)(c) of the Constitution. Curiously, the court did not refer to the provisions of Article 16 of the African Charter which was urged upon it in the application before holding that '….It is therefore my humble conclusion that issues of adequate medical facilities as raised in this application are not justiciable'.

Further, one of the earliest cases that judicially pronounced on ESR in Nigeria was *Archbishop Anthony Olubunmi Okojie & Ors v Attorney-General of Lagos State & Ors*.[53] There, the Lagos State Government, which is one of the state governments in Nigeria, had sought to abolish the establishment and running of private primary schools in the state, by a circular dated 26 March 1980. The plaintiff challenged the constitutionality of the order. The trial High Court referred certain constitutional issues to the Court of Appeal for interpretation. Among these issues was whether the government order violated the provisions of section 13 of chapter II of the then 1979 Constitution of Nigeria which provided for a duty for all arms of government to observe, conform to and apply the FODPSP. In holding that there was no violation, the Court of Appeal stated:

> While section 13 of the Constitution makes it the duty and responsibility of the judiciary amongst other organs of government to conform to and apply the provisions of chapter two, section 6(6)(c) of the same constitution makes clear that no court has jurisdiction to pronounce any decision as to whether any organ of the government has acted or is acting in conformity with the fundamental Objectives and Directive Principles of the State Policy. It is clear therefore that section 13 has not made chapter two of the Constitution justiciable.

The above decision has been criticised by Odinkalu[54] who argues that there is no conflict between section 6(6)(c) and section 13 of the Constitution. According to him, such conflict:

> …does not arise because of the contingent modifier in the former provision, which, in the structure of the Nigerian Constitution, necessarily means that the latter applies by virtue of the modifying contingency evinced in the former. To

[53] *Supra* (n 36).
[54] Chidi Odinkalu, 'The Imperative of Justiciability of Socioeconomic Rights in Nigeria' being a text of Lecture in Honour of Femi Falana, SAN, Bayo Aborishade (ed), (Centre for Labour Studies, 2013) 52.

> read the text in any other way would be to import extraneous consideration into the Constitutional text'.

As convincing as the above scholarly argument seems, it is argued here that it does not represent a persuasive interpretation of the provisions under consideration. It is argued that section 6(6)(c) neutralises the effect of section 13. Although section 6(6)(c) has a modifier or rider that states that its non-justiciability clause is subject to any other provisions in the Constitution, it is contended that section 13 is not qualified to come within the exception envisaged by section 6(6)(c). The plank of this argument is that section 13 forms part of chapter II of the Constitution which section 6(6)(c) has radically deprived of justiciability. One would be doing a great violence to constitutional interpretation by severing section 13 from the other provisions contained in chapter II. Chidikalu's argument would have been convincing if section 13 were not part of chapter II.

Consequently, it is argued, consistent with a line of authority from the courts that the hope of using section 13-imposed duty of the Constitution to valorise the enforceability of ESR in Nigeria has been dashed. However, that does not mean all hope is lost. One constitutional way out of section 6(6)(c) quagmire would be a constitutional amendment or a legislative intervention that provides for clearly justiciable ESR . That way, the argument that section 6(6)(c) is an impediment to justiciability would become needless. After all, as already noted, the said section is not an absolute bar to justiciability. Thus, in *Olafisoye v Federal Republic of Nigeria*,[55] the Supreme Court of Nigeria was of the view that:

> …the non-justiciability of section 6(6) (c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words 'except as otherwise provided by this Constitution'. This means that if the Constitution otherwise provides in another section which makes a section of Chapter II justiciable, it will be so interpreted by the court.

The foregoing judicial position reinforces the argument that the section that can make the application of the exception in section 6(6) (c) exist must be a section that is unaffected by or

[55] (2005) 51 WRN 52.

unrelated to chapter II of the Constitution. Thus, section 13 being part of chapter II cannot be used to escape from the non-justiciability debacle in section 6(6)(c).

An example of a constitutional provision that can serve as an exception to section 6(6)(c), however, is item 60(a) of the Second Schedule of Part I of the 1999 Constitution. That item gives the National Assembly[56] the power to make laws that will promote and enforce the observance of the FODPSP or ESR which are housed in chapter II of the Constitution. Thus, any law made by the National Assembly pursuant to item 60(a) would not be affected by the non-justiciability issues in section 6(6)(c) as far as implementation of chapter II is concerned. Consequent upon the above argument, a way that the section 6(6)(c) problem may be resolved in Nigeria would be by the legislature enacting a statute that recognises certain ESR as justiciable rights. Akinseye-George[57] seems to agree with this position when he states that,

> …The implication of this provision [section6(6)(c)] is that an action for enforcement of human rights or judicial review cannot be founded solely on the provisions of Chapter II. It also means that judicial power cannot be invoked solely on the basis of Chapter II provisions in order to give effect to the contents of the chapter. However, notwithstanding the so-called provisions on non-justiciability, the provisions of Chapter II of the constitution can be enforced by other means including judicial action founded on other legal and constitutional foundations outside Chapter II.

It is opined here that 'such legal and constitutional foundations outside Chapter II' which Akinseye-George advocates could include a legislative step to carve out some or all of the ESR or FODPSP in chapter II and embed them in a statute. That way, they will become self-enforcing and thus judicially recognisable and implementable, although it would then be through a statutory rather than constitutional recognition of ESR.

This position has been fortified by the Supreme Court in the case of *Attorney-General of Ondo State v Attorney-General of the Federation & Ors.*[58] In that case, and upon Nigeria's return to

[56] This is Nigeria's bicameral federal legislature made up of the Senate and the House of Representatives.
[57] Y. Akinseye-George, *Improving Judicial Protection of Human Rights in Nigeria* (Centre for Socio-Legal Studies, 2012) 38-39.
[58] (2002) 9 NWLR (pt 772) 2.

democratic rule in 1999 after a long period of military rule, the then President Olusegun Obasanjo perceived that corruption was the major bane of Nigeria's development. He thus sent a bill to the National Assembly with a view to setting up a mechanism to curb the monster of corruption. This resulted in the passing of the Corrupt Practices and Other Related Offences Act 2000 (ICPC Act) which established the Independent Corrupt Practices and Other Related Offences Commission (ICPC) to fight corruption throughout Nigeria. The applicant state government challenged the constitutionality of the ICPC Act when the ICPC sought to investigate and prosecute one of the state government officials under the Act. The contention was that the National Assembly lacked the power to enact law that would criminalise corruption at all tiers of government; that is, each state legislature ought to enact its own anti-corruption laws. In reaction, the respondent contended that the law was enacted pursuant to item 60(a) of the Second Schedule to the Constitution which gives the National Assembly the power to make laws that will valorise and 'justicialise' the otherwise non-justiciable chapter II (under which section 15(5) gives all arms of government the duty to expose corruption). The Supreme Court rejected the applicant's argument and held that the National Assembly acted in line with their constitutionally vested legislative powers.[59] Regarding the justiciability of section 15 (5) which is apparently under the non-justiciable chapter II via legislative enactment (ICPC Act), the apex court held:

> The Act is meant to make justiciable by legislation a declared state policy to abolish corrupt practices and abuse of power; it is to hearken to national and international concerns over corruption; it is to give a national leadership and impetus to the crusade while not standing in the way of the states; it seeks, among other things, to deal with and punish specific offences on corrupt practices even including those committed outside Nigeria by citizens and persons granted permanent residence in Nigeria.'[60]

Still on Directive Principles in chapter II, the Supreme Court went on to state:

[59] See section 4 and item 60(a) of the Constitution. See also *Alhaji Sani Dododo v Economic & Financial Crimes Commission and Ors* (2013) 1 NWLR (pt 1336) 464, 510.
[60] *Supra*.

> [Every] effort is made from the Indian perspective to ensure that the Directive Principles are not a dead letter. What is necessary is to see that they are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to any one of them through enactment as occasion may demand.[61]

The last sentence in the above judicial opinion further fortifies the argument that runs through this thesis; that there is a need for collaboration among the various arms of government and stakeholders on how best to protect and promote ESR. The place of the legislature in the entire ESR protection chain cannot be over-emphasised. Thus, the court held in the *Archbishop Anthony Olubunmi Okojie case*[62] that 'the arbiter for any breach of the Objectives and Directive Principles of State Policy is the legislature itself or the electorate.'

Going by the decision in the *Attorney-General of Ondo State case*,[63] it is imperative to emphasise the vital role of the legislature in the protection of ESR in Nigeria. This role is vital both in terms of making local legislation and domesticating international instruments that are protective of these rights. Nigeria is a dualist State where international treaties are, generally speaking, non-binding unless and until legislatively domesticated.[64] In fact, the protection that the Nigerian and regional judiciaries have accorded ESR has been rooted on legislative interventions. It is apposite to briefly examine some of these legislative interventions on ESR protection.

3.6 Legislative Interventions on ESR in Nigeria

Although the practical impact of some ESR-protecting statutes is yet to be felt in the lives of Nigerians, some of the statutes have changed the judicial narrative on the rights. These include:

---

[61] *Supra (n65).*
[62] *Supra* (n34).
[63] *Supra* (n65).
[64] See section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999.

3.6.1 The African Charter on Human and Peoples Rights (Ratification and Enforcement) Act[65]

Through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (the Charter Act), the Nigerian federal legislature domesticated the African Charter on Human and Peoples Rights (the African Charter) as part of Nigeria's legal system. The Charter Act is one of the statutes which protect ESR in Nigeria. Before a detailed discussion on the Act is undertaken, it is apposite to set out the background to Nigeria's dualist system.

3.6.1.1 Nigeria's Dualist System

As already noted, Nigeria operates a dualist system, thus section 12(1) of its Constitution provides that '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'. The legislative arm of the federal government has the power to make laws for the purposes of domesticating and implementing treaties already entered into by the executive arm. The subject matters of the treaty may be in the exclusive legislative list, in the concurrent list or the residual legislative lists.[66] This dualist approach is a reproduction of the British government practice and thus a relic from the British colonial government in Nigeria. This assertion is buttressed by the Supreme Court's decision in *Ibidapo v Lufthana Airlines*[67] where it was held, per Wali JSC, that 'Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law'.

Moreover, the Nigerian Supreme Court had the opportunity to pronounce on the effect of section 12(1) and it left no one in doubt about its position. This was in the case of *Abacha v Fawehinmi.*[68] The case was on the status of the African Charter on Human and Peoples' Right

[65] Cap A9, Laws of the Federation of Nigeria, 2004.
[66] Edwin Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria', (2007) 51(2) *Journal of African Law* 249-284, 250-251. Also see section 12(3) of the Constitution.
[67] (1997) 4 NWLR (pt 498) 124 at 150. See also R. Singh, 'The Use of International Law in the Domestic Courts of the United Kingdom' (2005)56(2) *Northern Ireland Legal Quarterly* 119, 120-121; *J H Rayner v Department of Trade and Industry* [1990] AC 418 at 550 on dualist constitutional tradition in the UK.
[68] (2000) 6 NWLR (pt 660) 228.

in Nigeria. The court held that having been domesticated, the provisions of the chapter are binding on all persons and authorities in Nigeria. According to the apex court, per Ejiwunmi, JSC, '…. It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory maybe it remains unenforceable, if it is not enacted into law of the country by the National Assembly'.[69]

Hence, unlike the African Charter that was held, in the *Abacha case,* to be binding, applicable, and ranks above national statutes in Nigeria by virtue of legislative domestication, an International Labour Organisation's treaty was held inapplicable and therefore non-binding on Nigeria. This was in the case of *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v Medical and Health Workers Union of Nigeria (the Registered Trustee case)*[70] which turned on the obligation of Nigeria under the Convention of the International Labour Organisation. The Supreme Court of Nigeria held that since the condition precedent in section 12(1) of the Constitution (that is legislative domestication of the Convention) had not been satisfied, then Nigeria cannot be bound by the provisions of the Convention despite its ratification of same. According to the apex court, '[i]n so far as the ILO Convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria and cannot possibly apply'.[71]

However, the *Registered Trustees* case is no longer a good law under the extant provisions of section 254 (c) (2) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010. The section provides that:

> Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.

[69] *Supra*, 356-357.
[70] (2008) 37 WRN 1.
[71] *Supra*, per Onu JSC, 39-35.

With this amendment heralded by the Third Alteration Act, despite the provisions of section 12 of the Constitution, all labour-related conventions or treaties ratified by Nigeria do no longer require domestication before they can have effect in Nigeria. Thus, it has been argued that 'claimants can now invoke, before the National Industrial Court, the relevant provisions of international treaties ratified by Nigeria notwithstanding that same have not been domesticated by an Act of the National Assembly'.[72]

Assuming that the *Registered Trustees* case were still a good law, it is argued, in agreement with Egede, that the above judicial pronouncement in the *Abacha case*, and by implication in the *Registered Trustees case*, 'appears to detract from the crucial objective of entering into such treaties, which are meant to protect individuals from the excesses of the government and its agencies.'[73] It is without doubt that in most democracies and especially in an African setting such as Nigeria, the executive arm seems to control the legislative arm. In such a situation, it becomes difficult for the legislature to make laws (such as domesticating human rights instruments) that would be at variance with the interest of the executive. Experience has shown that the executive arm in Nigeria is more interested in infringing on the rights of citizens than respecting or protecting the same.[74]

Thus, making the applicability and enforceability of international human rights instrument subject to legislative domestication is not in the interest of citizens and their rights. However, on the flip side of the argument, it is contended that the value that parliamentary input adds to treaty-making cannot be wished away. For example, the fact that every treaty that the executive arm enters into needs to be legislatively domesticated would make the executive members

[72] Flora Alohan Onomrerhinor, 'Re-Examination of the Requirement of Domestication of Treaties in Nigeria' (2016) *NAUJILJ* 23.
[73] Edwin Egede, 'Bringing Human Rights Home' (n 74)254.
[74] For example, the former National Security Adviser, Sambo Dasuki has only recently been released on bail after he had been in detention for more than 3 years despite several court orders granting him bail. The Federal Government kept disobeying clear court orders for his release. See Samuel Ogundipe, 'UPDATED: SSS releases Dasuki after four years' *Premium Times, (*24 December 2019).

cautious about the kind of treaties they negotiate. Thus, a vibrant and people-oriented legislature can block the effective implementation of an anti-people treaty by refusing to domesticate it.

Hence, there should be collaboration between the respective arms of government to implement treaties domestically, especially in jurisdictions such as Nigeria where domestication is a requirement for implementation of most treaties. Although in countries where domestication is a requirement, treaties often give the countries some discretion on implementation mechanisms, it has been argued that the above judicial decisions in the *Abacha case* and the *Registered Trustees case* could violate 'a fundamental principle of international law, "[a] state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law"', but that 'it[the judicial decision] nonetheless represents the true position of the law with respect to unincorporated treaties in Nigeria.'[75] Hence, the discussion has to revolve round what is obtainable at the moment, which is that, apart from labour-related conventions, all treaties must be domesticated before they can have the force of law in Nigeria. The relationship between the Constitution, domestic laws and domesticated treaties will now be discussed in relation to the African Charter.

3.6.1.2 The African Charter

An example of a Nigerian statute that has domesticated a ESR regional treaty is the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act (the Charter Act). The African Charter was adopted by member-states of the then Organisation of African Unity (OAU) (now African Union-AU) on 27 June 1981. Two years after, the National Assembly of Nigeria domesticated the Charter through the Charter Act in 1983. The Charter Act has a

[75] Stanley Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities' (2010) 10 *African Human Rights Law Journal* 209.

commencement date of 17 March 1983, and it has just two sections and a schedule (which reproduces the provisions of the 68 Articles of the African Charter)). The Charter Act applies across Nigeria and just like every other Act of the National Assembly, it has binding force on all persons and all members of the arms of governments are expected to observe and apply its provisions.

One of the issues that the *Abacha* case[76] threw up for determination was on the primacy of the domesticated African Charter in relation to other Nigerian municipal laws. Although the apex court held that, being a statute with an international flavour, the African Charter ranks higher than other municipal legislations, the court however cautioned that such municipal legislations do not include the Nigeria's Constitution, which, by virtue of its section 1(1), is supreme over all other laws, including domesticated international treaties. Thus, where there is a clash between a municipal law and the domesticated Charter Act, the municipal law must give way, in that it is a rebuttable presumption that the legislature does not intend to breach international obligations under the Charter Act. However, where there is inconsistency between the Charter Act and the Constitution, the Constitution must prevail.[77]

The above decision in *Abacha case* has led Ogunniran to state that '[t]he conclusion is that the Constitution supersedes the African Charter; hence socio economic rights remain unenforceable before the courts'.[78] While this thesis aligns with the scholar on the issue of superiority as between the two laws, it finds it difficult to concur on the point that socioeconomic rights remain unenforceable solely on the basis that the African Charter is inferior to the Constitution. The African Charter has been domesticated by the Charter Act, and unarguably, the Charter Act is a validly passed law of the National Assembly and it contains provisions that are protective of socio-economic rights.

[76] *Supra* (n76).
[77] See section 1(3) of the Constitution.
[78] Iyabode Ogunniran, 'Enforceability of Socio-economic Rights: Seeing Nigeria through the Eyes of other Jurisdictions' (2010) *JILJ* 65.

Thus, in line with the decision of the Supreme Court in the *Attorney-General of Ondo State case,*[79] it is argued here that the Charter Act fits into those legislative steps needed to activate the justiciability of the otherwise non-justiciable socioeconomic rights in chapter II of the Constitution. Just as the apex court held, regarding the ICPC Act in the *Attorney-General of Ondo case* that, '[t]he Act is meant to make justiciable by legislation a declared state policy to abolish corrupt practices and abuse of power...' it is also argued that the Charter Act, which in any case has been judicially recognised to be of a superior statutory flavour than municipal legislation like the ICPC Act, has made justiciable by legislation those socio-economic rights that the Act has expressly provided for. This is comparable to the UK's (quasi-)constitutional statutes like the Human Rights Act 1998 which are given some superiority over other domestic statutes. The ESR recognised under the Charter Act will be discussed in the following pages.

One striking feature of the African Charter and by implication the Charter Act is its introduction of the doctrine of universality, indivisibility and inter-relatedness of all rights, without regarding to their generationalist status.[80] Put differently, although the African Charter contains first generation CPR, second generation ESR and third generation solidarity rights, the African Charter, quite unlike other human rights instruments,[81] provides that all these rights should be treated as universally applicable, indivisible, inter-related and interdependent.

It has been asserted that '[t]he legitimate expectations that Africans have of their governments include the creation of a favourable environment for the realisation of socio-economic rights'.[82]

---

[79] *Supra* (n 65).

[80]Preamble to the African Charter

[81]For example, the United Nations Human Rights System dichotomises between CPR which are enforceable under the International Covenant on Civil and Political Rights (ICCPR) 1966 on the one hand, and the ESR which are not deemed immediately enforceable under the International Covenant on Economic, Social and Cultural Rights 1966, on the other hand. However, the UN has since adopted the principles of universality, indivisibility and inter-dependence of Rights after these Covenants, even before the Proclamation of Teheran (which was adopted at the International Conference on Human Rights of Teheran on 30 May 1968) and para 5 of the Vienna Declaration and Programme of Action of the Vienna World Conference on Human Rights of 1993 which formally recognised the UN position on indivisibility.

[82]Kenneth Asamoa Acheampong, 'Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-economic Rights' (2001) 2 *African Human Rights Law Journal* 202.

It has equally been observed that '[t]he main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances'.[83] Thus, it would be absurd for one to talk about realisation of democracy and human rights while there is prevalence of social and economic deprivations which is a fall out of a lack of economic development.[84] This is a major plank for the justification of the concept of indivisibility, interdependence and interrelatedness of all rights, whether civil/political or socioeconomic, as the reality of the practical implementation of these rights makes the distinction drawn between them of little significance which cannot justify placing of the ESR as a second fiddle to CPR.[85]

Hence, in realisation of this fact, the African Charter has, innovatively, provided for some justiciable ESR. These are the right to property,[86] the right to work under equitable and satisfactory conditions,[87] the right to receive equal pay for equal work done,[88] the right to enjoy the best attainable state of physical and mental health and the right to receive medical attention while sick,[89] the right to education,[90] the right to freely take part in the cultural life of one's community[91] the right to family life,[92] the rights of the vulnerable groups like women, children from discrimination,[93] the right of the aged and the disabled to special measures of protection in keeping with their physical or moral needs,[94] the collective right to economic, social and cultural development,[95] and the right to a general satisfactory environment favourable to one's

[83]B de Villiers, 'The Protection of Social and Economic Rights-International Perspectives' (1996) *Occasional Paper 9*, Centre for Human Rights 2.
[84] Acheampong, 'Reforming the Substance of the African Charter' (n88) 201.
[85] Ibid.
[86] Art. 14 which also however provides that the right may be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws (perhaps laws on payment of compensation upon acquisition, such as section 44 of Nigeria's Constitution)
[87]Art. 15.
[88]Art. 15.
[89]Art. 16(1) & (2).
[90]Art. 17(1).
[91]Art. 17(2).
[92]Art. 18(1) & (2).
[93]Art. 18(3).
[94]Art. 18(4).
[95]Art. 22(1) &(2).

development.[96] It should be mentioned that, apart from these ESR, the African Charter also provides for CPR in Articles 2 -13. This is worth mentioning, because, as discussed below, the courts have navigated through the CPR to protect ESR in the spirit of indivisibility and inter-dependence of human rights.

3.6.2 Courts' Navigation of the Justiciability Challenge through the African Charter

As noted, the Charter Act has been used as a potent force to weaponise the push for ESR realisation in Nigeria. This has been done both at the national and regional court levels.

In the case of *Abacha v Fawehinmi*,[97] the Supreme Court stated that having become part of Nigeria's municipal laws by virtue of the Charter Act, the African Charter's enforcement should, like in every other case, become a duty that falls within the constitutionally vested judicial powers of the courts and as such, the courts are empowered to enforce the provisions of the Charter in deserving cases.[98]

Hence, in the case of Jonah *Gbemre v Shell Petroleum Development Company of Nigeria Ltd & 2 Ors*,[99] the Federal High Court of Nigeria held that the multi-national oil company's engagement in continuous gas flaring in the applicant's community amounted to a violation of the fundamental rights to life, human dignity, health, healthy and satisfactory environment under sections 33 and 34 of the Nigeria's Constitution and articles 16 and 24 of the African Charter. Commendably, this decision did not only treat human rights as indivisible in that a threat to a living environment is a threat to life, but it also went ahead to expressly pronounce on the ESR of the applicant under the African Charter, by holding that such ESR are legally protectable. Unfortunately, instead of building on the positive judicial outcome, this revolutionary jurisprudential disposition in the area of ESR did not go down well with the government. It is reported that apart from frustrating the execution of the judgment, the

[96] Art. 24.
[97] *Supra* (n76). Also see *Ogugu v State* (1994) 9 NWLR (pt 366) 1.
[98] A similar decision was held in the Court of Appeal case of *Ohakosim v COP* (2009) 15 NWLR (pt 1164) 229.
[99] FHC/B/CS//53/05, (unreported)delivered on November 14, 2005.

government punished the Judge by transferring him to another division and the casefile has since mysteriously disappeared.[100]

Still using the African Charter to valorise ESR in Nigeria, the Federal High Court of Nigeria held in *Joseph Odafe & Ors v Attorney-General of the Federation & Ors*[101] that:

> The government of this country has incorporated the African Charter on Human and Peoples' Rights (Cap 10) as part of the law of the country. The Court of Appeal in *Ubani v. Director, SSS* (1999) 11 NWLR Pt 625) 129 held that African Charter is applicable in this country. The African Charter has entrenched the socioeconomic rights of a person. The court is enjoined to ensure the observance of these rights.

The *Odafe case* had to do with right to health. There, prison inmates tested positive for HIV/AIDS and were consequently quarantined on the basis of their HIV status. They were also not given access to medical care. They succeeded in enforcing their rights to life and health in court. The court, against the background of the domesticated status of the African Charter, held that they were entitled to medical treatment from the government and that failure to provide medical care amounted to non-compliance with section 8 of the Prisons Act and article 16 of the African Charter. However, the court's decision can be critiqued for stating that the 'African Charter has entrenched the socioeconomic rights of a person'. The Charter is not an entrenched statute because, it would take just a simple majority of the Nigerian National Assembly to either amend or repeal it. This is unlike entrenched statutes which are either almost impossible or difficult to amend. That said, it is commendable that the court held the government bound to make provisions for ESR realisation. According to the court:

> A dispute concerning socio-economic rights, such as the right to medical attention requires the court to evaluate state policy and give judgment consistent with the Constitution. I therefore appreciate the fact that the economic cost of embarking on medical provision is quite high. However, the statutes have to be complied with….[102]

[100] Egbewole & Alatise, 'Realising Socio-Economic Rights'(n22)13.
[101] (2004) *AHRLR* 205.
[102] Also see the Court of Appeal case of *Organ v Nigerian Liquified Natural Gas Ltd* (2010) All FWLR (pt 535 293, 338.

Another commendable judicial validation of ESR in Nigeria, through the African Charter, is the Court of Appeal's decision in *Alhaji Sani Dododo v Economic & Financial Crimes Commission and Ors*[103] to the effect that 'The African Charter is now part of the laws of this country protecting the social economic rights of citizens. The African Charter is preserved by the 1999 Constitution and must be always relied on to recognize political and socioeconomic rights'. Further, in the recent case of *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation*,[104], the Supreme Court stated, albeit *obiter,* that having willingly domesticated the African Charter, Nigeria is bound by its provisions and that the government thus has an obligation to ensure the realisation of the right to a clean and healthy environment as provided in article 24 of the Charter. This is a commendable persuasive authority, because, although section 20 of the Nigerian Constitution provides for the right to a clean environment as a non-justiciable ESR, the apex Court has recognised the import and impact of article 24 of the African Charter which makes the right justiciable. Thus, while section 20 of the Constitution generally makes the right non-justiciable, article 24 of the Charter serves as an exception envisaged under section 6(6)(c) of the Constitution which has been examined above. Lastly, on the African Charter, the African Commission on Human and Peoples Rights which is the institutional body charged with the responsibility of enforcing the Charter, has also shown a positive disposition towards protecting ESR in Nigeria. Hence, in *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*,[105] the applicants had filed the suit on behalf of the Ogoni Community of Rivers State Nigeria, alleging that multinational oil companies where being empowered militarily by the Nigerian government to deposit toxic wastes into their living environment, thereby causing a serious threat to their lives, means of livelihood and clean environment. The Commission held that

[103] (2013) 1 NWLR (pt1336) 468.
[104] [2019] 5 NWLR 518,598.
[105] Communication No 155 of 1996 delivered on the 30th Ordinary Session in October 2001.

Nigeria was in violation of articles 4, 14, 16, 18 and 24 of the African Charter by its collusion and condonation of environmental degradation and pollution carried by the oil companies. It thus urged the government to stop military attacks on the Ogoni people and provide adequate reparation and compensation. This is a commendable pronouncement. However, the Commission's decisions are not binding on state-party to the Charter, it is merely of persuasive value.

3.6.3 Other Enactments on Socio-economic Rights in Nigeria

Although it is not expressly stated that they protect ESR, the provisions of the following enactments have in one way or the other impliedly catered for the ESR of the Nigerian citizenry. Thus, in line with the rule in *Attorney-General Ondo case* (which recognises the possibility of making ESR justiciable through legislation), the courts can escape the justiciability problem in section 6(6)(c) of the Constitution by relying on these legislative interventions to protect or enforce ESR in Nigeria.

3.6.3.1 The National Health Insurance Scheme Act[106]

This Act provides for the establishment of a National Health Insurance Scheme (NHIS) with a view to providing access to good healthcare for the Nigerian citizens.

By the provisions of the Act, funding of the NHIS shall be by contributions from employees who are expected to pay 5% each of their monthly basic income into the fund while the employer pays 10%. The beneficiaries under the scheme shall be the employee, their spouse and four children. As for those in the informal sector, they are to make a monthly contribution as may be determined from time to time.

The NHIS has been hailed as ensuring equitable distribution of healthcare costs among different income groups, maintaining high standard of healthcare delivery services and efficient

[106] Cap N42 LFN, 2004.

healthcare delivery.[107] However, it is argued that the reality on the ground does not seem to support this assertion. Apart from the fact that many people in Nigeria are unemployed and out of business and thus cannot afford the percentage contribution that will make them eligible under the Act, there are also cases of non-implementation of the scheme in various governmental parastatals owing to 'weak managerial capacity and regulatory oversight functions'.[108] For example, many people, both employed and unemployed have been unable to key into the scheme which has only been able to capture 5% of the population, leaving a majority of the people to depend on out-of-pocket medical expenditure.[109] Thus, the scheme has been described as 'not effective and efficient. The coverage is skewed and inequitable, especially among the informal sector…raising concerns about sustainability and equity'.[110]

3.6.3.2 Nigerian Education Bank Act[111]

The Nigerian Education Bank Act establishes the Nigerian Education Bank. The bank was originally set up in 1993 to provide loans to students; it was designed to replace the former Students Loans Board.[112] Section 7 of the Act lists the functions of the bank as including approval and disbursement of loans for educational purposes, provision of loans to students to finance education in higher institutions, recovery of such loans, provision of financial advice to schools, parents and students, and provision of funding for authors to finance the publication of educational books. No doubt, these functions are laudable and would have afforded the indigent students the opportunity to access loans to finance their education, thereby realising the ESR to education. Regrettably, these functions were never carried out from the inception

[107] Femi Falana, *Nigerian Law on Socioeconomic Rights* (n1) 27.
[108] Gbadegesin O. Alawode & David A. Adewole, 'Assessment of the Design and Implementation Challenges of the National Health Insurance Scheme in Nigeria: A Qualitative Study among Sub-national level Actors, Healthcare and Insurance Providers' (2021) 21 *BMC Public Health* 124 https://doi.org/10.1186/s12889-020-10133-5.
[109] Ibid.
[110] Ibid.
[111] Cap N 104, LFN 2004.
[112] Afe Babalola, 'Time for FG to Re-establish Education Bank to boost Education among youths (2)', Vanguard Newspaper, November 7, 2018, available at https://www.vanguardngr.com/2018/11/time-for-fg-to-re-establish-education-bank-to-boost-education-among-youths-2/ (last accessed on 13 March, 2020).

of the bank. The Federal Government in 2000 set up a Ministerial Committee to wind up the bank for failure to meet its target.[113] However, the Committee Report revealed that the government was responsible for the bank's failure in that it never set up the requisite Board of Directors stipulated under section 8 of the Act. This means the bank could not operate or function from inception in 1993 until it was wound up.[114]

Since the Act still subsists, it is argued here that the right to education, albeit on loan, could be fought under this law. In *Femi Falana v Attorney-General of the Federation (No.1),*[115] the Federal High Court, per Idris J, held that, 'Section 13 of the Constitution imposes a duty and responsibility on the government to observe Chapter II and any law promulgated pursuant to the said Chapter of the Constitution, including the Nigerian Bank Act'. In the sister case of *Femi Falana v Attorney General of the Federation*[116] which sought to compel the Federal Government to re-establish the Education Bank, the court highlighted the importance of such bank by stating that,

> It is no doubt important to state at this juncture that the establishment of the Nigerian Education Bank will go a long way in alleviating the suffering of poverty-stricken Nigerians who cannot afford the services of our conventional banking system. The establishment of the Nigerian Education Bank and the provision of funds to be distributed to indigent Nigerians are the statutory duties of the federal government…. The duty conferred by the Act is mandatory and the president cannot elect not to establish the Nigerian Education Bank….

With this decision, one is hopeful that the Nigerian Education Bank Act can now be used to activate the right to education. The only downside is that, apart from the *Attorney-General Ondo State case*, most of these decisions that substantively favour ESR in Nigeria always end up at the lower rung of the judiciary-at best the Court of Appeal due to lethargy on the part of litigants. One looks forward to when the Supreme Court will have the opportunity to pronounce directly on the effect of local statutes on ESR realisation. Another major problem is one of

[113] Ibid.
[114] Ibid.
[115] (unreported) Suit No: FHC/L/CS/1121/2011 delivered on June 20, 2014.
[116] (unreported) Suit No: FHC/L/CS/1122/2011 delivered on 28 May, 2014

implementation. The above decisions in the *Falana cases* were delivered in 2014 and up till now, there is no evidence that the court order has been obeyed. This justifies the argument in this thesis which emphasises institutional collaboration where all three arms of government are agreed on what ESR should be funded and protected. Such institutional collaboration would forestall this kind of wilful disobedience to court orders.

3.6.3.3 The Compulsory, Free, Universal Basic Education Act 2004

The Nigerian Federal Government introduced the Universal Basic Education in 1999 with the aim of making provisions for greater access to quality basic education. This Act was therefore enacted to meet this goal. In other words, the main goal of the implementation of the universal basic education programme is to make basic education, which is composed of nine years of schooling at different levels accessible, and available for free for the benefit of every Nigerian child.[117] The Act imposes on the Federal Government the duty to give assistance to the other tiers of governments in their bid to set up educational system that will meet the goals of the programme. The Act also sets up a national body known as the Universal Basic Education Commission which is charged with the responsibility of meeting the statutory goals as spelt out under the Act.[118]

The Act provides in section 2(1) that '[e]very Government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and junior secondary school age' and that '[e]very parent shall ensure that his child or ward attends or completes his -(a) primary school education; and (b) junior secondary education, by endeavouring to send the child to primary and junior secondary schools.' Section 4 criminalises failure to send one's child to school. Regarding funding, section 11 states that the Federal Government shall provide not less than 2% of its Consolidated Revenue Fund while states shall only be entitled to access

[117]Muftahu Jibirin Salihu & Hazril Jamil, 'Policy of Universal Basic Education in Nigeria: An Examination of its Effectiveness on Implementation and Management' (2015)5(6) *American International Journal of Contemporary Research*150.
[118] Ibid. See also section 7 of the Act.

the fund upon payment of counterpart funding of not less than 50% of the total cost of the UBE projects in the state.

Again, this is a laudable move but its effectiveness in tackling educational problems is questionable. For example, there are questions around what happens if a state fails to provide its counterpart funding. It is argued that citizens of such a state should be able to activate the provisions of the Act in court, to compel the state to meets its obligation of providing right to education by way of order of mandamus. As the Supreme Court held in *Dr Ukaegbu v Attorney-General, Imo State*,[119] 'Every member of this Community has a right to adequate, unalloyed and balanced education; a right to receive healthy education; a right freedom from unsavoury and diabolical instructions and teachings….'

It is thus recommended that the provisions of relevant local statutes should be activated in addition to the African Charter which has been of some help in driving legal mobilisation on the right to education. For example, in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria (No. 1*),[120] the Court held that 'Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention… that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.' Also in the recent case of *Legal Defence and Assistance Project (LEDAP) GTE and Ltd v. Federal Ministry of Education and the Attorney General of the Federation*,[121] the Federal High Court, per J. T Tsoho held that although the right to education in section 18 of the Constitution is generally non-justiciable, the same right, as far as primary and secondary education is concerned, has however become judicially

[119] (1983) 1 SCNLR 212.
[120] (2009) *AHRLR* 331).
[121] SUIT NO.FHC/ABJ/CS/978/15 (Unreported) delivered on 01 March 2017, available at https://nigerialii.org/ng/judgment/high-court-fct-nigeria/2018/2 (accessed on 21 February 2020). Also see 'Nigerian Court declares free primary, junior secondary education an enforceable right', *Premium Times Newspaper*, 02 March 2017, available at https://www.premiumtimesng.com/news/headlines/225057-nigerian-court-declares-free-primary-junior-secondary-education-enforceable-right.html (accessed on 21 February 2020).

reviewable by virtue of a specific legislation (The Compulsory, Free, Universal Basic Education Act 2004) by which the legislature has given the right a stamp of enforceability.

3.7 Conclusion

This chapter has examined the legal status of ESR in Nigeria. It is unarguable that the constitutional and statutory provisions that have been identified and discussed are geared towards meeting the realisation of ESR of Nigerians. It is also conceded that the judicial decisions that have been reviewed aim at promoting ESR in Nigeria. However, there are challenges that frustrate these legislative and judicial interventions. First, there is a lack of political will to implement these rights in Nigeria. When one recalls the ordeal of the transferred Judge in the already examined *Gbemre case*, one would better appreciate the fact that achieving the ESR goal goes beyond judicial pronouncement. As Ibe observes, 'To concentrate on justiciability alone is to miss the point. If socioeconomic rights become immediately justiciable in Nigeria today, there would still be no guarantee of socio-economic rights, as enforcement of decisions could become a major issue'.[122]

Consequently, this thesis recommends an institutional collaboration where the three arms of government and other key stakeholders would sit in a round table to negotiate and agree on what ESR should be projected and promoted in a graduated form. The courts should champion or facilitate this collaboration by engaging in dialogue with other stakeholders. The relevant stakeholders and shape the discussion should take have been identified and discussed in chapter six of this thesis. With collaboration, the courts would not worry about delivering a judgment that will not be enforced, because the executive and legislative arms would have been carried along all along in the decision-making process. Also, the executive would not want to flout court decisions that flow directly from a pre-judgment discussion that they participated in. The next chapter focuses on the role of international or global cooperation in the realisation of ESR.

[122] Stanley Ibe, 'Beyond Justiciability' (n 51), 246.

CHAPTER FOUR

GLOBAL CONSTITUTIONALISATION AS LEGAL FRAMEWORK FOR THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS

4.1 Introduction

In a bid to herald a better regime for the protection of Economic and Social Rights (ESR), several arguments have been advanced as to the best way to achieve this. Among these is the argument that each nation should institutionalise such protection of ESR by expressly incorporating them into its constitution as enforceable rights. Put differently, rather than being viewed as mere governmental aspirations,[1] this argument holds that ESR should be constitutionally recognised as fundamental rights, just like their counterpart Civil and Political Rights (CPR). From another angle, there is the argument that beyond or together with constitutionalising ESR, the judiciary should be more favourably disposed to the protection of ESR in each nation-state. That is, the judiciary should be a useful tool for the advancement of ESR. In this thesis, these strands of arguments are referred to as the constitutionalisation and judicialisation of ESR.

The essence of this chapter is to discuss the idea of constitutionalisation in the practical realisation of ESR. To achieve this, the thesis begins by unpacking the term 'constitutionalisation'. Thereafter, it identifies the types and theories of constitutionalisation and how they impact on rights realisation. This is followed by a discussion on the role of international cooperation and assistance as a normative framework for globally 'constitutionalising' and realising ESR, before drawing a conclusion on the chapter.

The central argument in this chapter is that constitutionalisation should be re-imagined, making it practically valuable to the realisation of ESR. Thus, it is argued that the term should be re-designed in such a manner that would not only make it domestically applicable but also internationally useful in the drive to realising ESR in nation-states. Hence, the thesis makes a

[1] That is, goals that should be progressively pursued or realised.

recommendation for socially and economically oriented global constitutionalisation. While it is true that the justiciability debate on ESR has waned over the years, the fact remains that the lip service that is usually paid to the principles of indivisibility, interdependence, and inter-relatedness of all human rights since the 1993 World Conference in Vienna has really not brought about a practical realisation of ESR.[2]

Thus, drawing on research from multiple disciplines such as law, international relations, social psychology, sociology, education and communications, this thesis argues that there should be better national and global commitments to the realisation of ESR. It contends that the meaning, contents, scope and implementation of human rights at the domestic level should not be left for only the domestic legal systems to determine. Rather, the international human rights instruments should interactively be engaged with, with a view to unravelling the contents of such rights.

Such an interactive and integrated international legal order which exercises some control over the political decision-making process would only be possible in a system where national, regional and international constitutional orders complement each other.[3] Also, there should be a shift of focus, in the debates on global constitutionalism, from the pre-eminence of CPR to the indivisibility of CPR and ESR. As CPR cannot be fully realised without the realisation of ESR, it is argued that both domestic and global mechanisms should be channelled towards the protection and fulfilment of both CPR and ESR. So, there is a question around whether global constitutionalism debate has taken ESR into serious consideration and if it has not, whether there are ways ESR can be fashioned in. This chapter attempts a discussion around this question.

[2] Marie von Engelhardt 'Opportunities and Challenges of a Soft Law track to Economic and Social Rights - The Case of the Voluntary Guidelines on the Right to Food' (2009) 42(4) *Law and Politics in Africa, Asia and Latin America* 502-526, 510.

[3] Erika De Wet, 'The International Constitutional Order' (2006) 55 *ICLQ* 51-76, 53.

4.2 Conceptualising Constitutionalisation

Conceptualising the term 'constitutionalisation' is not an easy task. The difficulty lies in the fact that the definition that scholars give to the term depends on their ideological leanings. The context, content and uses of the term vary according to the user's disciplinary standpoint, legal orientation, cultural background and analytical objective.[4] So, it has been argued that 'the debate on constitutionalisation suffers from the great variety of meanings assigned to the key terms'.[5]

However, O'Donoghue asserts that 'constitutionalisation is the process by which a legal order goes from an *ad hoc,* decentralised and consent-based system to one where the remit of action of constituted power holders is curtailed by legal form and process; where law regulates the exercise of power and governance in line with substantive norms'.[6] Loughlin argues that 'Constitutionalisation involves the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a "constitution"'.[7] On her part, Peters states that it is 'the label for the evolution from an international order based on some organizing principles such as state sovereignty, territorial integrity, and consensualism to an international order which acknowledges and has creatively appropriated and-importantly-modified principles, institutions, and procedures of constitutionalism'.[8] In another work, the same author asserts that 'constitutionalisation' designates the 'process of the emergence, creation and identification of constitution-like elements' within a given legal order'.[9]

---

[4] Deborah Z. Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *EJIL* 39,40.
[5] Anne Peters, 'Constitutionalisation' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar Publishing Ltd, 2019) 141.
[6] Aoife O' Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press, 2014).
[7] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner & Martin Loughlin(eds)*The Twilight of Constitutionalism?* (Oxford University Press,2010) 49.
[8] Peters, 'Constitutionalisation'(n5).
[9]Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579–610.

Constitutionalisation refers to the process of implementation of the normative components of constitutionalism.[10]

These normative components include the acknowledgement of the individual as the key decisionmaker or 'ultimate unit of legal concern',[11] that the rule of law is a tool for empowering the individual as regards their rights and obligations, recognition of the value of the process of implementing the rule of law and lastly the acknowledgment that the rule of law as a mere concept is not enough if it does not have a structured and workable procedure.[12]

Fabre sees 'constitutionalisation' from solely domestic context wherein it means where 'rights are enshrined in the constitution and protected by an institution such as the judiciary, by way of judicial review and/or judicial preview'.[13] However, for the purposes of this thesis, the term 'constitutionalisation' refers to the process whereby a nation-state domestically recognises ESR as protected or enforceable rights in its constitutional framework and/or a process whereby member-states of the international community emplace a mechanism for realising ESR both nationally and extraterritorially, for example through the ICESCR.

As Peters concedes, 'constitutionalisation' has fragmented meanings in terms of different issues-areas of law and governance, different geographic regions and different levels of government.[14] Thus, constitutionalisation of international law is used here to refer to the process whereby the international community, represented by the United Nations (UN), designs institutional mechanisms which create legal obligations on States and their multinational corporations[15] to realise ESR in other States through international cooperation

[10] Rossana Deplano, 'Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry' (Spring/Summer 2013) 6 *European Journal of Legal Studies* 84.
[11] Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters & Geir Ulfstein(eds) *The Constitutionalization of International Law* (OUP, 2009)155.
[12] Deplano, 'Fragmentation' (n10) 85.
[13] Cécele Fabre, 'Constitutionalising Social Rights' (1998) 6(3) *The Journal of Political Philosophy* 263.
[14] Peters, 'Constitutionalisation' (n5)142.
[15] See for example the UN Guiding Principles on Human Rights and Transnational Corporations and Other Business Enterprises (2011), Report of the Special Representative of the Secretary-General with Guiding Principles in the Annexed (UN-Doc. A/HRC/17/31) of 21 March 2011, endorsed by the UN Human Rights

and assistance. It also means 'the recognition of interests of the community of states [as a whole rather than a state-centric interest] and the introduction of mechanisms for their implementation'.[16]

Thus, this thesis argues that constitutionalisation should go beyond the walls of domestic legal system in a bid to protect ESR. So, within the context of this thesis, 'global constitutionalisation' refers to the deployment of international cooperation as provided for in the international institutional and legal framework to operationalise ESR realisation. It is argued here that, if constitutionalisation of ESR should have any practical impact, there is then a need to re-imagine the concept (of constitutionalisation) in a way that will engender some shared sovereignty and responsibility among the multilevel governance structures at the domestic, regional and international spheres. There has been too much of a focus on constitutionalism and constitutionalisation at the national level when it comes to ESR, but it is argued here that the focus should also move to the international level. One major advantage of such constitutionalisation that has shared sovereignty is that '[i]t balances the levers of power and provides a legitimisation forum for the workings of states, international institutions, global actors, individuals and civil society amongst others'.[17] Further, a workable constitutionalisation process should be able to 'regulate the relationship between law and politics'.[18]

4.3 Types of Constitutionalisation

There are two types of constitutionalisation: domestic and global/international. While the former is the making of a process constitutional at the national level, that is, subjecting governmental powers to control while at the same time, not all the time though, protecting

Council on 6 July 2011 (UN-Doc. A/HRC/RES/17/4); OECD Guidelines for Multinational Enterprises (2011), OECD Publishing (http://dx.doi.org/10.1787/9789264115415-en).

[16] J.A. Frowein, 'Konstitutionalisierung des Vólkerrechts' in K. Dicke, *e tal* (eds) *Public Law and Private International Law in a Globalising International System* (Berichte der Deutschen Gesellschaft fúr Vólkerrecht 39, 2000) 447.

[17] O' Donoghue, *Constitutionalism in Global Constitutionalisation* (n6) 138. However, for an argument against the practical usefulness of constitutionalisation in the face of a highly fragmented or fragmentary, diverse and divergent international order, see Andreas L. Paulus, 'The International Legal System as a Constitution' in Jeffrey L. Dunoff & Joel P. Trachtman(eds), *Ruling the World?* (Cambridge University Press, 2009) 69-109.

[18] Ibid.

citizens' fundamental rights through the supreme law of the land, global constitutionalisation refers to an evolution of an international or regional constitution that goes beyond the consent of nation-states but commits such States to human rights protection. As O'Donoghue and Houghton put it, global constitutionalisation 'queries whether a new constitution is emerging beyond the state'.[19]

Thus, while in a domestic context, the term describes the effects of constitutional law on the interpretation of ordinary laws of a nation state,[20] international constitutionalisation evolves from international order based on state sovereignty, consent and territorial integrity to an international order of global constitutional principles, institutions and procedures on the establishment, organisation, integration and stabilisation of political communities as well as the containment of power.[21] This global strand of constitutionalisation is informed by the inadequacy and deficiencies in the respective domestic constitutional orders. The thinking is that a global legal order that is devoid of any individual State's influence or control would be more effective and protective of rights.

However, these domestic and global constitutionalisation processes are not mutually independent but interdependent. While there is a growing trend of constitutionalisation of international law, there is also the internationalisation of constitutional law wherein States borrow some international law norms like human rights values into their national constitutions and caselaw, thereby promoting what Peters refers to as a 'horizontal' convergence of national

[19]Aoife O'Donoghue & Ruth Houghton, 'Can Global Constitutionalisation be Feminist?' in Susan Harris Rimmer & Kate Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing, 2019) 81-102, 81.

[20] For Germany. Ph. Kunig, 'Verfassungsrecht und einfaches Recht—Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 VVDStRL 34, 51; W Heun, Verfassungsrecht und einfaches Recht—Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit (2002) 61 VVDStRL 80, 109; GF Schuppert and C Bumke, Die Konstitutionalisierung der Rechtsordnung, (Baden-Baden: Nomos, 2002), all cited in Christian Walter, 'International Law in a Process of Constitutionalization' in Janne E. Nijman & André Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007) 191.

[21] Peters, 'Constitutionalisation' (n5) 141.

constitutional law.[22] Thus, Walter notes that despite the different meanings that the term is capable of bearing, one thing that stands out is that constitutionalisation connotes a process.[23] It denotes a process of constitutionalising principles of governance and power regulation, whether at the national, regional or international levels. A further elaboration on this term will be made below. Perhaps, a better way to unravel the term 'constitutionalisation' and its contours is by examining the root words 'constitution' and 'constitutionalism'.

4.4 Unpacking 'Constitution' to unveil 'Constitutionalisation'

A constitution presents 'a complex of fundamental norms governing the organization and performance of governmental functions in a given State and the relationship between State authorities and citizens'.[24] Broadly speaking, constitution means the way a body is formed, regulated or functions. Narrowly or legally speaking, the term refers to the fundamental laws of a given nation as embodied in a single formal document (unless it is an uncodified or unwritten constitution).

According to Peters, there are three notions of a constitution: broad, narrow and legitimist notions. A broad notion sees the constitution as the laws organising and institutionalising a polity. A narrow or functional notion portrays it as the rules and principles fulfilling typical constitutional functions like composition and organisation of political entities, limiting political power and offering guidelines and justifying governance while the legitimist notion refers to the constitution as one which upholds human rights and separation of powers as necessary contents of a constitution.[25]

---

[22] Anne Peters, The Globalisation of State Constitutions' in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 251–308.

[23] Christian Walter, 'International Law in a Process of Constitutionalization' in Janne E. Nijman & André Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007) 191.

[24] Bardo Fassbender 'The United Nations Charter as Constitution of the International Community' (1998) Columbia *Journal of Transnational Law* 38, 534.

[25] Peters, 'The Globalisation of State Constitutions'(n22)256.

The term constitution can take on both empirical/descriptive sense and normative/prescriptive sense.[26] Empirically, it refers to the political conditions or structure that is in place in a particular region at a given time. Understood in this descriptive sense, the constitution cannot be exclusive to a nation-state but also applies to tribal, communal or international structures of governance.[27] The problem with this descriptive conception is that it weakens or reduces the value of 'constitution' to that of sheer organisational rules and regulations.[28] The contemporary idea of constitution is obviously more than that. So, from a normative sense, constitution refers to the fundamental law that regulates the establishment and exercise of political power and institutions.[29] However, as Kahn[30] contends,

> Nevertheless, these two meanings tend to come together once the constitution is understood as the object of an interpretive debate. The text is interpreted in light of the larger constitutional commitment to liberty, equality, and due process, as well as an understanding of the meaning of representative government.

So, the idea of constitution should necessarily embody the promotion of people's liberty and equality, in terms of provisions of social, economic, technical, medical and empowerment facilities that will lead to the realisation of ESR.

Further, it has been argued that a normative constitution is expected to not only set up government power in the polity but also limit the use of such power by defining the fundamental boundaries between the private and the public, the State and the individual in terms of fundamental rights, and between different branches of government.[31] The existence of these features and requirements in a constitution may account for a constitutional equilibrium,

---

[26] See G. Biaginni, 'Die Idee der Verfassung -Neuausrichtung im Zeitalter der Globalisierung?' (2000*) Zeitschrift fúr Schweizerisches Recht* 119 445 et. Seq. (455).
[27] Thomas Cottier & Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 *Max Planck UNYB* 279.
[28] Ibid.
[29] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016) 1.
[30] Paul W. Kahn, 'Interpretation and Authority in State Constitutionalism' (March 1993) 106(5) *Harvard Law Review*1147-1168,1159.
[31]Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27) 280.

that is, the ideal condition inspired by the adoption of constitutional norms in a given legal setting, which condition protects human rights and balances State powers.[32]

A normative or good constitution, whether liberal (as a defensive function of a power-restricting device and human rights)[33] or teleological (as an integrative function of laying down common social and economic objectives and affirmative claims against the State)[34] should possess the attributes of organisational functions, rule of law, human rights protection, checks and balances as well as democratic legitimacy.[35] In other words, a constitution should convey a legitimist notion, because, human rights and separation of powers are the necessary contents of a constitution.[36]

Another point that is worth noting is that 'constitution' is originally a term that was exclusively used in domestic legal systems. Thus, previously one could only talk of the Constitution of the United States of America or the Constitution of Nigeria. However, the term has since acquired a contemporary usage which stretches its meaning to regional and international law spheres. For example, it is no longer uncommon to hear of the constitution of the UNESCO or the European Court of Justice referring to the founding treaties as the constitutional Charter of the European Union Area[37] or the European Commission of Human Rights referring to the relevant convention as 'a constitutional instrument of European public order in the field of human rights.'[38]

---

[32] Peters, 'Compensatory Constitutionalism'(n9) 579–610.
[33] DP Kommers and WJ Thompson, 'Fundamentals in the Liberal Constitutional Tradition' in Joachim Jens Hesse & Nevil Johnson (eds) *Constitutional Policy and Change in Europe* (OUP,1995)35.
[34] U.K. Preuss, 'Patterns of Constitutional Evolution and Change in Eastern Europe' in Joachim Jens Hesse & Nevil Johnson (eds) *Constitutional Policy and Change in Europe* (OUP,1995)95; Nevil Johnson, 'Constituionalism: Procedural Limits and Political Ends' in Joachim Jens Hesse & Nevil Johnson (eds) *Constitutional Policy and Change in Europe* (OUP,1995) 46.
[35] Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27) 281.
[36] Peters, 'The Globalisation of State Constitutions' (n22) 256.
[37] Case 294/83, *Parti écolo-giste 'Les Verts' v European Parliament,* ECR 1986, 1339 et seq., 1365.
[38] See the decision in *Chrysostomos, Papachrysostomou and Loizidou v Turkey* delivered on 04 March 1991 in Application Numbers 15299/89;15300/89;15318/89 and the later European Court of Human Rights' decision in the same case of 23 May 1995, Series A No. 310 S 75.

Although Verdross[39] and Scelles[40] are reputed to have been among the earliest scholars to theorise this area of regional and international dimension to the constitution, the definition of De Wet in this regard captures the issue accurately. According to her, a constitution is 'a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community ('international polity') that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement'.[41] The prevalence of this dimension is evident in the current literature where such words as 'the constitution of mankind',[42] international economic constitution[43] or the constitution of the International Community'[44] are frequently used.

Be that as it may, it is worth noting that there are still fundamental differences between constitution in the domestic sense and constitution in the international or regional sense. For example, while it takes a majority decision to amend a domestic constitution, unanimity among States is usually required to revise an international treaty/constitution.[45] Further, as Walter argues, while national constitution confers on States the authority to exercise several public powers within their domains and in accordance with the traditional notion of state sovereignty, the international constitution may place some restriction as to the forms of regulations vis-à-vis human rights of individuals.[46] Thus, while under domestic constitutionalisation, the States exercise competencies which are territorially limited but potentially unlimited in respect of the subject matters to be regulated, international constitutionalisation has heralded actors which

[39] Alfred Verdross, *Die Verfassung der Vólkerrechtsgemeinschaft,* 1926.
[40] Georges Scelles, 'Le Droit constitutionnel international' (1933) *Mélanges Carré de Malberg* 503 *et seq*.
[41] Erika De Wet, 'The International Constitutional Order' (n3) 52.
[42] C Tomuschat, 'International Law as the Constitution of Mankind' in United Nations (ed), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (1997) 37.
[43] S Langer, Grundlagen einer internationalen Wirtschaftsverfassung: Struck-turprinzipen, Typik und Persapectiven anhand von Europáischer Union und Weltandelsorganisation, 1995, cited in Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27) 277.
[44] B Fassbender, 'The United Nations Charter' (n24) 529.
[45] Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27)284.
[46] Christian Walter, 'International Law' (n23) 196-197.

are functionally limited but which may have the possibility for global or almost global regulation with only few territorial restrictions, depending on the range of membership.[47]

The value or necessity of this stretched use of 'constitution' has led to a debate which has invariably grouped scholars into statist and internationalist schools of thought.[48] While the statist school is of the view that the constitution is an intrinsic part of the State which is perhaps incapable of acquiring an international character, the internationalist school argues that 'constitution' should be separated from the State and that in any case, the constitution has not always been part and parcel of the State but same has evolved as part of the State, only in the past two centuries. Thus, Biaggini argues that 'constitutional law is becoming more international, international law more constitutional' and this is often now referred to as the internationalisation of constitutional law and the constitutionalisation of international law.[49] Whatever school of thought one tends to align with, the common ground however remains that the constitution is seen or should be seen as an instrument of regulating human affairs and institutions.

4.5 The Idea of Constitutionalism

Constitutionalism is also not an immutable concept, but it has some historical evolution.[50] The meaning ascribed to it depends on the school of thought of the person defining it. Speaking about this unpredictable term, Walker has argued that 'Constitutionalism is a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities…'.[51] In modern times, constitutionalism refers to the notion of placing limits on governmental powers,

[47] Ibid 198.
[48] See G. Biaginni, 'Die Idee der Verfassung -Neuausrichtung im Zeitalter der Globalisierung?' (2000*) Zeitschrift fúr Schweizerisches Recht* 119, 445, cited in Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n29) 277.
[49] Ibid.
[50] Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation' (2019) 33(1) *International Review of Law, Computers and Technology* 76-99, 88.
[51] Neil Walker 'Post-national Constitutionalism and the Problem of Translation' in Joseph HH Weiler & Marlene Wind (eds) *European Constitutionalism beyond the State* (CUP, 2003) 53.

protection of democratic values, human rights and the rule of law.[52] According to Rosenfeld, 'constitutionalism requires imposing limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights.'[53] In a similar vein, Preuss states that '[C]onstitutionalism embraces essentially the idea of limited government.'[54]

However, from a transformative perspective, Klare perceives constitutionalism as a collaborative or inter-institutional project for emplacing social change. According to her, transformative constitutionalism is:

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[55]

It has also been suggested that in this era of informational constitutionalism (i.e. using State constitutional principles to regulate digital transactions and conversations), constitutionalism is no longer restricted to limiting governmental powers but it also now permeates into the limitation placed on the power of private actors who are imbued with self-regulation.[56] In other words, Fitzgerald sees constitutionalism as the mediation or definition of power relations which involves both public and private actors and which requires a mixed governance structure of private sector's self-regulation and public institutions' oversight functions.[57] Similarly, it has

---

[52] Jeremy Waldron, 'Constitutionalism: A Sceptical View' (2010) *Philip A. Hart Memorial Lecture*,available at . https://scholarship.law.georgetown.edu/hartlecture/4 (accessed on 11 February 2021).

[53] Michel Rosenfeld, *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Duke University Press 1994) 247.

[54] Preuss, 'Patterns of Constitutional Evolution and Change in Eastern Europe' (n34).

[55] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146-188, 150.

[56] Brian Fitzgerald, 'Software as Discourse? A Constitutionalism for Information Society' (1999*) 24(3) Alternative Law Journal* 144–149; Paul Berman,'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 *University of Colorado Law Review* 1263–1310; Nicolas Suzor, Nicolas, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) *Social Media+Society* 4(3) 1–11.

[57] Fitzgerald, 'Software as Discourse?'(n56); Brian Fitzgerald, 'Software as Discourse? The Challenge for Information Law' (2000)22(2) *European Intellectual Property Review* 47–55.

been argued that constitutionalism is 'a matter of interfacing different layers of governance from local to global levels, building a house with different storeys.'[58]

This latter definitional trend seems preferable, because it enhances the protection of human rights by ensuring that all institutions, locally and internationally, have a governance role to play on issues of balancing power relations and human rights. As the debate on constitutional protection of ESR rages on, the control of private power is important on issues of ESR, against the backdrop that unchecked private power can be used to subdue the realisation of ESR. As Liebenberg argues, private power can be a source of ESR deprivation in the sense that socio-economic resources needed for their fulfilment are usually distributed via private bodies like the family and the markets.[59] If these private bodies are not subject to control, then there may be no way that ESR would be fully realised.

The international dimension of constitutionalism is helped by the growing interdependence of States and their declining regulatory capacity[60] and, perhaps, the subjecting of such capacity to international and supranational legal regimes and governance structures. With particular reference to fundamental rights and peace, the domestic legal and governance structures no longer have exclusive control as, according to Biaggini, there has been a 'partial outsourcing'[61] of these functions from the domestic domain to the regional and international domains. For example, the overarching impact of the International Covenant of Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 is far reaching on what steps nation-states are expected to take in the protection of human rights within their domestic levels.

[58] Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (27) 264.
[59] Sandra Liebenberg, *Socioeconomic Rights Adjudication under a Transformative Constitution* (Juta & Company Ltd, 2010).
[60] Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27)269.
[61] Biaggini, (n48)454.

Thus, it has been argued that global constitutionalism 'is an attempt…to reshape constitutionalism for the global stage'[62]. This reshaping will no doubt unsettle the domestic idea of constitutionalism but whether it would meet the ideal situation is another issue to be determined.

According to Walker, there are six salient features of an ideal constitutionalism, viz: the development of an explicit constitutional discourse and consciousness, a claim to foundational legal authority or sovereignty, the demarcation of a sphere of competences, the existence of an internal organ charged with interpretative independence, the existence of the rights and duties of citizens and the specification of terms of representation of the citizens in the polity.[63] Taken as a whole, these features will ensure that each arm of government in a given polity knows its delineated area of competence; it will also ensure that the judicial and quasi-judicial bodies play their role effectively.

The international/regional conception of constitution and constitutionalism which Pernice[64] calls 'multilevel constitutionalism' seems attractive in this era of globalisation. It would help States to be inter-dependent on one another in the conceptualisation and protection of human rights. Put in other words, the meaning and scope of human rights should not be left for only the domestic legal system to determine. Rather, the international human rights instruments should interactively be engaged with a view to unravelling the contents of such rights. Such an interactive and integrated international legal order in which the exercise of control over the political decision-making process would only be possible in a system where national, regional and international constitutional orders complement each other.[65]

---

[62] O'Donoghue & Houghton, 'Can Global Constitutionalisation be Feminist?' (n21).
[63] Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional* (Hart Publishing, 2001) 31.
[64] Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 37 *Common Market Law Review* 703-750.
[65] De Wet, 'The International Constitutional Order' (n3)53.

Understood in that sense, a constitutionalisation of international law is not a hegemonic but a deliberative project. It offers different grades of inclusion and requires a continuous discourse within and in between the various regimes.[66] That is, all governance structures or levels should collaborate in a scheme that could lead to a substantially agreeable mechanism for rights protection.

4.6 Global Constitutionalisation and the challenge of Sovereignty

Although the concept of shared sovereignty is often used to refer to the process of sharing governmental powers between the Federation and the federating states within a domestic legal system,[67] Gusy has however rightly argued that there is nothing inhibiting the extension of the concept to the realm of international or supranational governance levels.[68]

Thus, shared sovereignty can be used to unstiffen the 'zero sum- i.e., you either have it or you do not'[69] conception of (absolute) traditional notion of sovereignty. This shared sovereignty as envisaged by the structuralist school of thought[70] will serve the need of realising ESR, in the sense that nation-states would not be seen as condemning the intervention by international bodies and agencies on ESR as a violation of state sovereignty. Rather, they would welcome such intervention as a cooperative and integrative international approach. This (re)conception of shared sovereignty would promote transnational identity through what Breton refers to as 'pragmatic solidarities'[71] among the nation-states, thereby furthering a transnational collaboration for the realisation of ESR. Such international 'higher' level of governance will

[66] Walter, 'International Law' (n23) 214.
[67] See Alexander Hamilton, James Madison and John Jay, *The Federalist Papers,* 1969 Paper No. 33, 198.
[68] C. Gusy, 'Demokraticdefizite postnationaler Gemeinschaften unter Berucksichtigung der Europaischen Union' in H. Brunkhorst and M. Kettner (eds) Glosaliserung und Democratie, Wirtschaft, Recht. Medien 2000, 131, cited in Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27)305.
[69] Kanishka Jayasuriya, 'Globalisation, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' (1999) 6 *Indian Journal of Global Legal Studies* 425.
[70]Jayasuriya, ibid; Neil MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State', in Richard Bellamy & Dario Castiglione (eds) *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell,1996) 141.
[71] Raymond Breton, 'Identification in Transnational Political Communities' in K Knop, et al (eds), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World (*UBS Press, 1995) 41.

essentially foster a communicative process which will bring about a continuing rapprochement of the different levels of governance.[72]

Several reasons have been advanced for the supremacy of the international, supranational or transnational governance level over national level. First, such supremacy leads to better coordination and coherence in dealing with transnational affairs, second, it helps both the transnational governance level and the lower levels to function effectively in that the 'whole cannot exist unless the constitutive parts subordinate their interests to those of the whole',[73] and the third reason is that the participation and consent of the domestic governance level in the transnational governance level activities confer some legitimacy on the latter to assert supremacy.[74]

Nevertheless, it is pertinent to state that the ultimate determinant of which between national or international constitutional regimes have precedence should be the domestic constitution. For instance, although the Constitutions of Russia[75] and Nigeria[76] give domesticated international law norms precedence over domestic statutes other than the Constitution itself, internal workings of the legal system suggest that domestic laws are being prioritised as first port of call on a given legal matter. Thus, as Peters puts it, '[t]he supremacy of international law is real only if a municipal court can review a domestic act for its compatibility with international law'

[72] Anne Peters, Elemente einer Theorie der Verfassung Europas, 2001, 214, cited in Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism'(n29) 309.

[73] G. Pescatore, 'Aspect Judiciaries de l' acquis communautaire' (1981) RTDE 17 617, cited in Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n29)307.

[74] Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27)309.

[75] Art. 79 Russian Constitution 1993. See also the decision of the Supreme Court of the Russian Federation (plenum), decision No 5 of 10 October 2003 on the application by ordinary courts of the universally recognised principles and norms of international law and the international treaties of the Russian Federation, (2004) 25 HRLJ 108–11, paras 1 and 8 which affirmed the superiority of international law over Russian domestic statutes.

[76] Section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 and the decision of the Supreme Court of Nigeria in *Abacha & ors v Fawehinmi* (2000) 6 NWLR 228 where it was held that a domesticated regional treaty (the African Charter on Human and Peoples Right) and by extension international treaties have priority over domestic statutes except the Constitution.

and that '[i]f no judicial review is available, any constitutional clause granting superiority of international law over the national constitution is basically a dead letter.'[77]

However, the point can be made that, under the traditional absolute sovereignty regime, the current practice of governance network at the international level, which sees national and international law, public and private law connecting,[78] does not give much choice to nation-states. Accordingly, Walter contends that even where States are theoretically given freedom to or not to participate in treaty making and execution, the current practice in many instances is that no much choice is really given, given that the price for staying away could be costly.[79] This domination of global constitutionalism over domestic constitutionalism accounts for Peters' argument that 'If global regulation with regard to global problems functions successfully, national regulation is no longer needed or may even be counterproductive.'[80] However, it is argued that global regulation cannot address every conceivable problem, whether globally or nationally. It is further argued that both global governance and domestic governance should synergise rather than one dominating the other. There are some advantages inherent in the network of governance levels, both for ESR and as a matter of general human rights protection.

First, it could signal the beginning of giving voices to NGOs and individuals who work for the realisation of human rights, because these individuals and organisations can draw on international support and pressures to drive human rights protection. Governance, unlike government, means 'the activity not only of state institutions, but also that of private entities; economy, Non-Governmental Organizations (NGOs) or hybrid private-public institutions which pursue objectives in the common interest'.[81] With the growing recognition of NGOs and

[77] Peters, 'The Globalisation of State Constitutions' (n22) 270.
[78] AM Slaughter, *A New World Order* (Princeton UP, 2004); A Fischer-Lescano & G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan JIL* 999.
[79] Walter, 'International Law' (n23)199.
[80] Peters, 'The Globalisation of State Constitutions' (n22) 257.
[81] Ibid 252.

other non-state actors as subjects of international law, their influence may just be another value in the push for ESR realisation. This is particularly possible against the backdrop that legal globalization is characterized by the diversification of law-making processes, law implementation mechanisms and an intensification of the participation of nonstate actors.[82]

Second, it has been suggested that a major advantage that an international constitutionalisation or multilevel governance structure can provide is the informal cooperation between national and international courts.[83] The cooperation is termed informal because no rules mandate a court to borrow from another jurisdiction in taking a decision, neither is any comparative approach mandatory at the moment.[84] That notwithstanding, there is evidence from the European Community, to the United States of America[85] that many national and regional courts now take a comparative approach by drawing on foreign laws and cases that advance human rights protection.[86] This informal cooperation is capable of being formalised and same should be formalised at the global level.

Relating the above discussion to Nigeria, although the nation operates a dualist system, it may find this informal cooperation useful in the realisation of ESR. A cursory examination of the Nigerian Constitution suggests that there is a need for review. Section 12 of the Constitution expressly provides that ratified international treaties are not binding on Nigeria unless and until they have been domesticated into law by Nigeria's National Assembly. It is argued that this section should be deleted or amended in a way that will make ratified treaties directly applicable and binding in Nigeria. Although a recent constitution amendment in Nigeria through the Third Alteration Act made a salutary move in this direction, it was not extensive

---

[82] Karsten Nowrot, 'Global Governance and International Law' in Christian Tietje, *etal* (eds), Beiträge zum Transnationalen Wirtschaftsrecht 33 (Halle-Wittenberg: Institut für Wirtschaftsrecht, Martin-Luther-Universität, 2004) cited in Peters, 'The Globalisation of State Constitutions' (n22).

[83] Walter, 'International Law' (n23)200.

[84] Ibid.

[85] See *Lawrence and Garner v Texas* 539 US (2003) a case which turned on the legality of sodomy and in which the court referred to an earlier decision in Bowers which referred to a 'world community' view on death penalty for offences committed by mentally retarded offenders.

[86] M Slaughter, 'Judicial Globalization' (2000) 40 *Virginia JIL* 1103,1117.

enough. Section 254(C)(1)(f)and (h) of the Third Alteration Act[87] confer on the National Industrial Court of Nigeria(NICN) the constitutional power to directly apply and enforce International Labour Organisation(ILO) Conventions or International Best practices and Labour Standards, whether or not they have been domesticated by the National Assembly.

Thus, unlike the manner Nigerian employers were hitherto dismissing their employees with a simple 'your services are no longer required' letter, the NICN recently held in the case of *Aloysius v. Diamond Bank Plc*[88] that dismissal or termination letter that states no reason for termination violates ILO's International Labour Convention and Standards, notwithstanding that the Convention and Standards have not been domesticated. Further, the same court has relied on ILO's Conventions, which Nigeria has ratified, to hold that 'your services are no longer required' line of dismissal as demonstrative of redundancy which should make the affected employee to be entitled to redundancy payment.[89] Obviously, this is a commendable departure from the past and same accords with global best practices. It would be a positive step forward if the National Assembly can also see to the realisation of ESR in Nigeria by constitution amendment to the effect that international conventions such as the ICESCR which Nigeria has ratified are now directly applicable in Nigeria.

However, the above proposal on direct application of international treaties to domestic situation is not without challenges. In the developing States like Nigeria, one major challenge with that monist approach to international law would be the risk of giving the executive branch excessive powers which may be subject to abuse. In other words, the executive branch could simply ratify any conceivable treaty that advances their political interest, without assessing the value it adds to the public interest. In the absence of a checkmating legislative role in the treaty process, the

[87] The Constitution of the Federal Republic of Nigeria (Third Alteration) Act No 3 2010.
[88] (2015) 58 N.L.L.R (Pt.199) 92; *Afolayan Aderonke v. Skye Bank*, unreported Suit No. NICN/IB/08/2015 delivered on May 17, 2017.
[89] *Ubong Asangausung v. Mainstreet Bank Registrars Limited*, delivered on December 12, 2019, available at http://judgment.nicn.gov.ng/pdf.php?case_id=1905 (accessed on 16 January 2020).

domestic governance level could be beset with an avalanche of treaties with their concomitant biting economic and policy implications.

To avoid this situation, the three branches of the federal government should collaborate and interact in the treaty process. That is, the executive should retain their powers of treaty making while the legislature could continue to scrutinise and domesticate such treaties. However, it has been suggested that the third arm, being the court, should be imbued with power to instruct legislators to properly implement (or domesticate)the agreement or treaty within a certain period of time, failing which the court will order a direct effect or application of such treaties.[90] This approach draws on the strengths of monism and dualism from a perspective of legitimate multi-layer governance.[91] While it is assumed that this multi-institutional approach will bring about a better thought out result, it is argued that before the court gives such instructions to the legislators, there should be some conversation to assess the desirability and quality of the treaty entered into by the executive. Such a treaty should be seen, manifestly, as promoting the general interest rather than personal, tribal or sectional interest of the makers.

Another problem associated with the multilevel governance network structure is that it lacks hierarchy and hierarchy is necessary for an effective implementation of international governance structure.[92] The absence of hierarchy of laws and structures may arguably work against, rather than advance the protection of individual rights in the sense that there would be no firmly defined institutionalised mechanisms of judicial control of State and international powers. This point reiterates the need for a side-by-side existence of domestic and global constitutionalisation instead of supplanting one with another. Since the public power that State organs, exercise is necessary for the activation of exercise of international power by international governance levels, it is necessary to establish limitation of that power and the

[90] Cottier & Hertig, 'The Prospects of 21st Century Constitutionalism' (n27) 311.

[91] Ibid 312.

[92] Walter, 'International Law in a Process of Constitutionalization' (n23) 201.

major way to do that is through domestic constitution which could strengthen global constitutionalisation.[93] Put differently, domestic constitutions should mirror international norms on ESR as far as possible.

An allied problem is whether States would willingly accept any limitation to their powers. As Simma argues:

> Perusing the list of parties to the major human rights treaties, any alert observer must wonder how many of these States have decided to join this great enterprise more for symbolic reasons than motivated by the desire to conform their domestic laws and practices to internationally agreed upon human rights standards and to subject themselves to international scrutiny.[94]

Thus, States which are bent on frustrating a multilevel human rights governance structure can easily circumvent or even manipulate the treaty monitoring process of international and regional human rights bodies, just to ensure that their domestic structure holds sway within their jurisdictions.[95] However, the gains of using international or multilevel cooperation and structure to drive the realisation of ESR are not something to be wished away.

4.7. **The Duty to Cooperate**

The duty to cooperate is a controversial duty. States often perceive any international cooperation and assistance that they render to other States and those States' citizens as a matter of moral, rather than legal obligation. However, as argued in this chapter, article 2(1) and other several articles of the ICESCR point to the fact that international cooperation is a legal duty. As Salomon argues, 'this philanthropic intuition [of developed States] notwithstanding, there are good reasons to suggest that the duties certain States owe to the world's poor go beyond the realm of charity to include obligations as a matter of international law'.[96] As this thesis discusses below, there are normative

---

[93] Ibid 202.
[94] B Simma, 'Reservations to Human Rights Treaties—Some Recent Developments' in G Hafner, *etal* (eds) *Liber Amicorum -Prof. Seidl -Hochenveldern in honour of his 80th Birthday* (Kluwer, 1998) 659.
[95] S Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System needing Reform' in P Alston and J Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 130.
[96] Margot E. Salomon, 'Is There a Legal Duty to Address World Poverty?' (2012) RSCAS Policy Papers (RSCAS PP 2012/03) 9.

and functional justifications for the duty to cooperate internationally in the realisation of ESR. In this era of globalisation, it is argued that 'international cooperation for the protection and promotion of human rights is a precondition for any effective action on world poverty'.[97] The compact nature of today's problems makes a global response to poverty anywhere essential.

There is currently some difficulty in pinning down the precise contours of the duty of States to cooperate internationally, in the realisation of ESR.[98] Despite the seeming imprecise nature of the duty to cooperate, it is argued that the duty indeed exists as far as realising ESR is concerned. As Pribytkova argues, 'international human rights law considers poverty to be a denial of human rights and acknowledges shared global obligations to alleviate poverty and realize socioeconomic rights indispensable for leading a decent live universally'.[99]

The duty to cooperation internationally to realise ESR creates institutional and interactional obligations, obligations of conduct and result, and obligations of relational and distribution justice.[100] In the context of this thesis, while the institutional and interaction obligations require States and global actors to organise global order and relate with the individuals in a way that would realise the individuals' ESR, the obligations of conduct and result require States and global actors to internationally cooperate and assist needy States to realise the ESR of their people, or that States should cooperate by a deliberate creation and maintenance of a just and sustainable global institutional scheme that would lead to the minimum decent life for all people, no matter where they are.[101] The obligations of relational justice and distributive justice demand that States and global actors treat individuals equally by fairly allocating resources or social goods that would lead to the ESR of all people wherever they may be.

---

[97] Margot E. Salomon, *Global Responsibility for Human Rights* (OUP,2007) 64.
[98] Margot E Salomon, 'How to Keep Promises: Making Sense of the Duty Among Multiple States to Fulfil Socio-Economic Rights in the World' in Andre Nollkaemper & Dov Jacobs(eds) *Distribution of Responsibilities in International Law* (CUP,2015) 366.
[99] Elena Pribytkova, 'Global Obligations for Sustainable Development: Harmonizing the 2030 Agenda for Sustainable Development and International Human Rights Law' (2021) 41(1) *U.Pa.Int'l L*. 1031, 1034-1035.
[100] Ibid.
[101] Ibid 136.

The duty to cooperate internationally became a major talking point after the Second World War, following the commitment in the Charter of the UN to fashion a global system that promotes social justice, human rights and a stable international order.[102] Globalisation has further highlighted the need to cooperate internationally. Thus, Salomon argues that 'the harms of globalisation and its attendant institutions reinforce the current significance of obligations of international assistance and cooperation to the ends of socio-economic justice. The forces of globalisation compel the cosmopolitan ethic that animates these obligations today'.[103] This duty to cooperate internationally to realise ESR is not just horizontal among equal and sovereign States, nor is it simply vertical among different layers of actors, but it is also a diagonal obligation of global actors, such as multinational corporations and international NGOs such as Amnesty International, towards individuals across the globe.[104] The primary goal of international cooperation in the realm of ESR realisation is the practical fulfilment of ESR of the human being, wherever they might be. It is safe to agree with Dimitrijevic that '…all ideologies competing for human minds and broad support have a chance only if they show that they aim to the liberation, self-attainment and fulfilment of the human being in a just society…'.[105]

However, there is a question around whether a State can be held liable for breach of the duty to cooperate where there is no evidence of a causal link between the State's action (or inaction) and the material or ESR deprivation that individuals in another State have suffered. On this, Salomon argues that there are two clearly defined legal dimensions to the duty to cooperate. The first dimension relates to a State's duty to internationally cooperate by addressing the consequences of its acts and omissions which have extraterritorial adverse effect on ESR enjoyment by people

[102] Salomon, *Global Responsibility*(n97) 66-67.
[103] Salomon, 'How to Keep Promises' (n98).
[104] Elena Pribytova, 'What Global Human Rights Obligations Do We Have? (2020) 20 CHI J. INT'L LAW 384, 407-412.
[105] V Dimitrijevic, 'A Natural or Moral Basis for International Law' in A Grahl-Madsen & J Toman (eds) *The Spirit of Uppsala, Proceedings of the Joint UNITAR-Uppsala University Seminar on International Law and Organization for a New Word Order* (Walter de Gruyter, 1984) 383, 395.

outside the State.[106] For example, if a State does anything that causes air or land pollution in another State thereby affecting the rights to health and adequate standard of living of citizens of that other State, the State would be required to internationally cooperate to remedy the situation.[107]

The second dimension to the duty to cooperate is that every rich State owes, simply by virtue of being a State, a duty to proactively realise ESR globally(whether or not it contributes to the ESR deprivation).[108] Thus, while a State's duty to cooperate is predominantly territorial in nature, 'the recognition under international law of a State's prescriptive authority to act beyond its borders is based on its obligation to advance human rights in the world'.[109] Further to the foregoing, it can be concluded that there are nascent steps in developing the obligation to cooperate outside of causal circumstances.[110]

In addition, there is a question around the extent to which a State is required to cooperate internationally to realise ESR abroad. CESCR has observed that each State should contribute to this task of international cooperation to the maximum of its capacities, that is, economic, technical, technological and influence/power capacities. This suggests that there are differentiated duties to cooperate internationally in the realm of ESR realisation, depending on the resources available to a State and the costs of deploying those resources to meet ESR needs abroad.[111] However, this does not mean that a State should use its capacities or resources to meet the ESR needs of its people to a maximum level before fulfilling its ESR extraterritorial obligations. Ooms and Hammonds have argued that once a State has realised ESR domestically to the minimum essential level, it must at

[106] Margot E Salomon, 'Is There a Legal Duty to Address World Poverty?' (2012) RSCAS Policy Papers (RSCAS PP 2012/03) 2.
[107] See Principle 8(a) of the Maastricht Principles.
[108] Salomon, 'Is there a Legal Duty' (n106) 3.
[109] Ibid.
[110] Salomon, *Global Responsibility* (n97) 64.
[111] L Wenar, 'Responsibility and Severe Poverty' in T.W. Pogge (ed) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP/UNESCO, 2007) 255, 265.

that point turn to its ESR extraterritorial obligation and realise ESR abroad to the same minimum essential level before it can justifiably aim to realise ESR to a maximum level domestically.[112]

While this Ooms and Hammonds' approach has the potential to promote an even ESR realisation at both domestic and global levels, it is argued that it is not a perfect approach. The minimum domestic realisation criterion may not serve a useful purpose where a State has the resources but deliberately fails to realise ESR of its people domestically. In the face of such a deliberate failure, the Ooms and Hammonds' approach would end up arming the defaulting States with a justification whereby they could simply argue that 'we have not fulfilled our ESR obligations domestically, so we do not owe people abroad a duty to fulfil their ESR extraterritorially'. Such a position would attenuate the very essence of international cooperation as a useful tool for addressing global poverty.

To address this situation, Salomon's approach appears more appealing. According to Salomon, a State is duty-bound to realise ESR extraterritorially, even where it has not realised ESR domestically, provided that there is an objectively established evidence that it has the requisite resources to realise those rights domestically and extraterritorially.[113] Put differently, a 'state that has not fulfilled the minimum essential levels of socio-economic rights at home might nonetheless be required to comply with its obligations to people elsewhere if, by objective criteria, it can be said to possess adequate resources'.[114] It behoves the State to provide justification for not realising ESR at home and abroad, despite the resources available to it.[115]

Furthermore, it is pertinent to unravel what the duty to cooperate internationally entails. Although developed States may be required to transfer financial resources to developing States for the realisation of ESR in the latter as part of the duty to cooperate, the duty is more expansive than provision of financial resources. As Pribytova suggests, it includes the creation and maintenance of

[112] G Ooms and R Hammonds, 'Taking Up Daniels' Challenge: The Case for Global Health Justice' (2010) 12(1) *HHR* 29, 36.
[113]Margot E Salomon, 'How to Keep Promises'(n98).

[114] Ibid
[115] Ibid.

an enabling environment (through pro-ESR laws and policies on investments, trade and politics) that would foster a global ESR realisation.[116] It includes the deployment of power and influence, and the decoupling of the Bretton Woods Institutions so as to create a fair voting mechanism that would ensure that decisions taken at such institutions enhance rather than impede ESR realisation of all people at all places. It also includes dissemination of scientific knowledge and coordination of global food production.[117]

The duty to cooperate demands the emplacement of a global system that ensures the existence of a fair political economy, participatory multilateral trading investment and financial systems that are conducive for the elimination of poverty everywhere.[118] Thus, it has been observed that international cooperation and assistance targeted at addressing poverty demands that 'all bilateral and multilateral decision-making processes are fair, equitable and transparent, and sensitive to the needs of developing States…'.[119]

It therefore behoves developed States to ensure that those who represent them in international institutional systems, such as the Bretton Wood Institutions, perfectly understand, respect and perform the extraterritorial human rights obligations of those they represent, both in decision making and implementation.[120] As Sands and Klein argue, 'members of international organisations may be responsible not for the consequences of the latter's illegal acts, but for their own participation in that act, or for their failure to ensure that the power that they have transferred… have been exercised in conformity with their own international obligations'.[121] Thus, the developed States

[116] Pribytkova 'Global Obligations for Sustainable Development' (n99).
[117] Meghan Campbell, 'Cooperating to Continuously Improve' to improve' in Jessie Hohmann & Beth Goldblatt(eds) *The Right to Continuous Improvement of Living Conditions* (Hart 2021) 41.
[118] P Hunt, M Nowak & S Osmani, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (OHCHR, 2005) para 102.
[119] Ibid, 105.
[120] Ibid., 104.
[121] P Sands and P Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, 2001) 525. Also see *Waite and Kennedy v Germany,* ECtHR App no 26083/94, Grand Chamber judgment of 18 February 1999, para 67.

would be held accountable for any of the Bretton Woods institutions' action that attenuate ESR realisation in the developing States.

In addition, in thinking beyond the provision of financial resources, there are a wealth of proposals on what cooperation entails, including the creation of access to markets by the developing countries, and cancellation of developing countries' debts.[122] It could include addressing structural injustices in the global system. As Andressan and Marks note, the duty to cooperate internationally goes beyond human rights-based policies and programmes of multilateral and bilateral agencies and feeds into addressing the structural injustices associated with the international political economy.[123] As argued in this thesis, addressing the structural injustices in the global political economy would go a long way in addressing the ESR of people everywhere. The duty to cooperate could also entail the creation of a global monitoring and evaluation system which assesses the impact of a State's aid and trade on the enjoyment of ESR by people in other States.[124] It requires a State to ensure that its multinational enterprises carry out a macro-level analysis and human rights impact assessment of their commercial activities, with the aim of conforming to the State's extraterritorial human rights obligations.[125]

Having identified some of the contents that the duty to cooperate entails, it should be noted that in the absence of a clearly defined international system of coordination and allocation of global resources to discharge this global duty, it might be problematic to determine which State owes what duty and to whom it is owed exactly. There is therefore a need to fashion a UN-coordinated body that is solely charged with the responsibility of coordinating international cooperation between developed States to developing States, specifically for the realisation of ESR. The needy States

[122] Salomon, *Global Responsibility* (n97) 102.
[123] AB Andressan and SP Marks, 'Conclusions' in BA Andressan and SP Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard University Press, 2006) 304, 307.
[124] A Eide, *reporting on the Right to Adequate Food and to be Free from Hunger* (Sub-Commission, 51st session, 1999) UN Doc E/CN4/Sub2/1999/12, para 131(c).
[125] Salomon, Global Responsibility (n102) 109; O De Schutter, 'Transnational Corporations as Instruments of Development' in P Alston and M Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (OUP,2005) 403, 405-406.

should also have a designated body that is charged with the international coordination and mobilisation of international cooperation and assistance for realising ESR of their people.[126] Hence, both domestic and international institutional reforms are needed to fashion an impactful international cooperation and assistance model in realising ESR. In sum, there is every reason for States to cooperate to realise ESR. In the next section, the thesis considers the justifications for international cooperation.

4.7.1. Justifications for International Cooperation

The project of realising ESR within a given State calls for both national and international efforts. In other words, States have extraterritorial obligation to cooperate and assist other States in realising the ESR needs of residents of the latter states. This is particularly important for developed or rich countries which have a treaty-obligation to cooperate and assist developing or poor countries to realise ESR. As CESCR notes, States-parties are required 'to take the steps necessary to prevent human rights violations abroad'.[127]Apart from the normative and jurisprudential underpinning discussed below, the deployment of international cooperation can also be justified on functional, political and constraining grounds.

Functionally, international cooperation promotes efficiency and effectiveness.[128] Put differently, using international cooperation to realise ESR would reduce transactional costs in that it would make it 'cheaper for governments to get together to negotiate agreements'[129] and implement such agreements -such as the ICESCR- through pooling together of financial, technical and material resources. Although scholars such as Caporaso have offered a contrary

[126] Salomon, 'Is there a Legal Duty' (n106) 6.
[127] CESCR, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24.
[128] Saadia Touval, 'Negotiated Cooperation and its Alternatives' in William Zartman & Saadia Touval (eds) *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge University Press, 2010) 79-80.
[129] Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984) 90; Lisa Martin, 'Interests, Power and Multilateralism' in Charles Lipson & Benjamin J. Cohen (eds) *Theory and Structure in International Political Economy* (MIT Press,1999).

argument that 'the costs of transacting almost certainly increase with an increase in actors',[130] the fact remains that international cooperation would be more efficient and effective than unilateral or isolationist approach to ESR realisation. The coordination and deployment of an internationally framed institutional and legal implementation framework would work better than a fragmented and sometimes *ad hoc* inventions by each State.[131] Further, the interdependence (not mere co-existence) which international cooperation heralds could lead to effectiveness, because it ensures coordination of national policies by an international regime, thereby eliminating state-to-state policy conflict or contradiction.[132]

The political justification for international cooperation is that it 'contributes to international stability and reduces the risk of war, harking back to the notion of reciprocity' , since '[m]any policies pursued by states affect other states – not only foreign and security policies, but also economic, social, environmental, and other matters'.[133] Within the prism of ESR, the performance of rich States' extraterritorial obligation to realise ESR of the people in poor States would enhance world peace. This is especially so with regard to Third World countries, given that some of the conflicts in the world can be traced to ESR deprivation triggered by historical or colonial legacy. There is thus 'a social obligation that states owe to other members of international society, advisable for prudential and practical reasons'[134] to realise ESR through international cooperation and assistance. The glaring truth is that an ESR-triggered crisis in the poor countries would have ripple effects in the rich countries, especially in this era of globalisation. As Pogge notes, 'Reducing severe poverty abroad is not easy, of course,

[130] James A. Caporaso, 'International Relations Theory and Multilateralism' in John Gerard Ruggie (ed) *Multilateralism Matters*: *The Theory and Praxis of an Institutional Form* (Columbia University Press,1993) 61-62.
[131] See Michael Lipson, 'Transaction Costs Estimation and International Regimes' (2004) 6(1) *International Studies Review* 1–20.
[132] Touval, 'Negotiated Cooperation' (n128) 80.
[133] Ibid.
[134] Ibid.

but it is generally much easier than reducing violence abroad'.[135] Such a violent outcome would have a debilitating ripple effect on the global system. The world should discourage such an outcome by adopting an international cooperation model.

The constraining ground for deploying international cooperation is that it prevents rich countries from taking actions without taking the interest of the weak and poor countries into consideration. Put differently, international cooperation 'helps to constrain powerful states. It is a balance of power mechanism. It is not military power against which states balance, but rather egoistic and inconsiderate policies of those who have the capacity to act alone on a wide array of …issues….[136] Hence, since 'great-power actions are likely to have a greater impact on others than unilateral actions by small and weak states',[137] It is imperative that the developed States take some constrained steps to avoid the polycentric effect of their actions. In terms of ESR, the economic and social inequalities between the people of the developed and developing countries depict a serious concern that should be constrained. Thus, the normative and jurisprudential architecture on international cooperation serves as a veritable launchpad to provide 'the weaker states with a voice, with an opportunity to influence the policies of others that affect their interests'.[138]

However, for international cooperation to work effectively, there should be some good faith commitment, on the part of developed countries, to practicalise the textual provisions of international cooperation. In other words, there should be a process or social system of punishment and reward among States, to ensure that States uphold their self-esteem by meeting their treaty obligation, and fairness to ensure that each State is treated deservedly in the

[135] Thomas Pogge, 'Priorities of Global Justice' (January 2001)32(1& 2) *Metaphilosophy (SPECIAL ISSUE: GLOBAL JUSTICE)* 6-24, 4.
[136] Touval, 'Negotiated Cooperation' (n128) 81.
[137] Ibid.
[138] Ibid.

distribution of world's goods.[139] To put it in Ruggie's perspective, international cooperation or multilateralism involves collective security or indivisibility whereby an injury to one is seen as an injury to all, non-discrimination whereby States are treated equally no matter their economic or political status, and diffuse reciprocity whereby States consider issues on a balanced scale rather than through individual State's lenses.[140] The absence of these commitments would make the institutional and legal architecture dead tools. It is not enough to have a negotiated framework like the ICESCR provisions on international cooperation and assistance without a corresponding genuine commitment to real-world realisation of ESR. As Doran asserts, there should be 'the demonstration that what has been negotiated is a success in terms of output or production'.[141] Multilateral cooperation should possess positive elements that are broadly and mutually attractive.[142]

According to Lax and Sebenius, cooperation is driven by certain elements, viz: 'Acquisition', 'effectiveness' and 'efficiency'. While acquisition refers to the desire to obtain an absent value (for example world peace) which cannot be obtained through a State's unilateral action, effectiveness means the need to collaborate with others to emplace that value and efficiency refers to the need to minimise transaction costs associated with obtaining that value. [143] It is argued that, just as in the realm of CPR where most developed States move in unison and financial mobilisation against human rights violation abroad, international cooperation and assistance should be deployed to realise ESR, thereby creating a world with less material deprivations and associated conflicts. However, cooperation is 'not self-implementing; one has

[139] Gretchen Vogel, 'The Evolution of the Golden Rule' (2004) 303 *Science* 1128-1131; Elliot Sober & David Sloan Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behavior* (Harvard University Press, 1998).
[140] John Gerard Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46 *International Organization* 569–574.
[141] Charles Doran, 'The Two Sides of Multilateral Cooperation' in William I. Zartman & Saadia Touval (eds) *International Cooperation: The Extents and Limits of Multilateralism (*Cambridge University Press,2010) 55.
[142] Ibid 58.
[143]David Lax & James Sebenius, *The Manager as Negotiator* (Free Press, 1986).

to work at it…'.[144] Thus, there should be concerted efforts to valorise or operationalise the normative and jurisprudential framework on international cooperation for ESR realisation.

4.8 The Normative and Jurisprudential Framework for International Cooperation and Assistance for ESR Realisation

There are normative and jurisprudential underpinnings which foreground the extraterritorial obligation to cooperate and assist. Below, the thesis analyses the normative and jurisprudential framework that underpin this cooperation.

4.8.1 Normative Underpinning

Several international human rights instruments, including the ICESCR, the UN Charter, and the Universal Declaration of Human Rights (UDHR) make provisions for international cooperation and assistance as a tool for realising ESR.

4.8.1.1 Pre-ICESCR Instruments on International Cooperation

The first instrument that recognised international cooperation as regards ESR was the Covenant of the League of Nations which in Article 23 provides that member-states should take steps to meet certain ESR obligations, both territorially and extra-territorially. Thus, since the coming into force of the Covenant, '…the international community has made state cooperation to fulfil human rights a priority'.[145] Similarly, to take the seriousness of its commitment to international cooperation beyond doubts, the Charter of the United Nations (which succeeded the League of Nations), expressly provides that one of the purposes of the body is 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights…'.[146] Article 55 of the Charter captures it more pointedly when it states that:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and

[144] Zartman & Touval, 'Introduction' (n128) 8.
[145] Daniel Aguirre, 'Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation' (2011) 42 *Cal W Int'l LJ* 123, 139.
[146] Art. 1(3) of the United Nations Charter.

> conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; …

Also, Article 56 of the Charter mandates member-states to 'take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. These provisions are not merely exhortative but binding principles of international law. As Aguirre observes, judicial and scholarly opinions are in agreement that the Charter creates binding human rights obligations for member States.[147] In other words, since the provisions of the UN Charter are 'quasi-constitutional' in nature, they are binding on all States.[148]

However, many political elites still perceive these obligations as mere governmental aspirations incapable of enforcement.[149] Rather than an international assistance and cooperation approach, many States have taken solely isolationist or purely state-centric actions and policies in their attempt to realise ESR. As discussed below, there is a normative ground for creating a legal duty to cooperate internationally. It is quite concerning that ESR challenge or its associated problem, 'including hostilities among major powers, raises the specter of global conflict instead of global cooperation'.[150] As Alston recently notes in the context of the current COVID-19 pandemic, '…multilateralism has been gravely wounded, and with a few exceptions, international solidarity has been conspicuously lacking'.[151] He further states that 'international cooperation and tax reform is necessary, but a crucial first step is

---

[147] Aguirre (n145) 140.

[148] Nigel Rodley 'International Human Rights Law' in Malcolm D. Evans *International Law* (4th ed. Oxford University Press, 2010) 783-820, 788-789.

[149] Josh Curtis & Shane Darcy 'The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation' in David Keane & Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future*, (Edward Elgar Publishing: 2012) available at https://aran.library.nuigalway.ie/bitstream/handle/10379/2185/CURTIS%20AND%20DARCY%20Article%2028%20and%20International%20Coop.pdf?sequence=1&isAllowed=y (accessed on 28 May 2020).

[150] J. Sachs, *Etal* 'The Sustainable Development Goals and COVID-19' *Sustainable Development Report* (Cambridge University Press,2020) 13. Available at https://s3.amazonaws.com/sustainabledevelopment.report/2020/2020_sustainable_development_report.pdf (accessed on 27 July 2020).

[151] Philip Alston, 'The Parlous State of Poverty Eradication: Report of the Special Rapporteur on Extreme Poverty and Human Rights' 9, para. 35 (02 July 2020), available at https://chrgj.org/wp-content/uploads/2020/07/Alston-Poverty-Report-FINAL.pdf (Accessed on 26 July 2020).

transparency'.[152] Yet, as his report observes, 'Following centuries of colonial exploitation, developing countries continue to be net providers of resources to the rest of the world'.[153] While this implied condemnation on lack of international cooperation or solidarity and the need for transparency is commendable, it however does not tease out the obligatory nature of being internationally cooperative from ICESCR context as discussed below.[154] This lack of commitment to an obligatory international cooperation is rather unfortunate and calls for a revisiting, because, the above provisions are not the only instruments that are supportive of an argument for international cooperation model for ESR realisation.

Article 22 of the UDHR clearly provides that 'Everyone… has the right to social security and is entitled to realization, through national effort and international co-operation… of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. These provisions do not only recognise ESR as nationally realisable, but they also envisage inter-dependence of States in realising them. Further, Article 28 of UDHR provides that, 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

In 2000, the then U.N. Secretary-General stated that 'an international and social order is one that promotes the inherent dignity of the human person…and seeks social progress through participatory development and by promoting equality and non-discrimination in a peaceful, interdependent and accountable world'.[155] The above Article 28 of UDHR thus brings to the fore the need for States to cooperate with one another to ensure the full realisation of everyone's ESR. Falk hails Article 28 as a 'normative promise' which engenders 'a

[152] Ibid para. 71.
[153] Ibid, para. 67.
[154] However, see para. 58 of the above Alston's report ('Continued large-scale global poverty is incompatible with the human right to an adequate standard of living, and the right to life alongside the right to live in dignity').
[155] U.N. Secretary-General, 'Globalization and its Impact on the Full Enjoyment of All Human Rights: Preliminary Report of the Secretary-General', 7, U.N. Doc. A/55/342 (Aug. 31, 2000) 2.

commitment to establish a just world order premised on humane governance'.[156] No doubt, compliance with the provisions of this Article and other human rights instruments will lay a solid foundation for the realisation of ESR in a globalised world.[157]

The same Article 28 of UDHR also demonstrates the importance of national and international contexts and their effect on human rights protection.[158] In other words, it shows that an event in one nation (for example the current COVID-19 pandemic which debuted in China) can have ripple effect on the entire globe. This situation thus demonstrates the desirability of pooling national and international resources to meet the ESR needs of the world's poor. It also calls for a move away from States' independence and co-existence to States' interdependence and cooperation,[159] to frontally confront ESR challenges. It has been suggested that 'our global order is to be assessed, developed and reformed principally by reference to its relative impact on human rights [ESR] fulfilment'.[160] In addition, Article 28, which was inserted into the UDHR as an attempt to resolve the age-long debate on the dichotomy between ESR and CPR in terms of justiciability,[161] imposes human rights duties not only on States but also on the international community, individuals and Non-Governmental Organisations (NGOs).[162]

---

[156] Richard Falk, *On Humane Governance: Toward a New Global Politics* (Pennsylvania University Press, 1995), cited in Victor Sidel, 'The Right to a Just and Peaceful Social and International Order' (1998) 3 *Health & Hum. Rts.* 110, 111.

[157] Victor Sidel, 'The Right to a Just and Peaceful Social and International Order' (1998) 3 *Health & Hum. Rts.* 110, 111.

[158] Curtis & Darcy 'The Right to a Social and International Order' (n149) 1.

[159] See generally Wolfgang Friedmann, *The Changing Structure of International Law*, (Columbia University Press, 1964).

[160] Salomon, *Global Responsibility for Human Rights* (97*)* 75.

[161] See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House, 2001) 116 who argues that the Article sought to 'contextualize the relationship between the new rights and the old: a provision for the right to a social and political order in which all the Declaration's rights and freedoms could be realized. This proposal met with general approval and eventually became the Declaration's Article 28, but it did not resolve the impasse'.

[162] General Assembly Resolution 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999.

Although it is generally non-binding, the UDHR is highly regarded for its normative influence on human rights protection,[163] as it has greatly influenced the normative calibration of other rights instruments, and some of its provisions have also passed into customary international law. For example, it has been argued that the right to development is 'based upon Article 28 of the Universal Declaration of Human Rights'.[164] However, as laudable as the foregoing provisions are, the UDHR was 'only the first step in the elaboration of the human rights programme [and international cooperation]…followed by a covenant on human rights…'[165] Thus, the ICESCR has boldly valorised and concretised the treaty obligation nature of international cooperation and assistance.

4.8.1.2 ICESCR Normative Framework on International Cooperation and Assistance

Apart from the quasi-constitutional character of the UN Charter and the provisions of the UDHR, the ICESCR also contains several provisions that recognise the place of international cooperation in the realisation of ESR. First, Article 2(1) of the ICESCR provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, 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.

This article 2 is a further enhancement on the international cooperation mechanism that was kickstarted by the already examined instruments. As Curtis and Darcy note, the insertion of this international cooperation scheme into the ICESCR expresses a treaty obligation which Article 28 inspired but was unable to couch in binding terms.[166] The incorporation was deliberate because, as revealed, Egypt and India were vocal about international cooperation

[163] Philip Oamen, 'Realisation of the Right to Health in Nigeria: The Prospects of a Dialogic Approach' (August 13, 2020),available at SSRN: https://ssrn.com/abstract=3673480 or http://dx.doi.org/10.2139/ssrn.3673480 (accessed on 20 August 2020).
[164]Salomon *Global Responsibility* (n97) 50. Also see Asbjørn Eide, 'Human Rights Requirements to Social and Economic Development' (1996) 21(1) *Food Policy* 23, 25.
[165] Yearbook of the United Nations, 1948-49, V. Social, Humanitarian and Cultural Questions, 527.
[166] Curtis & Darcy 'The Right to a Social and International Order' (n149) 12.

during the drafting of ICESCR. According to the representatives of the two countries, whose views were firmly opposed by representatives from the Western States, there was a need for international cooperation because, 'the available resources of the smallest [poorest] countries, even if utilised to the maximum, would be insufficient, [and] as a result, those countries would have to fall back on international cooperation', and that international cooperation was 'a point which was of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights'.[167] This position confirms Curtis and Darcy's argument that,

> …international cooperation can be characterised as a means of addressing the power differential between wealthy influential states and those states unable to realise the rights of their people. The concept of cooperation would then be fundamentally linked to this power differential, and obligations to cooperate would be based on any given State's relative power to affect the realisation of rights in any other given State.[168]

Put in another way, the need for international cooperation is informed by the stark reality on ground that some States are more powerful, richer and more domineering than other, thus the need to prevent the use of the international order to suffocate less endowed States. From a TWAIL perspective, this is particularly important against the backdrop of developed countries' historical expropriation of the developing countries through slave trade and colonialism.

Furthermore, Article 11(1) of ICESCR provides that States shall take steps while 'recognizing … the essential importance of international cooperation based on free consent', towards the realisation of the right to food. Similarly, Article 15(4) obliges States, while taking steps to realise the right to cultural life, to 'recognize the benefits to be derived from the encouragement and development of international contacts and co-operation….' Lastly on ICESCR, Article 23

[167] Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, (Intersentia, 2006) 85; Roland Burke, 'Some Rights Are More Equal than Others: The Third World and the Transformation of Economic and Social Rights (2014) 3 *Humanity Journal* 427-448, 439.
[168] Curtis & Darcy 'The Right to a Social and International Order' (n149)13.

provides that States shall recognise the importance of international action, methods, meetings, assistance and consultation in the realisation of ESR.[169]

To demonstrate the importance of international cooperation in ESR realisation, Craven reveals that, while article 2(1) of the ICCPR refers to a State's obligations to respect and ensure the rights of all individuals 'within its territory and subject to its jurisdiction', Article 2(1) of the ICESCR on the other hand omits this phrase.[170] In other words, while the provisions of Article 2(1) of the ICCPR expressly recognises the CPR obligations of States as essentially territorial in nature, Article 2(1) of the ICESCR expressly introduces an extraterritorial dimension to States' obligations regarding ESR realisation. Although Coomans has argued that ESR obligations are essentially national or domestic in nature,[171] and Skogly and Gibney contend that 'A person's home state is certainly the first place to look to in terms of the protection of economic rights – and all other human rights as well'[172], it is argued that the foregoing provisions of ICESCR on international cooperation show that all along, the intention behind ICESCR is equally international, extraterritorial and transnational. Thus, '…international assistance and cooperation was included as one of the means of realization of the right in the … general obligation provisions of the Covenant'.[173]

[169] Similarly, the Guidelines on Treaty-Specific Documents to be submitted by States Parties under Articles16 and17 ICESCR,24 March 2009, E/C.12/2008/2 also mandates States to indicate international cooperation and assistance rendered or given during a particular review period.

[170] Matthew Craven, 'The Violence of Dispossession: Extra-territoriality and Economic, Social and Cultural Rights' in Mashood Baderin & Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 75.

[171]Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011)11(1) *Human Rights Law Review* 1-35, 5.

[172] Sigrun I. Skogly & Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007) 267.

[173] Ibid 273.

4.8.2 CESCR Jurisprudence on International Cooperation and Assistance

To evince the value it places on international cooperation, the CESCR has, over the years, developed a rich jurisprudence on the essentiality of international cooperation and assistance towards the realisation of ESR. Below is a panoramic overview of this jurisprudence.

By General Comment No. 1 which relates to States' ESR monitoring and reporting process, the CESCR notes that 'international assistance and cooperation, as provided for in article 2…may well be required in order to enable some States parties to fulfil the relevant [ESR] obligations'.[174] It further provides that one of the objectives of the monitoring and reporting process is to enable 'the Committee to identify the most appropriate means by which the international community might assist States, in accordance with articles 22 and 23 of the Covenant'.[175] Similarly, General Comment No. 2 which is entitled International Technical Assistance Measures provides, within debt crisis context, that '…international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights, through, inter alia, international cooperation'[176] and that needy States have the opportunity 'to identify in their reports any particular needs they might have for technical assistance or development cooperation'.[177]

The need for international cooperation is also buttressed by CESCR's General Comment No.3(13) & (14), which states that, 'A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ..."'. The CESCR notes that 'the phrase "to the maximum of its available resources" was intended to refer to both the resources existing within a State and those available from the international

[174] CESCR, General Comment No.1: Reporting by States Parties, para.3.
[175] Ibid para.9.
[176] CESCR, General Comment No.2: International Technical Assistance Measures (Art. 22 of the Covenant) para. 9.
[177] Ibid para.10.

community through international cooperation and assistance' The CESCR then goes further to affirm that international cooperation for the realisation of ESR 'is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard'.[178]

Moreover, on the right to adequate housing, CESCR General Comment No. 4 notes with concern that, 'traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements…'. It however highlights that Article 11(1) of ICESCR mandates State Parties to recognise 'the essential importance of international cooperation' and thus urges that States should, 'when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect…'.[179] General Comment No. 5 also captures the value of international cooperation with respect to the realisation of the ESR of persons with disabilities when it states that '…international cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfil their obligations under the Covenant'.[180] Similarly, as regards older persons, General Comment No. 6 requires that international cooperation be 'expanded in the context of the strategies for reaching the global target on ageing…' and that 'international cooperation in accordance with articles 22 and 23 of the Covenant may be a particularly important way of enabling some developing countries to fulfil their obligations under the Covenant'.[181]

In addition, General Comment No. 8 provides that, when an international sanction is imposed on a given country, the external entity which is responsible for the country during the sanction,

[178] CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), paras. 13 & 14.
[179] CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), para. 19. Also see CESCR, General Comment No. 7: The Right to Adequate Housing (art. 11.1 of the Covenant): Forced Evictions.
[180] CESCR, General Comment No.5: Persons with Disabilities, para. 13.
[181] CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, paras 7 & 18.

'has an obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical" in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country'.[182] Also, as regards a plan of action to effectuate the right to (primary) education, while emphasising that a State cannot use a lack of resources as an excuse to escape its obligation, the CESCR highlights the importance of international cooperation and assistance. Thus, General Comment No. 11 states that '…the reference to "international assistance and cooperation" in article 2.1 and to "international action" in article 23 of the Covenant are of particular relevance in this situation', and that where 'a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist'. [183] Furthermore, the CESCR notes that coordinated efforts for the realisation of the right to education should be maintained and that the relevant UN agencies such as UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, and the International Monetary Fund 'should enhance their cooperation for the implementation of the right to education at the national level, …building on their respective expertise'.[184] It further mandates that '…the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis'.[185]

Regarding the right to adequate food, General Comment No.12 makes elaborate provisions for international cooperation, perhaps because of the essential nature of food. For example,

[182] CESCR, General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, paras -8-14.
[183] CESCR, General Comment 11: Plans of Action for Primary Education (Art. 14 of the Covenant), para. 9. See also para. 11.
[184] CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant), para. 60. See also para 56 of the General Comment.
[185] Ibid.

paragraph 36 of the General Comment indicates that, '…states parties should recognize the essential role of international co-operation and comply with their commitment to take joint and separate action to achieve the full realisation of the right to adequate food'[186] and that '[i]n implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required'. The paragraph further provides that '[s]tates parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end'.[187] Paragraph 37 of the same General Comment also requires that, 'States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries'. Paragraph 38 goes further to state that, 'States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons…'. The international financial institutions are not left out in this international cooperation role, because '…the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with debt crisis…'.[188]

Additionally, the right to health is also expansively covered by the CESCR jurisprudence on international cooperation. Hence General Comment 14 provides that '…States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health'. [189] It further

[186] CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11), para. 36.
[187] Ibid.
[188] Ibid, para. 41.
[189] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para. 39.

provides that '…States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries'.[190] In addition, in times of emergency, 'States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons'.[191] The States are also forbidden by the General Comment, from imposing embargoes on medical supplies and equipment to another State, as a political or economic weapon.[192]

Pertaining to the right to water, the General Comment No. 15 provides that Articles 2(1), 11(1) and 23 of ICESCR require that States Parties 'recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water'.[193] Accordingly, States have an extraterritorial obligation to respect the enjoyment of the right in other countries and 'International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries'.[194] Further, States should ensure that there are no embargoes on water supply as a political or economic pressure,[195] neither should they allow their citizens and companies to violate the right to water in other countries.[196] States also have a positive international obligation regarding this right as they are expected to '…facilitate realization of the right to water in other countries, for example through provision of water resources,

[190] Ibid.
[191] Ibid para. 40.
[192] Ibid para. 41.
[193] General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) para. 30.
[194] Ibid para. 31.
[195] Ibid para. 32.
[196] Ibid para. 33.

financial and technical assistance, and provide the necessary aid when required'.[197] Further, 'International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards...*The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard'.*[198]

With regard to the right to benefit from the protection of the moral and material interests from scientific, literary or artistic production which is protected by Article 15 of the ICESCR, General Comment No. 17 also provides for international cooperation. Thus, States should recognise the essential role of international cooperation for achieving 'the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions,' and should 'comply with their commitment to take joint and separate action to that effect. International cultural and scientific cooperation should be carried out in the common interest of all peoples'.[199] The CESCR further notes that by Articles 55 and 56 of the Charter of the UN, international cooperation for development and thus for the realisation of ESR 'is an obligation of all States parties and, in particular, of States which are in a position to assist'.[200]

Additionally, international cooperation also applies to the right to work. Hence, in the spirit of Article 56 of the Charter of the United Nations and specific provisions of the Covenant (arts. 2.1, 6, 22 and 23), 'States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to work'.[201] Compliance with this international obligation requires States to 'to promote the right to work in other countries as well as in bilateral and multilateral

[197] Ibid para 34.
[198] Ibid para 34.
[199] CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant) para. 36.
[200] Ibid para. 37.
[201] CESCR General Comment 18: The Right to Work (Art. 6 of the Covenant) para. 29.

negotiations.[202] Further, States that are members of international financial institutions like the International Monetary Fund, the World Bank and regional development banks, 'should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions'.[203]

Relatedly, the right to just and favourable conditions of work is to be protected through international cooperation. According to General Comment 23, 'All States must take steps individually and through international assistance and cooperation, especially economic and technical, with a view to achieving progressively the full realization of the right to just and favourable conditions of work.[204] This is particularly incumbent upon those States which are in a position to assist others, because 'International assistance and cooperation is a means of transferring knowledge and technology and a tool for States to maximize available resources for the full realization of Covenant rights'.[205]

However, international cooperation is not given as a matter of course but must be sought. Hence, 'When a State party is not in a position to meet its obligations to realize the right to just and favourable conditions of work, it must seek international assistance'.[206] When a needy State makes such a request, 'Economically developed States parties have a special responsibility for, and interest in, assisting developing countries' by providing sustainable, culturally appropriate and human rights-compliant assistance.[207] States also have extraterritorial obligation to respect the right to just and favourable conditions in their commercial transactions in other countries,[208] their companies operating overseas should

[202] Ibid para.30.
[203] Ibid.
[204] CESCR, General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (article 7 of the Covenant) para. 66.
[205] Ibid.
[206] Ibid para. 67.
[207] Ibid. Also see para. 68.
[208] Ibid para. 69.

comply with domestic labour laws of the host country,[209] and they should bear this right in mind when drafting and executing international agreements and lending policies.[210]

International cooperation is equally relevant to the right to social security. It is imperative to state that States are to '…recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of … the right to social security'.[211] They can comply with this extraterritorial obligation by 'by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries',[212] or 'by preventing their own citizens and national entities from violating this right in other countries',[213] and by facilitating 'the realization of the right to social security in other countries, for example through provision of economic and technical assistance'[214] depending on their available resources. Thus, 'Economically developed States parties have a special responsibility for and interest in assisting the developing countries in this regard'.[215]

A similar international obligation exists in favour of the right to take part in cultural life. According to General Comment No. 21, 'States parties should recognize and promote the essential role of international cooperation in the achievement of …the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect'.[216] The CESCR further recalls in the General Comment that international cooperation for development and for the realisation of ESR including the right to take part in cultural life, 'is an obligation of States parties, especially of those States that are in a position to provide

[209] Ibid.
[210] Ibid. paras. 71-72.
[211] CESCR, General Comment No. 19: The Right to Social Security (art. 9 of the Covenant) para. 52.
[212] Ibid para. 53.
[213] Ibid para. 54.
[214] Ibid para. 55.
[215] Ibid.
[216] CESCR General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant) para. 56.

assistance'.[217] So, all international transactions and agreements are expected to take this right into account, with a view to promoting it in favour of everyone.[218]

In addition, the right to sexual and reproductive health is also covered by international cooperation obligation. Thus, 'International cooperation and assistance are key elements of article 2(1) of the Covenant and are crucial for the realization of the right to sexual and reproductive health' and that '… States… that cannot realize the right to sexual and reproductive health due to a lack of resources must seek international cooperation and assistance'.[219] Further, the CESCR observes that 'States that are in a position to do so must respond to such requests in good faith and in accordance with the international commitment of contributing at a minimum 0.7 per cent of their gross national income for international cooperation and assistance'.[220] States are thus enjoined to ensure that their 'bilateral, regional and international agreements dealing with intellectual property or trade and economic exchange do not impede access to medicines, diagnostics or related technologies required for prevention or treatment of HIV/AIDS or other diseases related to sexual and reproductive health'.[221] The CESCR also warns that donor States must not use international cooperation and assistance as a bait to push privatization or emplace 'legal, procedural, practical or social barriers' to the enjoyment of the right in the recipient State.[222]

In 2017, the CESCR recognised the role of international cooperation vis-à-vis the extraterritorial obligation of States regarding their overseas business activities. Accordingly, General Comment No. 24 of that year states that the '…extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed

[217] Ibid para. 58.
[218] Ibid paras 57 & 59.
[219] CESCR General Comment No. 22 (2016): The right to sexual and reproductive health (article 12 of the Covenant) para 50.
[220] Ibid. See also para. 37.
[221] Ibid para. 51.
[222] Ibid para. 52. Also see para. 53.

without any restriction linked to territory or jurisdiction'.[223] Consequently, it provides that 'Moreover, article 2(1) refers to international assistance and cooperation as a means of fulfilling economic, social and cultural rights,'[224] and that 'It would be contradictory to such a reference to allow a State to remain passive where an actor domiciled in its territory and/or …under its control or authority, harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused'.[225] In addition to a State's obligation to respect by refraining from direct or indirect interference with ESR realisations overseas,[226] and the obligation to protect by preventing and redressing violation of ESR due to their business activities overseas,[227] they also have an extraterritorial obligation to fulfil ESR by engaging in international cooperation. Such cooperation should 'contribute to creating an international environment that enables the fulfilment of the Covenant rights' through the State's national legislation and policies as well as diplomatic and foreign relations.[228] It is also important to note that, in this regard, 'Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress'.[229] Hence, the CESCR calls for 'any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases'. [230]

Lastly, the latest General Comment No. 25 of 2020, which relates to the right to participate in and to enjoy the benefits of scientific progress as recognised in Article 15, provides that '…international cooperation should be enhanced… as these technologies need global

[223] CESCR General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 27.
[224] Ibid.
[225] Ibid.
[226] Ibid para. 29.
[227] Ibid para. 30.
[228] Ibid paras. 36-37.
[229] Ibid para. 35.
[230] Ibid.

regulations in order to be effectively managed'. The CESCR further affirms that 'Fragmented national responses to these transnational technologies would create governance gaps detrimental to the enjoyment of economic, social and cultural rights and would perpetuate technological divides and economic disparities'.[231] The justification for international cooperation in this regard include the need to foster scientific progress by encouraging scientists to cooperate internationally,[232] the existence of deep international disparities among countries in science and technology,[233] the need to share the benefits of scientific progress extraterritorially,[234] the need to arrest transnational challenges such as climate change and nuclear weapons[235], and the urgency to tackle pandemics in the form of viruses and pathogens which 'do not respect borders'.[236]

Finally, according to the Maastricht Principles, 'As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States'.[237]

The foregoing overview on international cooperation clearly supports the argument made in this chapter that there should be some form of synergy or cooperation between the global governance structure and the domestic legal order for the realisation of ESR. The current unilateralism and the protectionism that is being experienced across the globe is a clear violation of the provisions of ICESCR and other human rights instruments.

[231] CESCR, General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), para. 74.
[232] Ibid para. 78.
[233] Ibid para. 79.
[234] Ibid para. 80.
[235] Ibid para. 81.
[236] Ibid para. 82.
[237] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013), para 33.

4.9 The Optional Protocol Remedial Mechanism and International Cooperation

Despite the foregoing normative and jurisprudential flavour on international cooperation, there is a worrying concern in Article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol). The Optional Protocol is the main international instrument which provides for the procedural mechanisms by which individuals or group of individuals may seek redress for ESR violations. However, the Protocol states that 'Communications may be submitted by or on behalf of individuals or groups of individuals**,** under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party'.[238]

A reading of the above provisions would suggest that the individual complaint procedure introduced under the Optional Protocol can only be activated by individuals against a State-Party in whose jurisdiction they reside. In other words, Article 2 of the Optional Protocol does not seem to admit of an extraterritorial communication from a person in one State against another State in which they do not reside. It is argued that this provision of the Optional Protocol apparently contradicts the provision of the ICESCR and CESCR jurisprudence, which, as seen above, maintain a deliberate and consistent States' extraterritorial obligation position for ESR realisation. As Courtis and Sepulveda have argued, 'There was thus no justification to include a jurisdictional limitation in the text of the Optional Protocol, when the ICESCR does not make any reference to such limitations and, on the contrary, makes clear that ESC rights obligations have international (and thus extra-territorial) dimensions.[239]

Although the CESCR jurisprudence suggests that a State's jurisdiction extends to any territory over which it has geographical, functional or personal jurisdiction,[240] or over which it has an

[238] Art. 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted in 2008 but came into effect on 05 May 2013).
[239] Christian Courtis & Magdalena Sepulveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 54, 57.
[240] Concluding Observations on the Netherlands U.N. Doc. E/1999/22 para. 194.

effective control,[241] this jurisprudential position may prove problematic in the long run. It would be problematic in the sense that, by the current framing of the Optional Protocol, petitioners coming under the individual complaint procedure 'will bear the burden of proof in establishing that a violation occurring outside a State's territory occurs de jure within the State's jurisdiction'.[242] It is thus suggested that the Optional Protocol be reviewed to remove this jurisdictional bottleneck, so as to make the procedure less cumbersome and more effective. As Skogly and Gibney argue,

> Individuals enjoy human rights not because they are members of a particular society, but by simple virtue of their humanity…The entire premise behind all international human rights instruments is that Swedes are not only concerned with the wellbeing of other Swedes, and Nigerians are not solely concerned with the wellbeing of other Nigerians, and so on. Rather, in becoming a party to an international human rights treaty, the Nigerian government and the Nigerian people are proclaiming (legally and otherwise) that they are also concerned with the wellbeing of Swedes, as well as nationals of all other countries.[243]

Thus, the provisions of the Optional Protocol should not operate to attenuate the human rights of individuals acquired by virtue of their humanity, neither should it remove the international human rights obligation of States to realise ESR.[244] This position, of course, does not detract from the fact that there may be prioritisation of obligations. As has been observed, it would be unrealistic to expect France to pay an equal level of human rights attention to its citizens and those of Nepal.[245] But the point being made here is that it would be a violation of international human right obligations for a State to pay all attention to its citizens' human rights protection and zero attention to the human rights of other States' citizens. In other words, while it is true that the 'primary obligation to implement the right to food [and all ESR] rests with

[241] Concluding Observations on Israel U.N. Doc. E/1999/22 para. 232.
[242] Courtis & Sepulveda, 'Are Extra-Territorial Obligations Reviewable (n239) 58.
[243] Skogly & Gibney 'Economic Rights' (n172) 273.
[244] See *López Burgos v Uruguay*, UN A/36/40, 06 June 1979 para 12.3 where the UN Human Rights Committee held, regarding the ICCPRs, that '…it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'. Although this decision is unrelated to ICESCR, it is argued that its principle is persuasive in the present discussion.
[245] Skogly & Gibney 'Economic Rights' (n172), 277.

the home Government, so another Government cannot be obliged to guarantee complete implementation of the right to food in other countries, but only to assist',[246] it is argued that, at least, a secondary obligation to realise ESR rests on other States from ICESCR perspective. This suggests that 'international obligations are not a substitute for national responsibility. International action, however, is indispensable for addressing obstacles that are beyond the capacity of national governments to tackle on their own'.[247]

Thus, richer States indeed have and should fulfil an international obligation to support (not to exclusively provide) ESR fulfilment in poorer States. It is argued that the provisions on international cooperation and assistance should not be 'a forgotten right, forgotten concept, a laudable but unrealised aim…'[248], but that nations and international community should strive towards making ESR practically impactful in an era such as this pandemic period. The pandemic has highlighted the need for international cooperation because, it has demonstrated the interconnectedness of States. The fact that States have become networked has the potential of making a problem or crisis in one State (for example China) to have a systemic and paralysing effects on all other States. The pandemic has shown that a global response is the best shot at a problem, otherwise the problem might become global and uncontrollable. For the realisation of ESR, as with the current *war* against the COVID-19 pandemic, international cooperation and collaboration is the way forward. This position has been confirmed by the UN Report on Sustainable Development Goals (SDGs) and COVID-19 which indicates that, *'*... stronger international and multisectoral partnerships can support mitigation strategies by sharing best practices, and help prevent future disruptive events. The health, economic, and social crises call for increased international collaboration and solidarity to support the most

[246] UN Commission on Human Rights, 'The Right to Food: Report by the Special Rapporteur on the Right to Food, Jean Ziegler, U.N. Doc. E/CN.4/2005/47.
[247] Sakiko Fukuda-Parr, 'International Obligations for Economic and Social Rights: The Case of the Millennium Development Goal Eight' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007) 293.
[248] Curtis and Darcy (n149) 2.

vulnerable countries',[249] and that 'Strengthening multilateralism and global partnership are more important than ever'.[250]

However, it bears mentioning that, for ESR extraterritorial realisation, a needy State is expected to request international assistance or cooperation[251] which request must be considered in good faith by the States to which it is addressed.[252] This extraterritorial obligation to render cooperation and assistance encompasses a State's acts and omissions within or beyond its territory which have effect on the enjoyment of ESR outside of that State's territory, and it is an obligation of a global character set out in the UN Charter and other human rights instruments.[253] As Lehavi notes, 'the choice between globalization and localism is far from binary, meaning that states, organizations, corporations, and individuals may endorse some types of cross-border institutional frameworks while shunning others'[254]. Thus, as Berman observes, 'we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us'.[255]

[249] See Sachs. 'The Sustainable Development Goals and COVID-19' (n155) vii.
[250] United Nation, 'The Sustainable Development Goals Report 2020', 58. Available at https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf (accessed on 27 July 2020).
[251] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013), para 34.
[252] Ibid para 35.
[253] Ibid, para. 8.
[254] Amnon Lehavi, 'Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property' (2015) 15(2) *Chicago Journal of International Law* 452, 461.
[255]Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, 2012) 10. See also Ralf Michaels, 'Global Legal Pluralism' (2009) 5 *Ann. Rev. L & Soc. Sci*. 243.

4.10 Realising the Third World People's ESR through International Cooperation

As can be gleaned from the above normative and jurisprudential architecture on international cooperation and assistance, international cooperation is inevitable if the ESR needs of the people of the developing countries must be met. As Pribytkova notes as regards human centricity, 'dignity and human rights belong to a person as a member of a human society and not because of their special political connection with any state (membership in humanity)'.[256] Thus, while some ESR concepts such as minimum core may arguably not be universally applicable, States' duty to realise ESR should have a universal outlook. Even at that, as Hannum argues, 'universality does not, cannot, and should not be equated with uniformity in a world of diverse societies, differing government structures, and sovereign states'.[257] Thus, in terms of realising ESR, economically rich countries should not expect economically poor countries to render the same level of international cooperation based on a universally fixed metric. As argued above, the richer countries should internationally cooperate to realise ESR in the poorer countries based on their differential capacities or resources as objectively determined. It is argued that States should adopt a globally cooperative model that would ensure that the ESR needs of those in rich and poor countries are not compromised by virtue of geographical or jurisdictional location and limitations. Such cooperation may come in different shades, but such shades should resonate the UN Secretary-General's recent statement within the context of COVID-19 that,

> Whole societies must come together. Every country must step up with public, private and civic sectors collaborating from the outset. But on their own, national-level actions will not match the global scale and complexity of the crisis. This moment demands coordinated, decisive, and innovative policy action from the world's leading economies, and maximum financial and technical support for the poorest and most vulnerable people and countries, who will be the hardest hit. Given the world's extensive economic and social

[256] Pribytkova 'What Global Human Rights Obligations Do We Have?' (n104), 392.

[257] Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge University Press, 2019) 98.

> interrelationships and trade— we are only as strong as the weakest health system.[258]

Thus, from a TWAIL point of view, support or assistance that comes from international cooperation should not be seen as a matter of handout or charity but as a matter of entitlement to social arrangements, whereby poorer countries assert a right to be helped because they lack the necessary resources, and because of the nature of international policies and the systemic lop-sidedness in global governance.[259] This is because 'historical injustices, including genocide, colonialism, and slavery, play a role in explaining' the poverty of the poor nations and wealth of the rich ones'.[260] The effective deployment of international cooperation and assistance would help to address the socioeconomic inequalities that exist between the Global North and the Global South.

Further, a TWAIL perspective questions the continued zeal and commitment of developed countries to the promotion of CPR, rather than ESR, through international cooperation and assistance. It is not uncommon for developed countries to lift the veil of sovereignty from a developing country under the guise of promoting the democratic space and civil liberties (as opposed to ESR) of the latter's citizens. For example, in Fidel Castro's Cuba, the United States sought 'a shift toward a more democratic government and toward more market oriented policies' leading to the US trade embargo on Cuba.[261] Similarly, the US had at different times either facilitated or encouraged military intervention and regime change in Haiti and Iraq in a supposed bid to promote CPR, despite concerns from others that 'that military intervention was just a short-term fix that would do damage to the principle of state sovereignty…without

[258] United Nations Secretary-General, 'Shared Responsibility, Global Solidarity: Responding to the Socio-economic Impacts of Covid-19' (March 2020) 1, available at https://www.un.org/sites/un2.un.org/files/sg_report_socio-economic_impact_of_covid19.pdf (accessed on 08 October 2020).
[259] Fukuda-Parr, 'International Obligations for Economic and Social Rights' (n247) 293-294.
[260] Pogge, 'Priorities of Global Justice' (n135)14-15.
[261] Doran, 'The Two Sides of Multilateral Cooperation' (n141) 55.

producing any long-term benefits...'.[262] As Gavison observes 'exceptions to the principle of sovereignty' have always been centred on violations of CPR. Thus:

> While the world seeks to give humanitarian and medical relief to areas of the world stricken by starvation, there has been no attempt to use force to change the system of government that leads to such catastrophes. This is as it should be. But international law has also been very slow to adjust to the fact that in the SE [social and economic] realm, the implications of globalization are immense, seriously affecting the power of states to relieve the SE concerns of their populations.[263]

The irony in all of these is that the relevant instrument (ICCPR) which provides for CPR does not expressly provide for international cooperation and assistance. It is therefore paradoxically puzzling that developed countries have neglected their specific treaty-obligation under ICESCR to cooperate internationally with and assist developing countries to realise ESR of their populations, but they (developed countries) are quick to realise the CPR of those people by pushing for regime change in their countries. This pro-CPR attitude continues to fuel the 'unequal structures and processes that manifest themselves in the growing north-south divide'.[264] This attitude tends to suggest that the developed States are more interested in intervention in the area of CPR protection than ESR realisation (which will commit them to huge resource distributions) because they can easily hide under the cloak of CPR protection to perpetuate their imperialist tendencies by effecting regime change in the affected State. While not advocating a cessation of international interventions in the area of CPR, it is argued that the prioritisation of CPR over ESR in terms of international cooperation should stop.[265] The root causes of some of the CPR-implicated problems cannot be divorced from the deprivation of ESR needs of people. Thus, because international law cannot be separated 'from the

[262] Ibid 50-54.
[263] Ruth Gavison, 'On the Relationship between Civil and Political Rights, and Social and Economic Rights', in Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner (eds.) *The Globalization of Human Rights* (United Nations Publications, 2003)49.
[264] B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3-27, 1.4.
[265] Ralph Wilde, 'Socioeconomic Rights, Extraterritorially' in Eyal Benvenisti & Georg Nolte (eds) *Community Interests Across International Law* (OUP, 2018) 6.

production, organization and re-organization of our material world, as well as from our political, economic and social realities',[266] the reasonable thing to do is to deploy international cooperation, as specifically embedded in the ICESCR and CESCR jurisprudence to realise ESR.

Therefore, as noted above, there are ways to internationally cooperate with and assist developing countries to realise ESR. First, developed States can cooperate with developing States by reconsidering their position on issues of trade, development cooperation, participation in international institutions and security cooperation issues.[267] The policies and practices in these areas should be framed or reframed in such a way that would give developing countries voice, instead of their present beggarly posture.

Second, the World Bank and other international creditor banks should continue to either completely cancel outstanding indebtedness regarding bad credit facilities that were advanced to poor countries or substantially reduce the interests on those loans even after the repayment of the principal sums have been suspended. These institutions should also ensure that a State does not undermine its compliance with its ICESCR obligations when dealing with them as regards credit facilities.[268] Against the backdrop of the present COVID-19 global crisis, the World Bank and other global lenders have a duty to 'pay greater attention to the protection of the right to food [and all ESR] in their lending policies and credit agreements and in international measures to deal with the debt crisis'.[269] Hence, powerful and rich nations should cooperate by 'using their voting powers in international financial institutions to alleviate the financial burden of developing countries…'.[270] Although Coomans argues, as regards

[266] Luis Eslava, 'The Materiality of International Law: Violence, History and Joe Sacco's the Great War' (2017) 5 *London Rev. Int'l L.* 49.
[267] Skogly, *Beyond National Borders* (n167) 189-201. Also see Skogly & Gibney, 'Economic Rights' (n172) 268.
[268] Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict', 46 available at: https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf (accessed on 19 October 2020).
[269] CESCR's General Comment 12 (n163), para. 41.
[270] Ibid, para 21.

international loans, that States cannot be held responsible for their voting pattern because they lack control over the recipient State,[271] it is argued that States, however, have, at the very least, a moral responsibility to ensure that poor nations do not get emasculated through debt burdens, which will invariably affect ESR realisation in their jurisdictions. In addition, there is a need to reform investment law that prioritises business interests of some multinationals over and above the ESR of the nationals of their host nations.[272] Such a reform will cooperatively serve as a preventive measure against the violation of the already suppressed rights in poor host communities which usually suffer environmental and other human rights abuse from foreign corporations.[273] As Skogly and Gibney observe, international cooperation does not only speak to positive obligation (to provide ESR facilities) but also it relates to negative obligations (to refrain from actions that will adversely affect the enjoyment of ESR).[274] Thus, there should be an extraterritorial obligation of States to prevent multinational corporations, which are under their control, from violating ESR of members of the host countries.[275]

Third, this pandemic period, which has gravely affected the right to health and other ESR, is the time to share and cooperate nationally and internationally in terms of scientific research sharing and knowledge generation, because 'Pandemics are a crucial example of the need for scientific international cooperation to face transnational threats. Virus and other pathogens do not respect borders'.[276] It is thus important that 'mandatory worldwide sharing of all …knowledge, data and technologies with a pool of… licenses freely available to all countries…. to make full use of agreed safeguards and flexibilities in the WTO Doha

[271] Coomans 'The Extraterritorial Scope' (n171) 25-26.
[272] Luke Eric Peterson, 'Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-State Arbitration' (2009) *Rights and Democracy 44-45.*
[273] See, for example, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria,* African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).
[274] Skogly & Gibney 'Economic Rights' (n172) 278-279.
[275]Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, paras 16-19. Also see Coomans 'The Extraterritorial Scope' (n171), 29-33.
[276] CESCR, 'Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Right' (06 April 2020) para 23.

Declaration on the TRIPS Agreement and Public Health to protect access to medicines for all'[277] is assured in this period, and beyond. As the CESCR notes,

> The COVID-19 pandemic is a global crisis, which highlights the crucial importance of international assistance and cooperation, a core principle enshrined in the Covenant. Such international assistance and cooperation include the sharing of research, medical equipment and supplies, and best practices in combating the virus; coordinated action to reduce the economic and social impacts of the crisis; and joint endeavours by all States to ensure an effective, equitable economic recovery. The needs of vulnerable and disadvantaged groups as well as fragile countries, including least developed countries, countries in conflict and post-conflict situations, should be at the centre of such international endeavours.[278]

Fourth, as a long-term goal, the international community should think of decoupling the inequality inherent in the power relations among States in virtually all the respective international bodies. Salomon rightly asserts that 'the independence and autonomy formally afforded states as sovereign equals under international law does not endow them with functional equality in the shaping or enforcement of the rules of the game,' because 'Disparities in size, population, and particularly, wealth create power differentials between and among states that mock notions of substantive sovereign equality'.[279] As Pogge makes clear, '…current global institutional arrangements as codified in international law constitute a collective human rights violation of enormous proportions to which most of the world's affluent are making uncompensated contributions'.[280]

Consequently, from a TWAIL standpoint, there is a need to discard the 'savage-victim-savior'[281] rhetoric. There should be a balance of the power relations in such a way as to promote cooperation and equality, as well as eliminate all forms of protectionist practices

---

[277] 'Uniting behind a People's Vaccine against COVID-19' *UNAIDS Feature Story* 14 May 2020 available at https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter (accessed on 31 May 2020).
[278] CESCR, 'Statement on the Coronavirus Disease ' (n276) para. 19.
[279] Margot E Salomon, 'Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism' (2008) 51 *German Yearbook of International Law* 39, 41.
[280] Thomas Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' (2005) 18 *Leiden Journal of International Law* 717–745, 721.
[281] Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201.

imposed by the Global North on the Global South. This is because 'the moral quality, or justice, of any institutional order depends primarily on the extent to which it affords all its participants secure access to the objects of their human rights…'.[282] Thus, international agreements and dealings should be guided by 'the principles of transparency, equality of arms and participation… through mandatory procedural mechanisms and deliberative feedback…'.[283] Further, Coomans suggests that the CESCR could also rely on relevant information, supplied by NGOs, on a given State's compliance with its international cooperation obligation regarding ESR in assessing the State's compliance with its general ESR obligations.[284]

Fifth, another way to effectuate international cooperation is to ensure that a State's duty to render international cooperation is dependent on 'the state's weight and capacity in the world economy; its relative power and influence over the direction of finance, trade, and development; and the degree to which it benefits from the existing distribution of global wealth and resources'.[285] Thus, in this COVID-19 period, international cooperation and assistance should be carried out in such a way that:

> *Each State should contribute to this task to the maximum of its capacities*. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population... *The economically developed States parties have a special responsibility and interest to assist the poorer developing States.*[286]

Of course, as Curtis and Darcy note, there may be a huge resistance to the operationalisation of this international cooperation model by the powerful and wealthy nations.[287] The poor

[282] Pogge, 'Recognized and Violated '(n280) 721-725. Also see Thomas Pogge, 'Severe Poverty as a Human Rights Violation', in Pogge (ed), *Freedom from Poverty as a Human Right* (Oxford University Press and UNESCO,2007) 11.
[283] Curtis & Darcy 'The Right to a Social and International Order'(n149) 16.
[284] Coomans, 'The Extraterritorial Scope' (n171) 4.
[285] Salomon, *Global Responsibility for Human Rights* (n97) 200.
[286] CESCR General Comment No. 14.
[287] Curtis & Darcy 'The Right to a Social and International Order' (n149) 17.

countries' ability to engage in discursive talks to convince the rich nations that it is 'the very design of the economic order, which contributes to the perpetuation of world poverty'[288], or that 'The … historical injustices, including genocide, colonialism, and slavery, play a role in explaining both their [poor nations'] poverty and our [rich nations'] affluence'[289] could make the magic change. The rich countries should also remember that both the poor and rich countries use a single natural resource base, the vast portion of which reside in the poor countries; and that the global economic order supports and exacerbates global economic inequality.[290]

4.11 The Place of Global Legal Culture for ESR Realisation

To make the global order a more efficacious vehicle for realising ESR across the nation-states, there may be a need to create a global legal culture. That is, there should be a legal culture that goes beyond a particular nation-state in the imagination, structuralisation, institutionalisation and operationalisation of ESR at the world level. Legal culture need not go into details of how ESR may be realised on a State-by-State basis. This is because, as Menyhar argues, 'More realizable is the idea of the global legal culture assuming rights and responsibilities without defining them in absolute terms, instead allowing informal, indigenous mixtures of traditions, cultures, and some (mostly procedural) global legal standards'.[291] Although such a global legal culture would face many challenges such as a lack of loyalty from citizens of the different 'denationalised' legal cultures who may still want to flag their national identity,[292] the good news however, is that the global legal culture is not intended to supplant domestic regimes in the implementation drive for ESR. Rather, it would play a complementary role.

---

[288] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2008)1.
[289] Pogge, 'Priorities of Global Justice' (n135) 14-15.
[290] Ibid.
[291] Russell Menyhar,'Changing Identities and Changing Law: Possibilities for a Global Legal Culture' (Summer 2003)10(2) *Indiana Journal of Global Legal Studies* 157-199, 189-190.
[292] Ibid.

Thus, Franck suggests that a global legal culture will bring about 'interactive transactional factions, passionate value-and-policy discourses and emerging public and private transnational networks'.[293] No doubt, organising a global approach would help to enrich the normative and jurisprudential contents of ESR. This thesis leaves the 'how' question on global legal culture in this area of human rights for future research, as it falls outside its scope. However, it is pertinent to state that such an approach is needed and indeed feasible for the purposes of ESR realisation. One way to start building up this approach would be the CESCR's deployment of the 'system of inter-state complaints, and the inquiry procedure under the Optional Protocol to… address issues regarding the failure of a State (or States) to comply with their positive obligations of international cooperation'.[294] Since the Optional Protocol contains no clear provisions that bar States from bringing a petition under the inter-state communication and the inquiry procedure specifically for breach of international cooperation obligations, CESCR should be flexible enough to entertain petitions from developing States seeking to compel the developed States' performance of their duty to cooperate to realise ESR in the developing States.[295] Developing States should also rise up to the challenge by bringing petitions of this nature, thereby enriching CESCR jurisprudence and creating a better legal culture around ESR realisation. It may also help 'to prepare for future denationalization, thereby designing new legal theories and structures of dispute resolution'[296] in the area of ESR realisation. Global legal culture could lead to an implementation template that transcends national laws and norms.

4.12 Protection of ESR through Global Social Rights Constitututionalism

Scholars have written a lot on the value of global constitutionalism generally. However, little or no research has been undertaken on how global constitutionalism can specifically address the issue of non-realisation of ESR. In this section, the thesis argues that it is important to extend the value of global constitutionalism to the realm of ESR realisation through social rights global constitutionalism.

The phrase 'social rights constitutionalism' was used by Brinks, Gauri and Shen when they stated:

> Social rights constitutionalism goes well beyond the textual changes that brought social rights into domestic constitutions around the world. Still, no account of the phenomenon is complete without a look at the remarkable diffusion of social rights into constitutions around the world over the past fifty

[293] Thomas M. Franck, 'Community Based on Autonomy'1997) 36 *Colum. J. Transnat'l L.* 64.
[294] Salomon, 'How to Keep Promises'(n98) 18.
[295] Ibid.
[296] Menyhar, 'Changing Identities and Changing Law' (n291)199.

> or sixty years. Constitutions increasingly include specific provisions regarding economic and social rights, and just as frequently, today, empower courts to enforce these rights, often through expedited proceedings that give the rights special priority and the courts little time to weigh the pros and cons of enforcement.[297]

By the above excerpt and their subsequent argument that, 'What we have called social rights constitutionalism brings these human rights-or a subset of them-into domestic constitutions',[298] the authors suggest that what they meant by social rights constitutionalism is a mechanism that, though it goes beyond merely recognising ESR in the domestic constitutions, would enable courts and other local processes and actors to push for the realisation of ESR. The term does not involve global or international processes and actors, save for global principles. While it is agreeable that localisation, domestication and vernacularisation are of value to ESR realisation, it is argued that an interaction between the localised processes and an internationalised or global constitutionalism would be much more valuable to ESR realisation. In other words, it is argued that realising ESR should not be left for processes and actors of domestic constitutionalism only; actors and processes of global constitutionalism should also have a role to play. So, we need to re-imagine social rights constitutionalism in a way that would integrate international social rights actors, processes and principles into domestic constitutionalism. Apart from the needed cooperation between the various global human rights treaties committees like the Human Rights Committee and the CESCR as suggested by Schrijver,[299] it is argued that the global order needs to touch base with the domestic order to effectuate a better imagination and delivery of ESR.

[297] Daniel M. Brinks, Varun Gauri & Kyle Shen, 'Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular' (2015) 11 *Annual Review of Law and Social Science* 289-308.
[298] Ibid.
[299] Nico Schrijver, 'Fifty Years International Human Rights Covenants: Improving the Global Protection of Human Rights by Bridging the Gap between the two Covenants' (2016) 41(4) *NTMINJCM-Bull. Jrg.* 457-465, 464-465.

4.12.1 Global Interaction with a Domestic Order

To achieve this global social rights constitutionalism, the international institutions such as the UN can ensure that nation-states take steps that would socially and economically empower their constituents. One way of doing this is to encourage all UN bodies to emulate the WTO by building into their practices human rights norms, in this case, ESR norms in all their dealings with States.[300] Such norms should be flexibly and collaboratively, rather than rigidly and confrontationally urged on the States.[301] Such flexibility, just like the margin of appreciation within the European Court of Human Rights setting, would ensure that each State's local circumstances are taken into consideration in the formulation and implementation of ESR. This would not in any way undermine human rights, but it would rather fashion human rights in a somewhat agreeable manner.

Further, States can be encouraged to inculcate ESR norms through inter-state interaction. But the question would be on how such interaction can evolve. Thus, the tripartite mechanisms of coercion, persuasion and acculturation as suggested by Goodman and Jinks, as it relates to human rights generally, are worth considering in this regard.[302]

4.12.1.1 Coercion

By coercion, States subtly force other States to adopt international norms or principles through a carrot and stick method,[303] for example, by mounting (undue) pressure or suspension of rights in terms of economic and social sanctions. It is a mechanism by which States seek to influence another State's behaviour by the amplification of benefits for compliance with norms or accentuation of the consequence of non-compliance through the process of rewards and

[300] Jill I. Goldenziel, 'Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law' (2014) 14(2) *Chicago Journal of International Law* 478.
[301] Ibid.
[302] Ryan Goodman & Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke L.J.* 621, 630-638.
[303] Ibid.

punishments.[304] In order to coerce compliance, naming and shaming may be adopted. According to Roth, a good naming and shaming method would identify a ESR violation, the violator and the remedy sought for the violation.[305]

While coercion may be effective to an extent, there is a need to balance the value of coercing an unwilling State to obey human rights and the risk of completely alienating it for non-compliance, for example through suspension or expulsion. The reason for this, is to avoid a situation of 'public conformity without private acceptance'[306], or to prevent a situation of turning a deviant State into a 'hardened deviant' that would become worse than the pre-suspension or coercion stage. As Hirsh observes:

> …The need to reintegrate violators into the particular international social group (global or regional) suggests that while 'naming and shaming' techniques are often effective in reducing non-compliance in certain spheres, it is important to avoid humiliating or dehumanizing rhetoric that could reduce the likelihood of future reintegration into the international community.[307]

Thus, in a bid to realising global ESR norms at the domestic levels, there should always be an open arm policy to welcome back any deviant State into the international community and the existence of the welcome back option should be clearly made known to such a State right from the outset. Following from this, the emphasis should shift from public compliance that may not necessarily lead to private acceptance to 'attitude change' which Festinger defines as 'public compliance with private acceptance'.[308] A compliance obtained via threat or coercion may stimulate conformity but does not effectuate attitudinal change. Such compliance lasts only for the period that the threat, influence or coercion is in place.[309]

---

[304] Alastair Iain Johnston, 'Treating International Institutions as Social Environments (2001) 45 *Int''l Stud. Q*. 487-494.
[305] Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' (2004)26(1) *Human Rights Quarterly* 63-73.
[306] L. Festinger L., 'An Analysis of Compliant Behavior' in M. Sherif & M.O. Wilson (eds) *Group Relations at the Crossroads* (Harper, 1953) 232-256; L. Festinger., 'A Theory of Cognitive Dissonance' (Row Peterson, 1957).
[307]Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press, 2015) 182.
[308] Festinger 'An Analysis of Compliant Behavior' (n306).
[309] Ibid.

On a related note, Kelman has identified three types of social influence which would help drive Festinger's argument home. These are compliance, identification and internalisation.[310] Although the author discussed these outside ESR context, his explanation of the typology is worth considering and contextualising within the ESR discourse.

Compliance happens where a State obeys ESR norms through the influence or threat from other States because it wants to stand in a favourable position with those other States, not necessarily because it is convinced about the suggested course of action (thereby gaining rewards or avoiding punishment). Identification happens where a State takes on a behavioural disposition on ESR norms, similar to that of other States so as to satisfy some self-defining relationships it has with those States. Internalisation occurs where a State accepts other States' influence on it to obey ESR norms on the basis that the suggested course of action is in line with its value or normative system.[311] It is arguable that an imbibed internalisation would be more efficacious than compliance or identification, for the realisation of ESR norms. The reason for this is that it would reduce the forcefulness in coercion but promote voluntary adoption of the norms. However, these mechanisms are not mutually exclusively but complementary of each other.

4.12.1.2 Persuasion

By persuasion, States encourage others to adopt international principles by revealing the appealing value of such adoption. Persuasion is the actively strategic process of instilling norms into a domestic legal order.[312] One major feature of persuasion, Johnston argues, is that it is not just about 'a process of manipulating exogenous incentives to elicit desired behaviour

[310] Herbert C. Kelman, 'Compliance, Identification, and Internalization: Three Processes of Attitude Change' (1958) *Journal of Conflict Resolution* 51.
[311] Ibid.
[312] Margaret E. Keck & Kathryn Sikkink, 'Activists Beyond Borders: Advocacy Networks in International Politics (Cornell University Press, 1998) 16-25. For a detailed discussion on persuasion, see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press & Clarendon Press, 1995); Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International *Organizations* 887, 894–909; Thomas Risse, '"Let's Argue!": Communicative Action in World Politics',(2000) 54 *International Organizations* 1.

from the other side' but it is essentially aimed at presenting '…argument and deliberation in an effort to change the minds of others'.[313] Put differently, the value of persuasion lies not in 'sweet-talking' the other party into accepting the proposed course of action but in convincing them to such an extent that they would change their orientation or mind-set about the truth or validity of the course of action. Persuasion resonates in the realm of 'soft power' rather than 'hard power'. According to Nye, 'soft power' in this context means 'getting others to want the outcomes that you want'.[314] That is, it 'comes from attraction'[315] from one State to the target State and it 'rests primarily on three sources: its culture (in places where it is attractive to others), its political values (when it lives up to them at home and abroad), and its foreign policies (when they are seen as legitimate and having moral authority)'.[316] It is not just about persuasive abilities but also about possessive attractive features that can lead to acquiescence.[317] Soft power, Nye argues, 'uses a different type of currency (not force, not money) to engender cooperation-an attraction to shared values and the justness and duty of contributing to the achievement of those values'.[318] Further, he argues that '[s]oft-power resources tend to be associated with the co-optive end of the spectrum of behaviour, whereas hard-power resources are usually associated with command behavior'.[319]

Thus, the advantage that soft power has over hard power (coercion) is that the target State naturally and voluntarily gets attracted to and adopts the proposed course of action or norms suggested by the persuading State because of the latter's culture, values and policies.[320] Relating this to ESR norms, it is argued that although soft power is usually used in terms of

[313] Alastair Iain Johnston, 'The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors' in Daniel W. Drezner (ed) *Locating the Proper Authorities: The Interaction of Domestic and International Institutions* (University of Michigan Press, 2002).
[314] Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (Public Affairs, 2004) 5.
[315] Ibid 6.
[316]Ibid 11.
[317] Ibid 6.
[318] Ibid 7.
[319] Ibid.
[320] Ibid.

state relations, it could also apply to international bodies like the CESCR. The CESCR should fashion or continue to fashion ESR norms, values, practices and policies in a non-coercive manner and in such a way that would make them easily attractive for domestic legal systems to implement. With particular reference to international cooperation and assistance, the CESCR should continue to adopt a soft approach that will secure the commitment of developed countries to meet their treaty-obligation to internationally cooperate with and assist developing countries. Such an approach does not in any way attenuate the binding nature of the obligation. Rather, it simply enhances conformity to the obligation, and it is such conformity that would lead to a practical realisation of ESR in developing countries.

4.12.1.3 Acculturation

On its part, acculturation works by States' internalisation of the fact that international norms or principles are logically appropriate, that is, the adoption of the norms is, to use March and Olson's words, through 'logic of appropriateness'.[321] Acculturation means 'the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture' and '…conformity is elicited through a range of socialization processes'.[322]

Through this acculturation process, States as decision-makers 'take in a broader, less direct, set of influences',[323] through pressures to assimilate as may be induced by others or self-induced.[324] Put differently, through acculturation in the form of identifying with a particular State or group of States, some form of cognitive and social pressure would be on the identifying State to conform to the norms of those States in the group, and such pressure comes

[321] See James G. March & Johan P. Olsen, 'The Logic of Appropriateness', ARENA Working Paper 04109, available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2004/wp04_9.pdf (accessed on 02 April 2020); Zachary Elkins, Tom Ginsburg & Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harv Int'l LJ* 61,67.

[322] Goodman & Jinks, 'How to Influence States' (n302) 626 & 631.

[323] Zachary Elkins, Tom Ginsburg & Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harv Int'l LJ* 61, 67.

[324] Goodman & Jinks, 'How to Influence States' (n302) 626.

with subtle socio-psychological costs or benefits for conformity or non-conformity.[325] Although acculturation and persuasion seem similar, it should be noted that the main difference lies in the fact that while 'persuasion involves assessment of the *content* of the message (even if only indirectly); acculturation involves assessment of the *social relations* (the degree of identification) between the target audience and some group'.[326] Thus, the 'acculturated' State does not need to believe or even be persuaded about the content of the acculturation process before it changes its preferences, or interest in line with the norms of the 'acculturating' group. All that is required for it to act is a social relation or interaction between the two.

Further, although acculturation and coercion share some similarities, such as naming and back-patting[327] (cost and benefits) for conforming or not conforming, they are however different. According to Goodman and Jinks, the difference is that while coercion contains social sanction that comes with material cost (e.g., donor aid deprivation), acculturation contains sanctions 'only to the extent that social costs, in and of themselves, influence thought and action'.[328] Thus, acculturation is mainly concerned with social cost (lack of belongingness), rather than material deprivation, in the event of non-conformity with the group's norms. While coercion leads to compliance, persuasion leads to acceptance, but acculturation leads to conformity.[329]

Lastly on acculturation, it is pertinent to note that just like individuals, empirical research has shown that States are subject to social influence from their social environment through the acculturation process.[330] Hence, Hawkins and Humes argue that in this era of globalisation, 'international socialization is more important than domestic politics' in terms of making 'nonconformist states to change their policies to meet the standards of new international

[325] Ibid.
[326] Ibid 643.
[327] Robert B. Cialdini, *Influence: The New Psychology of Modern Persuasion* (Harper Collins Publishers,1985) 23-27.
[328] Goodman & Jinks, 'How to Influence States' (n302) 646.
[329] Ibid 655.
[330] Ibid 647-648.

norms'.[331] Socialisation as used here simply means 'the process by which international norms are internalised and implemented domestically'[332] by States. To further demonstrate the value of international socialisation, Finnemore claims that 'we cannot understand what states want without understanding the international social structure of which they are a part. States are embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world'.[333] Thus, identification with, rather than banishment of noncompliant States will more likely lead to conformity.[334]

4.12.2 Rationalist and Constructivist Approaches to Human Rights Compliance

The foregoing three mechanisms of coercion, persuasion and acculturation could come within the rationalist or constructivist theories of international law and relations.[335] Rationalist scholars refer to rationalism as the application of rational choice theory and they, in this wise, contend that the international order could use its military or economic power to coerce domestic regimes to conform to international human rights norms.[336] The constructivist scholars focus on constructivism in terms of causal processes of socialism through which agents acquire identities and interests, and thus argue that making States to obey human rights norms should ideally come by way of persuasion and socialisation.[337] Whereas the rationalism v constructivism debate is outside the scope of this thesis, it is however pertinent to identify

[331] Darren Hawkins & Melissa Humes, 'Human Rights and Domestic Violence' (2002) 117 *POL. SCI. Q.* 231, 256.
[332] Thomas Risse & Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink (eds)*The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999)5.
[333] Martha Finnemore, *National Interests in International Society* (Cornell University Press, 1996)2.
[334] Goodman & Jinks, 'How to Influence States' (n302) 671.
[335] These theories have been given various labels. For example, Johnston called them economic approaches (contractual institutionalism- wherein States collect and obey norms simply for fear of material sanction) and sociological approaches- whereby States and institutions are seen as environments for social interaction that trigger compliance with norms through psychological, affective and ideological or normative values rather than fear of material sanctions). See Alastair Iain Johnston, 'The Social Effects of International Institutions' (n320).
[336] See James Fearon & Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View' in Walter Carlsnaes *et al* (eds) *Handbook of International Relations* (Sage Publication Ltd, 2002) 52-57.
[337]Ibid.

two major 'take- aways' from the debate which advance the argument for adoption of persuasion and acculturation rather than coercion.

First, rationalism tends towards *homo economicus* whereby a State takes actions which provide the most efficient means of meeting its ends through a 'logic of consequence', while constructivism on the other hand adopts a *homo sociologicus* posture whereby the State acts habitually in line with its (socially recognised) identity, thereby following the 'logic of appropriateness' rather than mere consequence'.[338] Second, while rationalism believes that States comply with human rights norms simply on the basis of usefulness e.g., for fear of punishment or bad consequences, constructivism contextualises norms compliance on the basis of doing the socially recognised right and legitimate thing.[339] In other words, while the former is a 'realist' and self-centred theory of compliance that does not consider whether the norms confer any intrinsic or normative benefits on the actor, the former is a 'non-realist', collective or self-less theory of compliance which perceives norms compliance as the right thing to do, considering the social context and normative values.[340]

Taking it down narrowly to the realisation of ESR international norms at domestic levels, it is arguable that a constructivist approach would be more useful or efficacious. States should not perceive ESR norms as something that must be complied with in order to avoid international sanctions. Rather, they should 'constructivistly' contextualise and internalise the norms as something that would add normative content and dignity to the lives of people. To put it in another way, the respective branches of government in a State should ensure that the State 'intends not merely to proclaim democratic political rights but to commit the… people to achieve a new kind of society in which people actually have the social resources they need

[338] James March & Johan Olsen, 'The Institutional Dynamics of International Political Orders' (1998)52 *International Organizations* 943-969.
[339] Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53 *International Organizations,* 379-408.
[340] Fearon & Wendt, 'Rationalism v. Constructivism' (n336) 59.

meaningfully to exercise their rights'.[341] Such a socially constructed compliance approach would engender a self-enforcing or 'acculturatised' realisation of ESR in the respective States. The point has been made that the 'adoption of structural commitments or official policy goals in human rights does not necessarily entail concrete implementation'.[342] This is particularly so in the African continent where States, such as Nigeria, ratify treaties simply for showmanship and not necessarily because of conviction about the ideals behind the treaties.

The goal of international institutions like CESCR should, therefore, be geared towards making States to internalise international norms rather than merely engaging in cosmetic ratification. However, the point being made here does not mean that ratification or the rationalist or coercive approach should be completely undermined or forsaken. On the contrary, both rationalist and constructivist approaches, ratification and internalisation can be complementary of each other until such a time that the rationalist approach 'catches the fever' of constructivist socialisation.

The danger of completely abandoning one approach for another is that a State may lose the benefits that a mutual application of both approaches confers. Thus, Fearon and Wendt have argued that the two approaches are capable of interacting with each other. For example, where there is rationalist-inhered sanction for non-compliance and that sanction triggers a consistent compliance, chances are that such compliance would be perpetually internalised to become a constructive approach, while the absence of sanction might make a State that has been constructivist in approach to have a rethink in terms of compliance by questioning the essence of its compliance when others do not comply.[343] So, it would serve a useful purpose, for realising ESR, if internationally institutionalised sanctions are complemented by a

[341] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14(1*) South African Journal on Human Rights* 146-188, 153.
[342] Goodman & Jinks, 'How to Influence States' (n302) 651.

[343] Fearon & Wendt, 'Rationalism v. Constructivism' (n336) 59.

constructively designed compliance socialisation. This process obviously turns on the effective operationalisation of the ESR quadruple implementation mechanisms of (constitutional) legal mobilisation, judicial response to the mobilisation, government compliance (or non-compliance?) and follow up, if ESR must truly be domestically realised or vernacularised.[344]

4.13 Conclusion

This chapter has examined the place of global constitutionalisation framed in terms of international cooperation for the realisation of ESR. It has drawn on literature from multiple disciplines to unpack the theoretical underpinnings of key concepts that have been used in the chapter. While it is conceded that the concept of constitutionalisation comes with valuable impact, the chapter has argued for a broader (re)imagination of the concept. Thus, it has made recommendation that domestic and global constitutionalism should not be viewed as two irreconcilable strands. Rather, both should interact with each other with a view to enhancing the domestic realisation of ESR. To achieve this, it has deployed the normative and jurisprudential architecture on international cooperation and assistance as a veritable tool to drive ESR realisation in developing countries.

International or multilateral cooperation and assistance as advocated here should trigger aid that is not laced with 'the effects of proximate (specific) [and selfish] interests' but one that promotes distant (altruistic or general) interests'[345] among the peoples of the world. In other words, the treaty-obligation to internationally cooperate and assist poorer States in realising ESR should not be fashioned in the same self-interest style of bilateral aid allocation but it

[344] Varun Gauri & Daniel M. Brinks, 'Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights' in Varun Gauri & Daniel M. Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) 4.
[345] Jean-Claude Berthélemy, 'Asymmetrical Cooperation in Economic Assistance' in William Zartman & Saadia Touval (eds) *International Cooperation:The Extents and Limits of Multilateralism* (Cambridge University Press, 2010) 208.

should be geared towards real-need and good faith development assistance.[346] While political alliance and commercial interests cannot be completely divorced from multilateral relationships, it is argued that the ESR treaty obligation should be given its needed commitment without much of these extraneous considerations.

Further, it would not be out of place for international institutions to follow a cooperative interaction up with some material incentive in respect of poor States. This position is supported by Hawkins and Humes who contend that 'international organizations and leader states will play a key role in socializing noncompliant states through communicative interaction and material incentives such as grant money to develop programs related to the international norms'.[347] Such incentive can safely be accommodated under the international assistance or cooperation envisaged in the ICESCR and CESCR General Comments already examined above. Even though such opportunity is prone to States' abuse, the international institutions can put mechanisms in place with a view to ensuring that rich States with requisite resources to meet their ESR obligations, in a substantial way, do not abdicate their duties or rely on international grants, and that poor States utilise the resources for the purpose in respect of which the aid was given.

Through this cooperation model, the socioeconomic inequalities between the North and the South would have been reduced, thereby enhancing world peace. To repeat the words of Pogge, 'Reducing severe poverty abroad is not easy, of course, but it is generally much easier than reducing violence abroad'.[348] The reference to violence here is not a suggestive threat. Rather, it is an inevitable outcome waiting to happen, should a wide gap continue to exist between the haves and the have-nots, whether domestically or internationally. Such an outcome would have

[346] Ibid. Also see Craig Burnside & David Dollar, 'Aid, Policies and Growth' (2000) XC 4 *American Economic Review* 847–868.
[347] Hawkins & Humes, 'Human Rights and Domestic Violence' (n331) 248.
[348] Pogge, 'Priorities of Global Justice' (n135) 4.

a debilitating ripple effect on the global system. The world must discourage that by adopting an international cooperation model.

This chapter has also argued that coercion, persuasion and acculturation each has a role to play in emplacing a practical mechanism for ESR realisation. In the next chapter, focus would shift to the judicialisation of ESR.

CHAPTER FIVE

JUDICIALISATION AS A FRAMEWORK FOR THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS

5.1 Introduction

Some scholars[1] have argued that the judiciary has a role to play in the realisation of Economic and Social Rights (ESR). Although their arguments usually take the constitutional design on ESR into context and account, they contend that, rather than prevent a judicial role, a constitutional design could only limit the role. Put in another way, the question on whether a constitution recognises ESR as fundamental rights or mere directive principles would determine the level of judicial involvement in their implementation. While courts in some jurisdictions- such as India-may simply adopt an activist judicial position, courts in other jurisdictions may take a passive or measured role in the implementation of these rights.

However, it is largely agreeable among scholars that there is a growing trend of court's involvement in the realisation of ESR. These days, the courts are seen as a vehicle for social transformation and economic empowerment. The reasons for a rush for this court-triggered transformation include the persistence of wide poverty and social and economic inequalities, the discovery of law and the courts by progressives and their hope that rights-based litigation can produce the social and economic transformation that the political class has not produced, and the complete or gradual process of institutionalising ESR nationally and globally thereby giving the progressives the legal and moral mechanisms to accentuate their legal grievances.[2]

This court-centric rush has, more often, only focused on 'the production phase of [courts'] judgments' thereby creating 'an analytical and practical blind spot: the implementation stage

[1] For example, see Ebenezer Durojaye & Enoch MacDonnell Chilemba 'The Judicialisation of the Right to Adequate Food: A Comparative Study of India and South Africa',(2017) 43(2) *Commonwealth Law Bulletin* 255-275, 264.

[2] Javier A. Couso, 'The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity' in Roberto Gargarella, Pilar Domingo & Theunis Roux (eds), *Courts and Social Transformation in New Democracies*: *An Institutional Voice for the Poor*? (Ashgate Publishing Limited, 2006)71-72.

of [courts'] rulings'.[3] That is, pro-judicialisation literature has not fully engaged with the real-world outcome of ESR judicialisation. There are questions around whether the political branches (fully) implement ESR as directed by the courts, and whether if they do not, courts usually enforce those judgment and by what means or power.

This chapter assesses the judicialisation of ESR and argues for a more nuanced approach to judicialisation. The argument in the chapter is that, although the judiciary has a vital role to play in the ventilation and legal mobilisation for ESR realisation, its direct and indirect impact may not be felt fully in a 'command and control' configuration of ESR judicialisation. In other words, this chapter argues that a confrontational judicial approach is not helpful sometimes nor feasible for a practical realisation of ESR, and therefore not appropriate for developing countries such as Nigeria. It therefore argues for a cooperative or non-confrontational approach as an alternative that may be used to drive ESR realisation in Nigeria. While Brinks and Gauri argue that 'Progressive activists around the world have seized on the judicial enforcement of social and economic rights as a powerful new tool in the politics of social provision,'[4] there is however a need to critically assess the practical dividends that such an embracement of judicialisation has heralded.

Legal, constitutional and judicial recognition of ESR is important but not sufficient to ensure the full realisation of the rights; it needs the rule of law, good governance, accountability, people's participation and inter-branch collaboration.[5] According to McCann, 'judicial proclamations of just sentiments do not automatically translate into just social practices; the courts alone rarely can do much to advance progressive social agendas'.[6] Further, the reaction

[3] César Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015) 8.
[4] Daniel M. Brinks & Valun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (June 2014) 12(2) *Perspectives on Politics* 375-393, 376.
[5] FAO Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Justiciability of the right to food: Information Paper, (FAO Document IGWG RTFG/INF (2004) 10.
[6] Michael W. McCann, 'Reform Litigation on Trial' (Autumn 1992) 17(4) *Law and Social Enquiry* 715-743, 720.

of the political branches to judicial decisions on ESR matters is quite concerning. More often, political branches' reaction to such decisions depends more on the decisions' 'liveability' (the inconvenience for implementing it) than its importance.[7]

Therefore, this thesis argues that the court's impact, whether on a case-by-case basis or on a structural basis, may only be strikingly and fully impactful if it is pursued and accommodated within an inter-institutional or collaborative framework (a framework that recognises the other branches of government as partners in the realisation of ESR) that would lead to realisable remedies. Thus, this thesis canvasses for a collaborative approach from the courts to the other branches and other stakeholders on issues of ESR realisation. Other stakeholders here refer to non-governmental organisations and social movements that play influential roles in social mobilisation. It has been observed that the 'absence of legal aid for…rights litigation in many jurisdictions make social rights adjudication and its follow-up heavily dependent on highly organised and resourced civil society organisations and/or the voluntary efforts of lawyers, communities and social movements'.[8]

Experience has shown that non-compliance with court orders is more common when such orders direct not just the executive but other political and non-political persons to do or undo an act,[9] hence the need to extend this collaborative discussion to many stakeholders, both within the public and private sectors. However, the point should be made that co-opting the private sector does not relieve the States of their primary duty to realise ESR. As has been observed, 'the impunity of powerful actors is rooted in entrenched social networks and social norms'[10], but at the same time, 'Social mobilization capacity determines the success of … the

[7] Bradley C. Canon, 'Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches' in Marc Hertogh & Simon Halliday (eds) Judicial *Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge University Press, 2004) 82.*

[8] Malcolm Langford, 'The Impact of Public Interest Litigation: The Case of Socio-economic Rights (2021)27(3) *Australian Journal of Human Rights* 505-531, 512.

[9] See Alexander Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44(3) *Cornell International Law Journal*, 508.

[10] Ibid 520.

four stages of the legalization of policy— from the initial mobilization and filing of cases, to gaining the support of the courts, to matters of compliance and, ultimately, the close engagement with the implementation process …'.[11]

Hence, a collaborative approach will help to calibrate and resolve the issues around the 'myth of rights' which gives victims of rights violation the assurance that their rights will be judicially affirmed and implemented as if courts' decisions are self-executing forces of social change that exist without political power play among the branches of government.[12] It would also enable the court to bring about more real and transformative change, thereby avoiding a situation where the 'courts act as "fly-paper"' in certain cases.[13] However, the point should be made at this preliminary stage that this thesis does not under-estimate judicial role in ESR realisation.

As the other branches are important, the court too is essential. Nevertheless, inter-branch cooperation or collaboration is needed for a fuller impact. As McCann seems to argue, just as judicial impact is contingent on support or cooperation from other branches, the dependence of those other branches on the courts' cooperation is equally essential.[14] Thus, while not unmindful of Tushnet's[15] strong right approach and weak right approach categorisation, this thesis adopts a collaborative approach which neither suppresses the justiciable nature of ESR nor overly pushes the justiciability to a stage where it becomes practically useless to the rights user. The adopted approach, therefore, seeks to balance the tension that exists between a confrontationally activist judicial regime and an unpardonably docile judicial regime on ESR

[11] Brinks & Gauri (n4) 381.
[12] 1. Stuart Scheingold, *The Politics of Rights* (Yale University Press, 1974), cited in McCann (n6)715.
[13] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991) 341.
[14] McCann (n6) 728.
[15] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008) 228.

realisation. This balance finds expression in a judicially inhered conversational partnership with the political branches on how and when to realise ESR at any given time.

It bears mentioning that Brinks and Gauri have stated that '…comparative politics literature takes too little account of legal processes, and…how those processes actually operate. This literature could benefit from the insights of scholars of law and politics'.[16] The authors further state that, 'By the same token, much of the literature on law… is too innocent of the vast comparative political literature, which provides a more nuanced understanding of the political and institutional context in which legal institutions operate, and could benefit from a more sophisticated reading of that literature'.[17] It is in pursuance of the foregoing that this chapter draws on an array of literature, both from politics and law, to build up arguments in the chapter.

This chapter unfolds in 7 sections. After this introductory section, section 2 unpacks the concept of judicialisation while section 3 examines the conditions for activating judicialization. In section 4, the chapter proceeds to explore the legal framework for judicialising ESR and section 5 examines the metrics for assessing judicial impact on ESR realisation as well as engage in a comparative impact assessment of judicialisation across select legal systems with a narrow aim of demonstrating that a confrontational judicial approach is not always helpful. Section 6 collates the arguments while section 7 concludes the chapter.

5.2 Conceptualising Judicialisation

Judicialisation is one of the ways that ESR literature usually projects as a means of achieving ESR. The concept of judicialisation has consolidated itself as a theoretical and analytical perspective, dating back to the 20th century, and suggesting that the judiciary has a high degree of possibility of influencing the enforcement of rights and the implementation of public

[16] Brinks & Gauri (n4) 381.
[17] Ibid.

policies.[18] Despite being an expression that denotes the idea of inter-penetration between politics and justice, the perspectives of judicialisation are not homogeneous.[19] Thus, it is apposite to examine the concept. However, before that, the point should be noted that judicialisation is a system-wide, not an individual Judge kind of process. As Handberg notes, '…judicialization is not singular deviant judges acting as rogue agents but a more general attitudinal change within the entire judiciary'.[20]

According to Hirsch, the term judicialisation refers to ' the expansion of the province of courts and judges in determining public policy outcomes, mainly through "ordinary" constitutional rights jurisprudence and the judicial redrawing of boundaries between state organs (e.g., the separation of powers, federalism)'.[21] Judicialisation is 'characterized by judges or courts-i.e. their ruling's effect-encroaching on decisions that fall under the jurisdiction of the legislature'.[22] In Vallinder's view, judicialisation means ' …the expansion of the province of the courts… at the expense of the politicians…ie the transfer of decision-making rights from the legislature, the cabinet…to the courts…'.[23] The term has also been defined as 'the process by which triadic lawmaking progressively shapes the strategic behavior of political actors engaged in interactions with one another'.[24]

Thus, judicialisation can be seen as that process which transforms the court from "Mute 'Power' to the Third Giant",[25] or one which reinforces 'the institutional role of the Judiciary

[18] Felipe Dutra Asensi, 'Judicialization or Juridicization? Legal Institutions and their Strategies in Health' (2010) 20(1) *Physis Rio de Janeiro,* 33-55.
[19] Ibid.
[20] Roger Handberg 'Judicialization across Societies: The Spread of Judicial Power and Societal Change' (1999) 22(8) *International Journal of Public Administration* 1269-1292, 1277.
[21] Ran Hirsch, 'The New Constitution and the Judicialization of Pure Politics Worldwide' (2006)75 *Fordham L. Rev.* 721, 724.
[22] Hannes Mosler, 'Judicialization of Politics and the Korean Constitutional Court: the "Party Chapter Abolition Case"' (2014)47(3) *Law and Politics in Africa, Asia and Latin America* 293-318, 296.
[23] Torbjorn Vallinder, 'The Judicialization of Politics: Meaning, Forms, Background, Prospects' (1992) *Acta Societatis Juridicae Lundensis* 267.
[24] Alec Stone Sweet, 'Judicialization and Construction of Governance' (1999) 32(2) *Comparative Political Studies* 147-184, 164.
[25] Vianna Luiz J. Werneck, et al., *Body and Soul of the Brazilian Judiciary (*Rio de Janeiro: Iuperj, 1997) 39.

in making the rights formally expressed into effectively exercised by their holders'.[26] Judicialisation means 'the involvement of the judiciary in the political sphere'.[27] Hence, Tates has posited that it is a process whereby courts and judges increasingly become outspoken in politics and policy-making.[28] It is 'the emergence of the Judiciary's protagonism in the realization of rights, mainly of a social and collective nature… the citizen would turn to the Judiciary as a strategy to mobilize resources and arguments for the defense and conquest of rights'.[29] It is a process whereby the judiciary or court becomes an 'active agent in the implementation of public policies and the enforcement of rights'.[30] The concept has also seen as a citizen's reply which they explore as a matter of last resort when the elected government fails to meet their needs.[31]

Further, Durojaye and Chilemba see justiciability and judicialisation as the same term which 'implies that individual should be able to obtain judicial redress … for acts threatening or violating the right … the courts… should issue orders that give effective remedies; whilst also elaborating the state's obligations for realising the right'.[32] Cane's definition of judicial review is also relevant in the conceptualisation of judicialisation. According to him, judicial review is the 'scrutiny by the judicial branch of government of decisions and actions of the executive branch to police compliance with rules and principles of "public law" (including but not limited to "higher law")'.[33]

---

[26]Asensi (n18).

[27] Borges, D.C. L. & Uga, M.A.D., 'Conflicts and Impasses in the Judicialization of the Supply of Medicine: Circuit Court Rulings on Claims brought against the State of Rio de Jaheio, Brazil, in 2005' *(2010)26(1) Cad. Saude Publica*, 59-69.

[28]Neal C. Tate, 'Why the Expansion of Judicial Power?' in Neal Tate and Torbjörn Vallinder (eds*) The Global Expansion of Judicial Power* (New York University Press,1995) 27–36.

[29] Asensi (n18).

[30] Ibid.

[31] L.W. Vianna (Ed.), A democracia e os três poderes no Brasil (first ed.), Editora UFMG, Belo Horizonte (2002) 17-42, cited in Claudia Marcela Vargas-Peláez, etal, 'Right to Health, Essential Medicines, and Lawsuits for Access to Medicine- A Scoping Study' (2014) *121 Social Science & Medicine* 48-55, 50.

[32] Durojaye & Chilemba (n1) 164.

[33] Peter Cane, 'Understanding Judicial Review and its Impact' in Marc Hertogh & Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge University Press, 2004) 16.*

From the various definitions above, it can be argued that judicialisation is a process through which the court influences or seeks to influence policy outcomes from the other branches of government, whether directly or indirectly. There are several arguments, such as illegitimacy and undemocratic credentials, that have been advanced against the judicialisation of ESR.[34] While it is true that the judicialisation or the use of court process to operationalise rights could lead to conflict between the appointed judiciary and the majoritarian executive and legislature, it is also worth remembering that there are salient advantages inherent in the use of court. For example, courts act as dispute settlers on rights issues, institution for commitment credibility, as part of governance regime as well as producer of knowledge.[35] It has also been argued that the court process, if properly provoked, can be an instrument for the formation of public policies.[36]

Furthermore, on the international plane, a recent study reveals that the two preconditions for judicialisation (of international relations) are delegation of State powers to international courts and legal rights claiming by complainants.[37] The fundamental advantage of having legal rights claimant relying on international judicialisation mechanism to realise ESR is the unlikelihood of domestic interference by the affected State. Alter *et al* put it better when they argue that, 'The transnational nature of adjudication involving international law illustrates why the judicialization of international relations is a different phenomenon than the judicialization of domestic politics', because, 'At the domestic level, executive and legislative branches can more easily reclaim a central, if not exclusive, role in politics'.[38] This preceding point supports

[34] These arguments have been discussed in chapter two of this thesis.
[35] Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (NYU School of Law Public Law Research Paper No. 11-05, of February 2011, available at https://ssrn.com/abstract=1753015 (accessed on 26 February, 2020).
[36] Sueli Gandolfi Dallari, et al. 'Health Advocacy in Contemporary Brazil' (1996) 30(6) *Revista de Saúde Pública* .
[37] Karen J. Alter, Emilie M. Hafner-Burton & Laurence R. Helfer, 'Theorising the Judicialization of International Relations' (2019) *International Studies Quarterly* 63: 449-463,450.
[38] Ibid.

one of the overarching arguments in this thesis, which is to the effect that the judicialisation process should be remodelled to be more collaborative or institutionally interactive and less confrontational or 'compellatory', so as to avoid or minimise conflicts with, and interference by the political branches. As Felipe[39] argues, the centrality of the judge in rights enforcement must be weighed with caution, so as not to cause 'an overvaluation of the judicial dynamics'.[40]

5.3 Conditions for Judicialisation

Judicialisation, whether nationally or internationally, does not happen in a vacuum. There are certain features that allow it to germinate or bud. According to Tate, the conditions that must exist for an effective judicialisation process include the existence of democracy in a given society, the operation of the doctrine of separation of powers, the existence of 'politics of rights', active interest groups which fully utilise the judicial process, active opposition party which uses the court process, ineffective political branches (executive and legislature), public dissatisfaction with the policy-making bodies and delegation of certain powers to the judiciary by the political branches.[41]

Going by the above conditions, it would be clear that a full-blown judicialisation is most appropriate where there is total failure of the political branches whose officials would also be willing to delegate powers to the judiciary to act, with a view to correcting their leadership failures. It is argued that, by virtue of the delegation element in the conditions, a judicialisation scheme that is fashioned in line with these conditions is similar to a collaborative scheme which this thesis advocates. It is further argued that the ineffectiveness of the political branches serves as a fruitful ground for the judiciary to thrive. To put it in Handberg's words, this Tates' list of conditions 'basically identifies characteristics of societies in which the political policy process has become immobilized. In essence, the courts become an alternative by which to break the

[39] Asensi (n18).
[40] Ibid.
[41] Tate (n28) 27.

stalemate'.[42] So, under a condition where the political branches are fully effective and assertive, the courts would find it difficult to effectively judicialise the policy-making process without the support of the other branches, and if or when they succeed, the outcome of the judicialisation would most likely not be fully implemented.

5.4 Legal Framework for Judicialisation

Although there are different models of judicial review or judicialisation which include English rule-of-law and rights-based model, US separation-of -powers-based model, the Australian hybrid model and the Indian public-interest-based model, and social justice model among common law countries[43], or minimalist, maximalist and responsive adjudication,[44] the imprimatur for judicialisation of ESR could either be local or international. For example, the UN's Committee on Economic, Social and Cultural Rights (CESCR's) General Comment 24[45] provides, in the context of business entities' compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), that 'Violations of Covenant rights will often be remedied by an individual claim against the State, whether on the basis of the Covenant itself or on the basis of domestic constitutional or legislative provisions that incorporate the guarantees of the Covenant'.[46]

At the local level, a court may rely on a constitutional provision which empowers it to adjudicate ESR-related matters, or it could invoke its inherent judicial powers to carry out adjudication on ESR. As regards international imprimatur, a court may rely on regional and international human rights instruments that a particular nation (in which the court is situated) has adopted and ratified, to judicially affirm the protection of ESR in the country. This section

[42] Handberg (n20) 1276.
[43] The discussion of these models is outside the scope of this thesis. For a detailed discussion of these models, see Cane (n33) 20-29.
[44] Malcolm Lanford, 'The Responsive Court: Social Rights, Democracy and Transformation' (2012)1, 14-15, available at https://www.jus.uio.no/smr/english/research/projects/socio-economic-rights-ml/docs/draft-intro.pdf (accessed on 12/01/2022).
[45] CESCR General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.
[46] Ibid, para 51.

of the chapter briefly examines the local, regional and international framework, using South Africa, Nigeria, the African Charter on Human and Peoples Rights (African Charter), and the ICESCR together with the CESCR's General Comments as examples.

Sections 26-29 of the South African Constitution[47] provide for justiciable socio-economic rights to housing, health, food, water, social security, and education. By section 8 of the Constitution, these rights provisions are binding on all the branches of government and the court is empowered to give effect to them. Further, section 165 of the Constitution vests judicial powers on the courts and clearly states that judicial decisions are binding on all person and states organs to whom it applies. So, in South Africa, the judiciary has a strong constitutional imprimatur to judicialise ESR.

On the other hand, sections 16-21 of the Nigerian Constitution[48] make several ESR provisions but they are all couched in the form of directive principles. Thus, section 6(6)(c) of the Constitution ousts the Court's jurisdiction to determine any issue relating to the ESR provisions except as permitted by the Constitution (but see the full discussion in Chapter 3 of this thesis). Thus, constitutionally, ESR are not generally judicially enforceable in Nigeria.[49] However, the African Charter, which Nigeria has ratified and domesticated provides for judicially enforceable ESR.[50] Hence, Nigerian Courts can rely on these provisions to operationalise ESR[51], because the Nigerian Supreme Court has held that the Charter is binding on Nigeria since the country has legislatively domesticated it.[52]

[47] The Constitution of the Republic of South Africa 1996.
[48] The Constitution of the Federal Republic of Nigeria, 1999.
[49] This is the same position in India, although the Indian Judiciary has given the Indian Constitution a purposive interpretation that indivisibly links the civil rights with ESR.
[50] See Arts. 15-24 of the African Charter generally.
[51] See *Gbemre v Shell Petroleum Development Company and Others*, Suit No. FHC/B/CS/53/05; (2005) AHRLR 151 where a High Court Judge relied on the African Charter to affirm the justiciability of ESR in Nigeria. However, the negative reaction of the Nigerian government to this judicial decision has been discussed in chapter 3 of this thesis.
[52] *Abacha and Others v Fawehinmi* (2002) 3 LRC 296; (2000) 6 NWLR 228; (2001) 1 CHR 95.

As to the CESCR imprimatur, General Comment 24 expressly indicates the CESCR's preference for judicialisation of ESR realisation when it provides that the States' discharge of their duty to protect shall ensure 'access to remedies, preferably judicial remedies'.[53] It further provides that States must provide appropriate means of redress which should '…preferably take the form of ensuring access to independent and impartial judicial bodies…'.[54] Similarly, General Comment No.12[55] provides that any victim or group of victims of right to food violation should have access to effective judicial or other appropriate remedies at both national and international levels and that 'Judges… are invited to pay greater attention to violations of the right to food in the exercise of their functions'.[56] Moreover, General Comment No. 9 requires courts to take into account, ESR within the limits of their judicial functions to ensure that the State's conduct is consistent with its obligations under the ICESCR.[57] Also, an individual or group of individuals can file a communication against their State at the international level (CESCR) seeking remedies for the State's violation of their rights.[58] However, before this can happen, such a State must have recognised, by way of being not just a party to ICESCR but also a party to the Optional Protocol, the competence of CESCR to receive and consider such communications,[59] in addition to the applicant having exhausted all available domestic remedies before approaching CESCR.[60] Lastly on CESCR, the most recent General Comment 25 also reinforces the need for judicial approach to ESR realisation when it provides that the right to participate and to enjoy the benefits from scientific progress and its applications, like all other rights, is justiciable and that States should establish effective

[53] CESCR General Comment No. 24 (2017) (n45) para 38.
[54] Ibid para 39.
[55] CESCR General Comment No. 12: The Right to Adequate Food (Art. 11) (1999).
[56] Ibid, paras 32 & 34.
[57] CESCR General Comment No. 9: *The Domestic Application of the Covenant (03/12/98), para 14.*
[58] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol), Art. 2.
[59] Ibid, Art.1.
[60] Ibid, Art. 3(2). Also see C Golay,' The Right to Food and Access to Justice: Examples at the National, Regional and International Levels', FAO, Rome, 2009; C Golay, Droit à l'alimentation et accès à la justice, Bruylant, Brussels, 2011.

mechanisms and institutions to ensure effective judicial, administrative and other remedies for victims of violation of the right.[61]

[61] CESCR General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Art. 15.1.b, 15.2, 15.3 and 15.4) para. 89.

5.5 Impact Assessment on ESR Judicialisation

In this section, the thesis examines several challenges to assessing judicial impact, and the metrics for such an assessment. It thereafter considers judicial impact in select jurisdictions.

5.5.1 Challenges of Impact Assessment

Assessing the impact of ESR judicialisation poses several challenges. There are challenges around what one seeks to examine as an 'impact'. First, there is the challenge of getting accurate data to work with and most scholars usually rely on assumptions about judicial impact on ESR realisation.[62]

Second, there is the challenge of what is to be assessed. As Wheeler argues, one must differentiate between compliance, implementation and impact when carrying out impact assessment.[63] While compliance (or non-compliance) revolves around whether or not what the court directed has been carried out by those to whom it was directed,[64] implementation is a broader term which relates to the 'behavior of lower courts, government agencies, or affected parties as it relates to enforcing a judicial decision',[65] whereas impact relates to 'all effects resulting from a decision regardless of whether people knew about the decision'[66] or 'broad legal, political, and social consequences of judicial policies'.[67]

Viewed from the above perspective, compliance is narrow, implementation is broad while impact is broader. This compartmentalisation creates a possibility of examining the effect of judicial decisions 'from the narrower question of compliance or non-compliance with a court decision, through the implementation of the decision by political actors, to the broad impact of a decision both legally and politically on society'.[68] Despite this compartmentalisation, for the

[62] Brinks &Gauri (n4) 381.
[63] Darren A. Wheeler, 'Methodological, Theoretical and Topical Challenges in Judicial Implementation and Impact Studies' (2010/2011) 13 *Indiana Journal of Political Science* 18, 19.
[64] Ibid.
[65] Bradley C. Canon & Charles A. Johnson, *Judicial Policies: Implementation and Impact* (2nd ed, CQ Press. 1999) 17.
[66] Stephen L. Wasby, *The Supreme Court in the Federal System* (4th ed, Nelson-Hall Publishers, 1993) 364.
[67] Harry P. Stumpf, *American Judicial Politics* (2nd ed, Prentice Hal, 1998) 415.
[68] Wheeler (n63) 19.

purpose of this thesis, the three terms are used interchangeably to refer to the change brought about by judicial decision. It is therefore needful to contextualise the compliance that leads to change.

According to Canon and Johnson, compliance means 'behavior that is in some way consistent …with the behavioral requirements of the judicial decision'.[69] On his part, Paulson argues that compliance 'consists of acceptance of [a court's] judgment as final, and reasonable performance in good faith of any binding obligation'.[70] From these definitions, it can be observed that compliance often leads to a change in the behaviour of the target audience of the court's decision, although whether such change evinces true acceptance or grudging compliance is another issue altogether. However, the point should be made that measuring compliance is not an easy task because '…the comparative courts literature on compliance has progressed in diverse directions, and its various branches are not always in dialogue'.[71]

It has been argued that compliance can be measured by 'three steps: (1) identifying, analyzing, and scoring the specific behavioral mandate(s) in the court's ruling; (2) identifying, analyzing, and scoring the action(s) authorities appeared to take in response; and (3) comparing the two'.[72] There are generally three ways the political branches may react to a court decision: positive reaction, indifferent reaction and negative reaction.[73] Unfortunately, ESR court decisions are usually met with a negative reaction because of their resource implications.

The third challenge to assessing judicial impact is that the meaning attached to 'impact' is relative-it could be primary or secondary. Thus, while one person may see a judicial decision that validates a given ESR as impactful, a second person might think otherwise. The second

[69] Canon & Johnson (n65) 17.
[70] Colter Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2004) 98(3) *American Journal of International Law 434-461, 435.*
[71] Diana Kapiszewski &Matthew M. Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings' (Fall 2013)38(4) *Law and Social Inquiry* 803-835, 805.
[72] Ibid 809.
[73] Canon (n7) 79-80.

person may view impact in terms of practical dividends or results that flow from the court decision. To problematise the issue, it is needful to draw an illustration. When a court declares that Mr A has a right to food and the government refuses to comply with the judicial decision, it can be said that such a decision was or was not impactful, depending on one's theorisation of what amounts to impact. To one person, the decision is impactful because it serves as a launchpad for legal mobilisation among the civil society organisation for the right to food campaign. To another, it is not impactful because Mr A remains without food despite the court's judgment.

Thus, it is important to distinguish between decisions that are doctrinally impactful (that is, ground-breaking judicial decisions) and those that are of real bureaucratic importance (that is, those that are of importance to public bodies),[74] for example, those that have made them to actually change policies or take practical actions to realise ESR. It is pertinent to forefront the argument in this chapter, which is that, for a judicially affirmed right to food for example, impact should be judged not only on a court paper, system-wide or policy basis, but also on the direct or 'food- in-the-stomach' or 'food-in-the-store' basis. That is, the court order should at least contribute to government decision to provide food to the litigant. While it is conceded that a strong and independent judiciary is needed to secure the rule of law and promote human rights, thereby encouraging investments and promoting development,[75] it is argued that, because of the resource peculiarities involved in ESR realisation and the institutional framing of the courts, a more cooperative and interactive judicial system would be a better driver for real-world ESR realisation. That said, the importance of assessing the impact of judicial review

[74] Ibid, 53.
[75] Maria Dakolias, 'Court Performance Around the World: A Comparative Perspective' (1999) 2 *Yale Hum. Rts & Dev. L.J.,1.*

or judicialisation lies in the fact that such an understanding tells us something about the ways in which courts matter.[76]

There are several reasons for compliance or non-compliance with court decisions. It could be a matter of political will,[77] the vagueness of the decision,[78] the fear of reputational loss,[79] the absence of clear legislative statement on procedure for implementation of court decisions,[80] or it could be a matter of how costly its implementation would be.[81] However, it is argued that the political and rule of law climate in a given nation also has a lot to do with how judicial decisions are complied with. As Cavallaro and Brewer note regarding compliance with the European Court of Human Rights (ECHR's) decisions, '… given the generally high degree of respect for the rule of law by the governments in question, there is little doubt that the legal reforms and policy efforts … often, if not always, translated into better protection of human rights for the intended population'.[82] To buttress this point on political and rule of law climate, upon the entry of the former Soviet bloc States(noted for their human rights violation) into the then Council of Europe thereby being subject to ECHR's jurisdiction, compliance level with ECHR's decision dropped radically.[83] Nigeria is mostly noted for gross violation of human rights and desecration of the rule of law. Nigerian and other African political branches do not

---

[76] Maurice Sunkin, 'Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies', in Marc Hertogh & Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge University Press, 2004) 43.*

[77] Courtney Hillebrecht, 'From Paper Tigers to Engines of Change: The Effect of International Human Rights Tribunals on Domestic Practice and Policy' 21 (May 10, 2010) (unpublished Ph.D. dissertation, University of Wisconsin-Madison, on file with author), cited in Huneeus (n9), 511.

[78] Jeffrey K. Staton & Alexia Romero, 'Clarity and Compliance in the Inter-American Human Rights System' (2011) available at http://biblioteca.cejamericas.org/bitstream/handle/2015/448/Clarity-and-Compliance-in-the-Inter-American-Human-Rights-System.pdf?sequence=1&isAllowed=y (accessed on 17 May 2020).

[79] Shai Dothan, 'Judicial Tactics in the European Court of Human Rights' (Summer 2011) 12(1) *Chicago Journal of International Law* 116-142, 116.

[80] Viviana Krsticevic, 'Implementation of the Decisions of the Inter-American System for Human Rights: Suggestions for Legislative Processes' (Center for Justice and International Law ed., 2009) 1,10.

[81] Darren Hawkins & Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights' (2010) 6 *J. INT'L L. & INT'L REL.* 45.

[82] James Cavallaro & Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102(4) *American Journal of International Law* 768-827, 773.

[83] Ibid. This drop can only be explained in terms of the Soviet States' 'poisoning' of the once homogenous rule of law governance in Europe by their entry into ECHR jurisdictional competence.

like to comply with (quasi) judicial decisions on human rights as a matter of course.[84] In Nigeria, though the political branches usually comply with judicial decisions on electoral matters (perhaps because of the dangerous implications of non-compliance),[85] they do not pay much respect to judicial decisions on human rights protection.[86]

More specifically, there is evidence that the political branches would not comply with pro-ESR judicial decisions in Nigeria. In the *Gbemre case*,[87] the trial judge affirmed the justiciability of ESR in Nigeria while relying on the African Charter. Rather than obey the decision, the political branches 'punished' the Judge by transferring him to another division and the casefile was declared missing.

This non-compliance situation then calls for a deep consideration of Cavallaro and Brewer's position that 'the type of rights violations prevalent in a region, the political climate on the ground, states' general willingness to comply with the court's orders, and the current efforts of local actors and groups working on underlying human rights issues should all shape the procedures and jurisprudential patterns of a court'.[88] It might thus be worth considering for the ESR adjudicators to adopt 'affective phrases', which Pelc and Busch argue, are deployed by the WTO Appellate Body in its rulings.[89] Such affective judicial decision would take the 'sensibilities', resources constraints, opinions or views of the State into consideration. Instead of a coercive stance, the affective mechanism would lead to constructivist persuasion and

[84] See Frans Viljoen & Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004', (2007) 101 AJIL 1, 5 (where it was reported that as of mid-2003, only 14 percent of African Commission on Human and Peoples' Right's Recommendations have received full compliance).

[85] Amaechi v. I.N.E.C. (No.3) (2007) 18 NWLR (Pt.1065) (where the Supreme Court judicially installed as Governor a person who was unlawfully denied his party ticket -the party's unlawful candidate was declared winner of the general election by the electoral body).

[86] See the World Justice Project Rule of Law Index 2020, available at: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf (accessed on 17 May, 2020) which places Nigeria at 108 out of 128 countries assessed on Rule of Law.

[87] *Supra* (n51).

[88] Cavallaro & Brewer (n82) 784.

[89] Krzyzstof Pelc & Mark Busch 'Words Matter: How WTO Rulings Handle Controversy' (2019) *International Studies Quarterly* 63(3) 464–476.

acculturation which would in turn minimise incidence of non-compliance with pro-ESR court judgments and avoid what some scholars call 'dejudicialization',[90] that is the removal or reduction of judicial powers by the political branches.

Drawing on existing politics and law literature, this thesis examines below the impact of judicialisation of ESR in Brazil, South Africa, and Colombia. The essence of the impact assessment on these countries is not to present a blanket argument that confrontational judicialisation is not always impactful- evidence abounds that judicialisation has had positive impact on ESR. Rather, the impact assessment seeks to reveal that a confrontational judicial approach may not always be helpful without external factors, hence the need to embrace a more cooperative judicial approach in Nigeria. The choice of the three jurisdictions is informed by the high level of ESR litigation from those countries, and their courts' positive disposition towards ESR claims. While being perceptive to the political, constitutional and jurisdictional contexts in those countries vis-à-vis other nations (particularly Nigeria), and the need 'to be very careful in drawing conclusions about the likely impact of judicial review in one jurisdiction from impact studies undertaken in another jurisdiction',[91] it is argued that an assessment of the impact of judicial decisions from these jurisdictions can serve a useful purpose for mapping or guiding an impact analysis for ESR adjudication in another jurisdictional context. However, before considering the judicial impact in the select jurisdictions, it is apposite to examine the metrics for judicial impact assessment.

5.5.2 Metrics for Impact Assessment

To determine the impact of ESR litigation, Gloppen groups the litigation stage into four stages. According to her,

> At the most basic level, there are four main stages or variables in the litigation process that interact to determine the success or failure of social rights litigation: first, the extent to which people whose social rights are violated *voice*

[90] Tom Ginsburg & Daniel Abebe, 'The Dejudicialization of International Politics?' (2019) *International Studies* Quarterly 63 (3): 521–30.
[91] Sunkin (n76).

> their claims in the courts; secondly, the courts' *responsiveness* to these claims; thirdly, the judges' *capability* to give legal effect to the social rights claims that are voiced; and fourthly, the authority of the courts' social rights decisions, seen in terms of *compliance* with the terms of the judgment, directly and in terms of subsequent legislation and policies.[92]

So, using Gloppen's framing, four things should be considered to determine the ESR litigation success. In the first place, the litigation could be measured by looking at the ability of victims of ESR violation to voice their claims or have them voiced for them.[93] This in itself suggests that there should be a system which recognises, inspires or encourages victims of such violation to approach the court for remedy. As far as this variable is concerned, the higher the opportunity given to the victims to present their claims in court, the more likely that the procedural steps would lead to some substantive outcomes. However, this variable seems to underrate the fact that the link between procedural law and substantive outcomes is far from clear.

In the second place, it is not enough to say that victims of ESR violation have access to court for voicing their claims. There should be evidence that the court is willing to respond to the voiced claims.[94] In other words, the court should be receptive to hearing and determining such claims. However, Gloppen did not indicate whether just any responsiveness would suffice. It is argued that such responsiveness should not be reactive but accommodating. This stage would not be satisfied by simply listening to the victims just to 'fulfil all righteousness'. There should be an involved response.

The third stage is the capability stage. The court should demonstrate an ability to 'give legal effect to social (and other) rights in ways that significantly affect the situation of marginalised groups'.[95] This is the stage where the court does not just hear the claim but it also gives firm decisions that protect ESR. This is followed by the fourth stage, compliance stage which

[92] Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework' in Roberto Gargarella, Pilar Domingo & Theunis Roux (eds), *Courts and Social Transformation in New Democracies*: *An Institutional Voice for the Poor*? (Ashgate Publishing Limited, 2006) 42.
[93] Ibid, 37.
[94] Ibid
[95] Ibid.

assesses the extent to which these judicial decisions are 'politically authoritative'.[96] This is where the overarching impact of the judgments is weighed, because it goes beyond the courtroom pronouncement and assesses what the other arms of government make of the court decision; resistance and rejection or acceptance and compliance.

While the first to third stages are important, it is argued that the 4th stage is the most fundamental because, it either resonates or defeats the social effectiveness of the court judgment. In other words, the concrete everyday evidence that ESR has been realised through the court process should be the social effectiveness of the litigation process. To test the effectiveness of a court decision that promotes ESR, a question around the political branches' concrete compliance with the decision is essential. Thus, Asensi argues that 'based on the assumption that the right [ESR] exists to be realized, the idea of effectiveness means the concrete development of the social function of law' because this 'perspective has sought to focus on the factual dimension of law through its social effectiveness, that is, the possibility of producing concrete effects in the daily lives of the practices of social actors'.[97]

a. Neorealist and Constructivist Approaches to Impact Assessment of ESR Judicialisation

The determination of the overarching impact of ESR-related judicial decisions is not easy to measure. However, Rodríguez-Garavito[98] suggests that there are two approaches to judicial impact assessment, depending on the type of effect. These are the neorealist and constructivist approaches to impact assessment.

On the one hand, the neorealist approach focuses on the direct and palpable impact that a given court decision has on the individual litigant. According to Rodriguez-Garavito, this approach sees law as shaping human conduct and it applies 'a strict causality test to measure the impact of judicial interventions: a judgment is effective if it has produced an observable change in the

[96] Ibid.
[97] Asensi (n18) 33-55.
[98] César Rodríguez-Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89(7) *Texas Law Review* 1669–1698, 1672.

conduct of those it directly targets'.[99] Thus, according to this 'court-centered approach',[100] if a judicial decision does not change the conduct of those at the helm of affairs, and thereby positively and significantly changing the socioeconomic life of the ESR litigant, it is considered not impactful or, to user Rosenberg's words, it is a 'hollow hope'.[101] According to this approach, the judicial decision should not only lead to acceptance by the political branches but it should also cause what Canon refers to as 'behavioural adjustment'.[102]

On the other hand,, the constructivist approach looks beyond the individual's direct and material litigation gains, but examines the overall impact of a court decision on the wider society.[103] According to this approach, court decisions generate social transformation not only in terms of changing human conduct of those directly involved in the case, but also by indirectly producing transformations in social relations or by changing the actors' perception, thereby legitimising the litigants' worldview and formation of activists groups.[104] For example, this approach states that while 'the scope of the remedies seem limited in the short term, and the human rights crisis at hand cannot wait for the slow wheels of justice to find solutions for all, a judicial decision sets a precedent and provides opportunities for future development of access to rights and entitlements afforded by the legal framework…'.[105] Thus, beyond direct impact, this approach considers the indirect impact of judicial intervention.

In the same vein, Gambitta argues that an indirect impact of adjudication is access to the government arena, as it seeks to generate answers and information from public agencies and promote accountability through publicity, even when the claimant is unsuccessful at the end of

[99] Ibid.
[100] McCann (n6) 740.
[101] Rosenberg, *The Hollow Hope* (n12)80.
[102] Canon (5) 80.
[103] For example, in *Victoria (City) v Adams 2009 BCCA 563; 2008 BCSC 1363*, the courts of British Columbia held that squatters had a right to live on temporary shelter on a public park since they were homeless. Although the court did not affirm the right of the homeless to a decent housing, the government on its own provided decent shelters for the homeless after the judgment. This, according to Brinks and Gauri (n4)379, created some indirect or collective effect on the society.
[104] Rodríguez-Garavito (n98).
[105] FAO, 'Legal Developments in the Progressive Realisation of the Right to Adequate Food' (2014) 10.

the litigation.[106] Further, the indirect impact that a judicial decision can trigger in the face of non-compliance includes domestic mobilization by NGOs and opposition political parties to compel compliance, further litigation to compel compliance, international naming and shaming in form of denial of donor aid.[107] Also, Brinks and Gauri note that indirect effect of judicial decision could come in form of a direct collective effect (where the court affirms a claim that expressly seeks collective goods) or indirect collective effect (when judicial decisions alter the bargaining power of key actors).[108] However, the full real impact of ESR litigation may be difficult to weigh if the litigating claimant is not successful. This is because, a successful judgment against governmental bodies and the way they react to it 'symbolizes the fullest immersion of the administrative decision-making process into the legal world'.[109]

Thus, while the neorealist approach looks at the direct and material benefits that accrue to a litigant, for instance, actually gaining access to qualitative education as a result of ESR litigation, the constructivist approach looks at the symbolic and indirect benefits such as ideological re-orientation and formation of social movements that such ESR litigation would herald.[110] For example, where a court's decision holds that 'A' is entitled to access to education but the government has not directly given them that court-directed access, but has instead reviewed its policy to accommodate the court's decision or where the decision has activated public awareness and campaign about the right to education, the constructivist approach sees such a decision as impactful, though indirectly. In other words, the indirect impact of a judicial decision may resonate in the realm of provision of clarity and legitimacy.[111]

---

[106] R. Gambitta, 'Litigation, Judicial Deference and Policy Change' in R. Gambitta, M. May & J. Foster (eds), *Governing Through Courts* (Sage, 1981).
[107] Alter, *etal* (n37) 456.
[108] Brinks & Gauri (n4) 379.
[109] S. Halliday, 'Researching the "Impact" of Judicial Review on Routine Administrative Decision-Making' in D. Cowan (ed), *Housing: Participation and Exclusion* (Aldershot, 1998) 192.
[110] Ibid.
[111] Sunkin (n75) 51.

McCann, being a major proponent of the constructivist approach which he calls 'dispute-centered or decentered approach' elsewhere,[112] argues that 'although judicial victories often do not translate automatically into desired social change, they can help to redefine the terms of both immediate and long-term struggles among social groups'.[113] Thus, a judicially affirmed norm can form, a '… constitutive capacity of law: Legal knowledge prefigures in part the symbolic terms of material relations and becomes a potential resource in ongoing struggles to refigure those relations'.[114] This approach sees judicial decisions as not linear processes nor implemented in a vacuum which have contextual isolation, rather, they are processes whereby different elements interact to bring about different outcomes.[115]

The difference in opinion in these two approaches is traceable to the methodological process adopted: while the neorealists adopt a quantitative research technique (which focuses on direct impact by analysing social indicators for the beneficiary population, and measurement of press coverage before and after the court's decision), the constructivist approach adopts both quantitative technique and qualitative technique (interviews with office holders, NGOs and the beneficiary community to assess the indirect impact of the judgment on their perception about the right and strategies adopted).[116] These different approaches lend credence to the fact that there can be no single perspective to the impact of judicial proceedings.[117]

In the same vein, Sunkin calls the different impact assessment metrics formal and informal reactions, and positivist and interpretivist approaches. According to him, '…a formal reaction is one that has been formalised in a rule or in a formal decision, and an informal reaction is

[112] McCann (n6) 740.
[113] Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago University Press, 1994) 285.
[114] McCann (n4) 734.
[115] Camila Gianella-Malca, Siri Gloppen &Elizabeth Fosse, 'Giving Effect to Children's Right to Health in Colombia? Analysing the Implementation of Court Decisions Ordering Health System Reform' (2013)5(1) *Journal of Human Rights Practice* 153-176, 159.
[116] Rodríguez-Garavito (n98).
[117] Cane (n 33) 33.

one that is represented in other ways, such as in attitudes and feelings of officials'.[118] Similarly, a positivist approach interrogates impact '…in an experimental setting in which variables can be carefully controlled and causal links accurately determined by measurable objective evidence'.[119] For example, if two bureaucratic bodies were identical but one suddenly changed its system as a result of a court decision, positivist approach sees the court decision as impactful.[120] But if no change occurs, the court decision cannot be said to be impactful according to this approach. This is because 'one cannot say that a decision has had this or that impact unless at least persuasive evidence exists to support the claim that there is a causal connection between the decision and the impact'.[121] On the other hand, interpretivist approach states that '…we can only meaningfully study the way judicial review impacts upon bureaucracy from the point of view of those involved in bureaucratic decision-making' and that 'this is… the informal impact of judicial review, that is to say its impact on the attitudes and actual behaviour of administrators in their day-to-day work'.[122] In other words, the interpretivist approach, just like the constructivist approach, looks at the eventual society-wide influence of the judicial decision which influence might trigger an attitudinal change of those in the political branches in their reaction to the decision. In a similar vein, Cane groups impact assessment into instrumentalist and non-instrumentalist categories.[123]

[118] Sunkin (n75) 62.
[119] Ibid 66.
[120] Ibid.
[121] Ibid.
[122] Ibid 68.
[123] Cane (n33) 16-17, 33-40. In his view, the instrumentalist approach assesses the impact of law and judicial decisions on it by reference to the effects they have on human behaviour, i.e., 'the chief value and importance of legal rights and powers, duties and obligations, is as means to ends'. On the other hand, the non-instrumentalist approach, assesses impact in 'terms of concepts of interpersonal, social and political justice… on whether it embodies and expresses the right values concerning the way people ought to behave towards one another'. However, these approaches, in Cane's views, are not mutually exclusive, because the fact that the consequences of judicial proceedings are important in assessing its relevance does not mean the proceedings should be looked through the lens of consequences only.

Although a court's judgment can have a broader socio-economic or societal implication as the constructivist approach suggests, this thesis focuses on the direct and material impact of ESR judgements in line with the neorealist approach. Owing to 'impact agnosticism',[124] it is important to constrict the meaning ascribed to the term 'impact' in this work. This thesis concentrates on the effect that the decision of the interpreting population (courts) has had on the implementing population (executive) to make the latter to change its position or policies in favour of the primary population (those directly or potentially affected by the decision), not necessarily the secondary population (indirectly impacted society).[125] In other words, the thesis concentrates on impact which is 'the ultimate outcomes for the applicants of individual judicial review proceedings'.[126] For example, this impact is one which happens where a court states that party A is entitled to decent housing as part of their ESR package and the Government, in compliance with the court's decision, proceeds to give party A decent accommodation without cost to party A. So, the spill-over effect of ESR judgments, which may or may not enhance State practices and ESR judgment compliance behaviour, is, specifically speaking, not the concern of this thesis.

While Brinks and Gauri's argument that favours an aggregate effect approach and states that, 'focusing narrowly on the direct, individual effects of cases biases the findings in favor of a more regressive conclusion'[127] might be true, it is argued that it is quite difficult to determine what informs such system-wide or collective policy changes after a court's decision. It is argued that it is possible that such policy changes occurred after political branches might have been influenced to act by forces or reasons not associated with the court's decision which might

[124] See Hertogh, M. & Halliday, S. (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) 11,where the authors express the view that it is extremely difficult to give a comprehensive discussion on what 'impact' means because of the inability to get sufficient empirical data to so generalize.
[125] Bradley C. Cane & Charles A. Johnson (n65).
[126] Cane (n33) 32.
[127] Brinks & Gauri (n4) 378.

simply be coincidentally placed. As Levine notes, the connection between court's decisions and outcomes is a matter of probability, not of determinacy or determinism as several superseding variables can spring up after a judicial decision to determine political actions.[128] Further, even in their own argument, Brinks and Gauri concede that there are cases where effects 'are essentially limited to individual litigants',[129] meaning that the effect may not reasonably be expected to have a system-wide implications. The authors however did not take such cases into consideration in their arguments for an aggregate or collective effect. Litigants with ESR cases of narrow individual effect deserve to see the impact of judicial decisions on their socio-economic lives.

The point should, however, be made that this study does not argue against a system-wide judicial impact. On the contrary, the argument is that judicialisation should emplace both practical individual or direct redress and indirect social policy impact. That way, both the individual litigant would materially benefit from the fruit of their litigation while there would, also, be 'administrative policy changes that have consequences reaching into the future and beyond the particular decision…'.[130] In any case, in a common law country like Nigeria, a judicial opinion which individually impacts on the litigant can also have system-wide effect through the doctrine of judicial precedence.

Further, it is apposite to state that the judicial impact examined in this thesis is limited in scope- it is restricted to ESR only. So, the adopted neorealist or quantitative impact approach considers the positive difference between the number of court's ESR decisions made and the number of decisions that the governments or States have complied with.[131] Using this

[128] J. Levine, 'Methodological Concerns in Studying Supreme Court Efficacy' (1970) 4 *Law and Society Review* 585.
[129] Brinks & Gauri (4)378.
[130] Marc Hertogh, 'Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands' (2001)23(1) *Law and Policy* 48.
[131] Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) *Transnational Environmental Law* 1-28, 8.

approach, an impact could be assessed as (a)no impact/compliance, (b)minor impact/compliance, (c)partial impact/compliance or (d) full impact/compliance,[132] depending on whether the government has complied with the ESR judicial decision at all, or has complied with none, a few, half or all of the decisions. Therefore, a judicial decision that validates ESR should evidently show a positive change in the life of the litigant by way of government's compliance with the decision, whether in a minor, partial, or full level. If that does not happen, it is argued that the practical impact of judicialisation would not have been fully felt.

So, whereas it is conceded that symbolic impact is important, regardless of the actual impact of judicialisation,[133] it is argued that a better option would be to secure a combination of actual and symbolic impact. To secure this, and consequently secure practical realisation of ESR, there is a need to calibrate judicialisation to make it work better and avoid what Bruun calls 'legal victory, political defeat'[134] situation. The court can achieve this by engaging in collaborative network with the political branches.

However, a note of caution should be given here. Impact studies is always not complete or comprehensive as different factors, aside the immediate parties and the court system, determine the pendulum-swinging posture of a given case. So, this thesis does not go near any perfection in its discussion of impact of ESR judicialisation. As Cane argues, '…the extent of our ignorance and uncertainty about those effects [impact] would require some guises to be made, on the basis of what is often called "intuition", about whether the game was worth the candle'.[135] Thus, the next subsection briefly examines the impact of ESR judicialisation in three select countries.

[132] Ibid.
[133] Cane (n33)41.
[134] Rita Bruun, 'The Boldt Decision: Legal Victory, Political Defeat' (1982) 4 *Law & Pol'y* 271.
[135] Ibid.

5.5.3 Country Impact Study: Brazil, South Africa and Colombia

Under this section and using a literature-based research approach, this thesis briefly assesses the impact of judicialisation of ESR in select countries. As mentioned above, the essence of this impact assessment is not to suggest that ESR judicialisation has not been generally impactful in these countries or that it is not generally helpful across the board. Rather, the aim is to demonstrate that a confrontational judicial approach may not always be helpful for the realisation of ESR. Thus, there is a deliberate selection of few cases in this thesis, and the selected cases should not be taken as representative of the overarching impact of confrontational judicialisation in the select jurisdictions. The discussion on the select jurisdictions should be seen as mere analytical tools to help to advance an argument for a more cooperative judicial approach. The evidence from the impact assessment below shows that while the impact has been remarkable in others, the result has not been too encouraging in others.

i. Brazil

Chapter II of the Constitution of Brazil 1988[136] recognises ESR and these rights have direct and immediate efficacy.[137] Brazil is a civil law country where individuals file suits with the aim of getting individual reliefs. There is a proliferation of ESR lawsuits, especially on right to healthcare services in Brazil. According to a survey carried out by Brinks and Gauri, there were about 8,000 cases in four states of Brazil alone as of 2014 and 94% of them related to individual suits for health-related goods.[138] The result of this survey shows that:

> Overall, the distribution of beneficiaries in Brazil skews upward slightly, relative to the population. This confirms our expectation that litigation undertaken for individual benefits is regressive, though perhaps not by a great margin… Health-rights litigation in Brazil is hardly a phenomenon limited to or dominated by "elites," however you may define them, but the distribution of

[136] Amended in 2014.
[137] Vanice Regina Lírio Do Valle, 'Judicial Adjudication in Housing Rights in Brazil and Colombia: A Comparative Perspective' (2014) 1(2) *Revista de Investigações Constitucionais, Curitiba* 67-102, 76. However, by efficacy, Valle means direct application, not effectiveness or impact.
[138] Brinks and Gauri (n4) 382.

> benefits of litigation is less pro-poor than the distribution through the general public health system (which serves a population that is about 43 percent poor) by about seven percentage points…[139]

So, the conclusion that can be drawn from this is that individual ESR litigation in Brazil healthcare system is not really promotive of the socioeconomic wellbeing of the poor. It is one, more in favour of the elite, who have the means to access adjudication and, two, because most of the judicial decisions simply demand the provisions of healthcare services for 'rich people's illnesses'.[140] The survey however shows that, on the right to education which is usually fought through a collective litigation, the impact is more pro-poor than what happens in the healthcare situation.[141] The summary then is, depending on how ESR litigation is pursued, the impact of judicial decisions could be hugely felt by all or it could be for the select few.

Care should, therefore, be taken to ensure that judicialisation does not lead to 'over-healthilization' of one set of people and 'under-healthilization' of another set of people under the same legal and political systems. As Persad argues, the rich's individualisation of the right to health litigation threatens availability of healthcare for other less-endowed patients as well as undermines the provisions of other ESR facilities due to the high cost of implementing the judicial decisions in those individual cases.[142] While the Brazilian situation can be said to be impactful when viewed through the individualised or direct impact lenses that has been discussed above, it has however also severely attenuated the symbolic impact of judicialisation. As mentioned above, a good judicial decision on ESR should lead to a combination of actual and symbolic impact.

[139] Ibid 283 (footnote omitted).
[140] Ibid.
[141] Ibid.
[142] Govid Persad, 'The Medical Cost Pandemic: Why Limiting Access to Cost-Effective Treatments Hurts the Global Poor' (2015) 15(2) *Chicago Journal of International Law* 610-611.

ii. South Africa

South Africa is arguably the most radical jurisdiction as far as recognition of ESR is concerned. Apart from the fact that sections 26-29 of the South African Constitution[143] provide for socioeconomic rights to housing, health care, food and water, education and social security as justiciable rights, South Africa also boasts a rich jurisprudence on ESR. However, it bears mentioning that the South African experience should be understood within its peculiar context. It would be recalled that the country had a long history of Apartheid regime which saw stark socioeconomic discrimination and deprivation among different classes. Towards the end of the Apartheid regime, there were several rights negotiations and talks between the then ruling National Party (NP) and the opposition African National Congress (ANC). While the ruling party wanted an insertion of a right to property clause into the interim Constitution, so as to protect and preserve the white minority's (undeserved) accumulation of landed property in a post-Apartheid democratic regime,[144] ANC argued that such an insertion would make it difficult to restore land to those who suffered wrongful expropriation during the Apartheid and that it might also make the provision of homes for the homeless challenging.[145]

In order to resolve these two opposing views, the ANC pushed for the insertion of justiciable ESR into the new Constitution. In justifying the ground for their argument for ESR, the ANC stated that, 'the new Bill of Rights [should not] shy away from including within the scope of its protection, fundamental rights, which while posing difficulties in enforcement reflect important principles in the promotion of a society based on justice and equality, a society which

[143] Constitution of the Republic of South Africa 1996.
[144] Mathew Chaskalson 'Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution' (1995) 11 *South Africa Journal of Human Rights* 222-240.
[145] For a comprehensive review of the history of the ESR into the South African Constitution, see Tom Ginsburg & Rosalind Dixon, 'The South African Constitutional Court and Socio-Economic Rights as "Insurance Swaps"' (2013) *University of Chicago Public Law & Legal Theory Working Paper* No. 436, 12-20.

seeks to redress the imbalances of the past'.[146] This position was well received by NP and other stakeholders, thus ushering in the innovative justiciable constitutionalisation of ESR in the 1996 Constitution. This historical background reveals how the South African Constitution was framed via what Ginsburg and Dixon call 'the insurance swap-based theory'.[147] This theory seeks to balance conflicting interests by negotiating a compromise.

As regards the impact of the South African Constitutional Court (CC's) decisions on ESR, this study will simply refer to two cases. This selection of just two cases is justified because as stated above, this thesis does not dispute the fact that there are other cases that have had more direct and symbolic impact, but these two cases have been chosen solely with the intention to demonstrate that a confrontational judicial approach may not *always* lead to a practical realisation of ESR. In the *Government of* the *Republic of South Africa v Irene Grootboom & Ors*[148], the court ordered that Grootboom should be provided with a decent shelter. Despite this decision, it is common knowledge that she still died homeless years after the decision. From a neorealist perspective, the court's decision was not impactful but from a constructivist standpoint, the fact that that decision has reshaped housing rights discussions and jurisprudence in South Africa is a huge symbolic and indirect impact. Thus, it would be safe to say that *Grootboom case* did not deliver a direct judicial impact since Grootboom was not given the court-ordered decent shelter.

Also, in the *Minister of Health v Treatment Action Campaign (TAC) case*,[149] the applicant NGO demanded that the government should not restrict the availability and access to the Nevirapine drug to a few pilot sites. They argued that pregnant women should have access to the drug wherever they might be, with a view to using the drug to fight mother-to-child HIV transmission. The CC agreed with them and held that the government was under an obligation

[146] See ANC, 'Preliminary ANC submission Theme Committee 4 — Further socio-economic rights' sec 1.A.
[147] Ginsburg & Dixon(n145) 6 .
[148] 2000 (11) BCLR 1169. (CC).
[149] [2002] ZACC 15; 2002 (5) SA 721.

to create an expansive access to the drugs outside the sites.[150] This decision has been hailed as being impactful in that it 'saved tens of thousands of lives',[151] because the government, in line with the judgment, provided more access to the drugs.

However, one point worth noting about the judgment in the *TAC case is* that there were some external factors that aided the government's compliance. For example, the private sector was very instrumental in the implementation of the judgment; the manufacturers of the drugs made it available to the government free of charge for a 5-year period.[152] One wonders whether the same level of impact would have been felt had the government not had such an external support. It is unlikely. The fact that the private sector was involved supports the argument for a collaborative approach to realising ESR. The CC impliedly recognised the relevance of collaboration when it held in the *TAC case* that 'The magnitude of the HIV/Aids challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led.'[153]

iii. Colombia

The 1991 Constitution of Colombia provides for enforceable ESR in Chapter II[154] and also states clearly that treaties are domestically binding.[155] The Constitution has thus been described as 'forward-looking'.[156] The Constitution empowers anyone to file a *tutela* before any court for enforcement of their civil rights, but the Colombian Constitutional Court (CCC) has since extended the *tutela* device to ESR adjudication. A *tutela* is a constitutional injunction that

[150] *Supra*, 68.
[151] See http://www.escr-net.org/docs/i/403050 (accessed on 12 May 2021)
[152] Persad (n142) 582.
[153] *Treatment Action case* (n149) 123.
[154] The 1991 Constitution was amended in 2004 but it retains ESR.
[155] Rodrigo Uprimny Yepes, 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in Roberto Gargarella, Pilar Domingo &Theunis Roux (eds) *Courts and Social Transformation in New Democracy: An Institutional Voice for the Poor?* (Ashgate Publishing Limited, 2006) 128.
[156] Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2009-2080, 2014.

protects citizens' rights against actual or threatened violation by government or public officers. This *tutela* system has been deployed to activate right to healthcare in the country, whereby 'Colombian citizens can enjoin the national government to pay for lifesaving medical care'. [157] Several scholars have praised the CCC's progressive use of this mechanism to bring healthcare to the citizens.[158] The political apathy, and the feebleness of social movements and political parties have been identified as structural factors that have triggered the CCC's progressive judicial activism which has enabled the court to fill the void left by political actors.[159]

The CCC has experienced an upsurge of ESR litigation since 1998. Before then, the number of *tutelas* filed before the court (which was established in 1992) was negligible. But since then, an increase in *tutela* has emerged, especially against the State's Social Security Institute.[160] As of 2008, there had been more than 650,000 right to health suits alone before the CCC.[161] It is necessary to examine the impact of ESR adjudication by the CCC in two cases. Again, the choice of these two cases does not undermine the fact that there are other cases in Colombia where ESR adjudication has been more impactful, but the choice is simply informed by the need to push forward an argument that a confrontational judicial approach may not work sometimes, hence the need for a more collaborative judicial approach.

In the *Internally Displaced Persons (IDP) case*,[162] some IDPs filed *tutela* suit for the protection of their right to housing and human dignity. The CCC did not only uphold their contention, but it also made a declaration of 'unconstitutional state of affairs' whereby it ordered government to initiate moves to meet the 'minimum core' ESR needs of the IDPs. Although government

[157] Persad (n142) 582.
[158] Yepes (n155)141.
[159] Ibid 128-129.
[160] According to Yepes (ibid) 134, the number of cases before 1998 stood at 2,999 but it rose to 10,771 in 1998 alone.
[161] Persad (n142) 582 (footnote omitted).
[162] Ruling T-025/2004. Also see the *Overcrowded Prisoners case* (Ruling-153/1998) which affirmed the right of prisoners to live in a prison that is not overcrowded. This decision was implemented by the government which built more prisons and renovated old ones after the decision.

made some policy changes to accommodate this decision,[163] there is evidence that the subsequent court orders indicate that the decision has not been fully complied with till now. [164] Writing on the case, Eslava states that:

> the Court currently is witnessing how its role can passed [sic, pass] from being an example of emancipation to become an empty constitutional exercise…as strong as the declaration of an unconstitutional state of affairs sounds, it is simply a rhetorical claim about the validity of the social contract. It appears to push to the limit the Court's capacity to de-formalize and reconstruct the law on constitutional grounds – it is the court trying to push the nation-building project by its own. Yet, at the end of the exercise, both structural inequalities remain and the perceptual value of constitutional rights has been eroded. If the Court cannot deliver the expectations that the Constitution has encoded, the emancipatory power of the Court's decisions will slip into the arena of political manipulation…[165]

Also, in the *UPAC case*,[166] some middle-class mortgagors who were at the verge of losing their homes to the government UPAC as a result of their inability to meet their repayment obligation because of the 1997 Colombian financial crisis, went to court to challenge the UPAC rules. The CCC ruled in their favour and held that they were not liable to repay the loan or lose their houses while the crisis persisted. The court ordered government to make a new law to lessen the burden of these people. Consequently, Congress passed a new law on housing finance which law provided some relief for the debtors.

From the above, it can be said that the impact of ESR judicialisation is highly felt in Colombia as there is usually compliance with the decisions of the courts which results in improved socioeconomic wellbeing of the litigants. However, it is arguable whether the government's decision was pursuant to or independent of the court's decisions. For

---

[163] See Rodríguez-Garavito & Rodríguez-Franco (n3) 22-23 whose empirical research reveals that the government reviewed its policy (via the National Plan for Comprehensive Care for People Displaced by Violence (Decree 250 of 2005) and funds allocation, that the court's deadline 'served as an effective nudge for the relevant government agencies' and that 'in interagency preparatory meetings prior to follow-up meetings with the Court, national and local law enforcement officials would state that they had to hurry because they were going before the Court or because they would miss the Court's deadline'.

[164] See Auto No. 176 of 2005 (Const. Ct. August 29, 2005)1. See also: Codhes. Los autos de la Corte (September 21st, 2005).

[165] Luis Eslava, '*Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons' (2009) 22 Revista Derecho del Estado* 183-229, 219.

[166] Ruling C-383/1999, C-747/1999 and C/700/1999.

example, in the *UPAC case*, the litigants had protested to Congress and the executive and without waiting for a reply within a reasonable time, they rushed to court. So, it is possible that the government's positive reaction had started in-house even before the judicial decision.

Secondly, it is argued that the CCC's decisions, for example in the *UPAC case*, favour the middle class who are already socioeconomically comfortable, thereby leaving the low-income class worse-off. Lastly, the CCC's decisions are not only disruptive of the political branches' social and economic policies but they also come with high financial implications. This worrisome situation can be summed up with Persad's assertion that:

> In Colombia, the [tutela] system more than tripled health care expenditures in a single year-between 1998 and 1999. This rise in health care costs continued over time: …the cost of health litigation climbed from U.S. $1.48 million in 2001 up to U.S. $344 million in 2008. Not only did health care expenditures rise staggeringly, but the court system also became overburdened:… by 2008, there had been more than 650,000 right to health actions brought" …But the greater resources that flow to the individuals winning tutela judgments have frequently… come not from increased tax revenue or cuts in other sectors, but from cannibalizing less visible but crucial parts of the health sector, like childhood immunizations, and have flowed to the middle class rather than to the working class and the poor….[167]

The above statement presents a disturbing dimension of ESR litigation that is not all-inclusive. While ESR judicialisation is a veritable tool, it should not be used to deplete public treasury in favour of those who are already comfortable, to the detriment of the vulnerable and marginalised groups. It is therefore necessary to rethink judicialisation, by embracing a discursive and collaborative approach that would encourage the political branches to utilise the limited resources to meet the needs of the very needy. Thus, as the CCC rightly recognised in the later *T/760/2008 case*,[168] ESR cases require not just court decisions but public debate, decisions, citizen participation and policy implementation.

[167] Persad (n142) 582-583.
[168] Sentencia T-760/2008. 3.3.14. The decision in this case was also impactful as it led to the enactment of the Colombian Statutory Law on Health of 2015.

In concluding this section, it is argued that both national and international tribunals need to 'utilise institutional collaborations and expertise…'.[169] The Colombian judicial system has a great mechanism (structural remedial and follow-up mechanism) by which the court issues remedies that have system-wide implications and then goes ahead to monitor the implementation of the same. This mechanism as adopted in Colombia and India is helpful to the collaborative approach discussed in this thesis. The usefulness of the approach will be discussed in the next chapter.

5.6 Towards a more effective judicialised ESR Regime: From a Coercive Control to a Cooperative Control

While it is true that the courts could play a valuable role in the realisation of ESR, care, however, should be taken as not to over-rely on them, because as Richardson argues, '…there is a formal limit to what the courts can achieve'.[170] Yepes similarly argues that, 'An excessive "judicialisation" of social rights can certainly be detrimental, both to a participatory democratic culture, and to the cause of social justice, which would tend to become "politicised" and overloaded'.[171] An over-reliance on courts could lead to democratic deficits which would in turn lead to the political branches' non-implementation of the judicial decisions,. Over-reliance on courts could also lead to a situation where the rights-holders' attention is drawn away from the exploration of other 'political' means of realising ESR.[172] For example, despite the numerous Indian Supreme Court's decisions affirming ESR, millions of the Indian population still live in acute poverty without access to basic amenities.[173] Another thing to be wary of is the over-empowerment of the courts beyond their traditional domain.

---

[169] Alicia Ely Yamin & Angela Duger, 'Adjudicating Health-Related Rights: Proposed Considerations for the United Nations Committee on Economic, Social and Cultural Rights, and Other Supra-National Tribunals' (2016) 17(1) *Chicago Journal of International Law* 101.

[170] Genevra Richardson, 'Impact Studies In The United Kingdom' in Marc Hertogh & Simon Halliday (eds) Judicial *Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge University Press, 2004) 105.*

[171] Yepes (n155) 141.

[172] Surya Deva, 'Access to Justice for Socio-Economic Rights: Lessons from the Indian Experience' (2017) Völkerrechtsblog, doi: 10.17176/20170915-123858.

[173] Ibid.

It is argued that the over-empowerment of the courts could lead to judicial tyranny and needless confrontation with the political branches. If this happens, rather than benefit from judicialisation, ESR realisation would be worse for it. Although it could be true that in some cases, the political branches may accept and comply with 'externally imposed (in this case courts') solutions', such cases usually require 'an unusually strong rule of law orientation among political elites and the population'.[174] More often, what the political branches do is to activate a cognitive dissonance mode (whereby they deliberately misconceive the nature and scope of the judicial decision, so as to deliberately make it inapplicable to the present situation),[175] or they could simply ignore the decision or apply delay tactics.

Considering the widespread disregard for the rule of law by political leaders in most Third World countries, with particular reference to Nigeria, it may not be expected that the political branches will voluntarily comply with judicial decisions that are pro-ESR. Thus, where such judicial decisions are given, the political branches' behavioural reaction to the decision may simply be that of a '*pro forma* change'[176] (that is, cosmetic, unreal, faked change) just to appear that they are obeying the decision whereas they are not. In other cases, where a political branch finds 'a judicial decision unwelcoming, it may be tempted to minimise compliance or forego it altogether'. [177] There is thus a need to harmonise unchecked political processes and unchecked judicial powers with a view to fashioning out better constitutional provisions and better ESR realisation mechanism.[178]

Therefore, a better option would be to re-imagine the court as a collaborator with the other branches of government in driving the realisation of ESR. As Deva argues, '[w]ithout compromising their independence or totally disregarding the separation of powers, Courts

[174]Handberg (n6)1282-1283.
[175] Canon(n5) 85.
[176] Ibid 93.
[177] Ibid 81.
[178] Tushnet (14) 228.

should be having a "continuing constitutional conversation" with the other two branches of the government on how best to realise socio-economic rights'.[179] They could do this in the form of a watchdog, advisor, norm setter, awareness raiser, apolitical expert or mediator[180] but not purely as a rule giver who adopts a command-and-control procedure. Therefore, courts should review their procedure and make ESR work by becoming more interactive and involved than traditionally confrontational and officially officious. As Galanter states, 'the work of courts is seen not primarily as the resolution of disputes in official settings but as the projection of bargaining and regulatory endowments into a world unevenly occupied by indigenous regulation, a world in which the influences that emanate from courts mingle with those from other sources'.[181]

Many pro-judicialisation advocates of ESR realisation often point in the direction of India where the courts accept public interest litigation in advancing ESR. However, what most of these advocates fail to realise is that the Indian courts' approach is not confrontational but collaborative. Hence, in India, 'what the courts expected from the respondent, which was the State in most of the cases, was that instead of taking an adversary position, and merely denying the allegation, it should help the Court to find the truth'.[182] This simply suggests that the Indian courts adopt a collaboratively inquisitorial procedure in dealing with public interest litigation[183] on ESR cases. This approach displaces a coercive approach and emplaces a cooperative approach which will in turn lead to a better compliance with ESR-related judicial decisions.

[179] Deva (n172).
[180] Ibid.
[181] Marc Galanter, 'The Radiating Effects of Courts' in Keith O. Boyum & Lynn Mather (eds) *Empirical Theories about Courts* (Quid Pro Books, 2015) 117–142, 123.
[182] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002) 207.
[183] Cane (n33), *27.*

5.6.1 Coercive and Cooperative Control

Building on the work of Hertogh,[184] this thesis argues that a cooperative style of control, rather than a coercive style of control by the court on the political branches would be more efficacious in driving a robust policy impact on ESR realisation. According to Hertogh, a coercive style of control is one in which the outcomes or decisions of an adjudicatory process are solely produced by the court and unilaterally imposed on the government agency concerned.[185] That way, the court as the controller acts as a 'superior' to the controlled (political branches) and when the desired compliance is not given, there would be threat of sanctions.[186]

On the other hand, a cooperative control is concerned with generating outcomes or decisions based on communications and negotiations between the controller (court) and the controlled (political branches).[187] This style recognises the peculiarities involved in the realities, languages and rationality in the different branches of government,[188] and thus tries to accommodate these differences by allowing the political branches to relate and negotiate in a less confrontational way and in their own language.[189] Using this normative control[190] mechanism, the court seeks to put itself in the shoes of the political branches with a view to seeing how problematic the implementation of its decision might be.[191]

Using the above styles, Hertogh conducted empirical research on the compliance by two Dutch administrative agencies (Dutch Tax Authority and IB-Group) with court decisions and Ombudsman recommendation vis-à-vis policy impact of such judicial decision or recommendations. The research sought to find out 'those situations in which, as a result of a

[184] Hertogh (n130).
[185] Ibid. 54-55. Also see Amitai Etzioni The *Active Society: A Theory of Societal and Political Processes (*Free Press, 1968) 96 who calls it coercive control and Andrew Dunsire, *Control in a Bureaucracy* (Martin Robertson, 1978) 35 who calls it control by 'duress'.
[186] Ibid.
[187] Ibid.
[188] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd, Butterworth, 1992).
[189] Hertogh (n130) 55.
[190] Etzioni (n185), 96.
[191] Donald A. Schoen & Martin A. Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (Basic Books, 1994).

court ruling or an ombudsman report, government agencies make policy changes that have consequences reaching into the future and beyond …'.[192] The author reveals the styles which are applicable in the Dutch courts and the Ombudsman practices, while the court adopts a coercive style, the Ombudsman on the other hand applies the cooperative style. It is also interesting to note that under Dutch law, the court's decisions are binding and sanctionable whereas the Ombudsman's decisions are non-binding.[193]

However, Hertogh's empirical research revealed that, '…court decisions, which are legally binding, sometimes have only a limited effect on the policies and behavior of government agencies. By contrast, the ombudsman's reports and recommendations, which lack legal force, can be fairly successful in influencing administrative action in the long run…'[194] The research further revealed that the Ombudsman, despite being a 'crusader without a sword',[195] is able to influence policy impact in the way and manner administrative bodies carry out their responsibilities. On the contrary and despite the availability of legal sanctions, the court's decisions are usually not obeyed as they are not the outcome of a deliberative or discursive process. One of Hertogh's interviewees notes,

> I have the impression that the courts act strictly on their own, and they have the right to do so. But with regard to some rulings I sometimes wonder: How can you make this decision, while you are aware of the fact that it will seriously disrupt our daily practice? They act strictly independently, and that is a good thing, but sometimes they also operate from an ivory tower'.[196]

On the other hand, another interviewee has this to say of the Ombudsman: 'there are many roads that lead to Rome', and that the ombudsman allows them to `select the road that is the most efficient for us'. [197]This perception about the coercive and cooperative approaches has a

[192] Hertogh (n130) 51.
[193] Ibid, 51-54.
[194] Ibid.
[195] T Barkhuysen & M LM. Hertogh 'Effectieve bescherming van mensenrechten: Rechter, ombudsman en artikel 13 EVRM,' NJCM Bulletin 6:751-66, cited in Hertogh (n88).
[196] Hertogh (n130) 56.
[197] Ibid.

telling effect on how the outcome of proceedings will be treated by the political agencies in terms of compliance or non-compliance.

Regarding compliance with court's decisions, Hertogh examines the compliance level through the lens of three-pronged phases of information, transformation and processing.[198] At the information stage, the government officials try to internalise the court's decision by digesting it to know what it actually says. At the transformation stage, they seek to know what the ruling means for them as a government agency while at the processing stage they determine what to do with the ruling.[199] It is at the transformation and processing phases that preference for a cooperative control style is more pronounced. This is because, it is the transformation stage that really reveals the policy tensions between government and the court, while the processing stage reveals the way the government agencies deploy their delay and defence tactics to frustrate a decision that was simply imposed on them.[200] Thus, Johnson argues that,

> [a] decision concerning whether the court's program is acceptable is expected to depend on two factors: a. the perceived difference between the existing program and that suggested by the court and b. the commitment of the agency to the existing program. The hypothesis follows that the greater the change required by the court as perceived by the agency, the less likely the agency is to immediately adopt the court's program.[201]

A coercive judicial approach deters government agencies from obeying court's decisions that are either difficult to meet based on resource constraints or simply on the basis of lack of consultation. On the other hand, throughout the three stages above, the cooperative control style has strong potential to build up a fruitful and positive policy impact. For instance, in Hertogh's empirical research, it is stated that the cooperative style allows for more dialogue between the Ombudsman and the government agency, which leads to easier understanding of

---

[198] Marc LM Hertogh, 'The Policy Impact of the Ombudsman and Administrative Courts: A Heuristic Model' (1998) 2 *The International Ombudsman Yearbook*, edited by International Ombudsman Institute & Linda C. Reif. The Hague: Kluwer Law International.
[199] Ibid.
[200] Hertogh (n1130), 59.
[201] Charles A Johnson, 'Judicial Decisions and Organizational Change: A Theory' (1979) 11 *Administration & Society* 27-51, 38.

what the recommendation requires of them, thereby motivating the government and eliminating policy tensions. This is not to say that every conceivable policy tension would be amenable to the cooperative model; a court with radically different ideologies from that of the political branches may not be able to adopt this model to effectuate a collaborative resolution of issues. Further, at the processing stage, there may not be a problem of implementation of the judicial decision as the same would have been reached in a consultative manner which eliminates surprises that are associated with the court's coercive style.[202] Rather than obey a coercive court decision, government agencies usually rely on all forms of delay and technical excuses as well as legislative intervention, knowing full well that the court cannot enforce its sanction power without the help of the security officers who happen to take order from the political branches. As Canon rightly notes, 'courts do not have many powers to effect implementation of their policy decisions…. So, in good part courts have to depend upon non-judicial factors to gain agency compliance'.[203] Hence, it is imperative for the courts to adopt a cooperative approach to ESR adjudication.

Consequently, it is argued that the courts should leave officialdom behind and bring their influence to bear through a conversational and deliberative process, both at the hearing and remedy-awarding stages. Such a deliberative process would enhance the court's judicial effectiveness, in the sense that the judicial outcome would be a robust result of interaction with political branches of government and other stakeholders. It is not enough for a court to have judicial autonomy, that is, the ability to be the 'authors of their own decisions'[204] or the ' judges' ability to develop opinions independent of the preferences of other political actors'.[205]

[202] Hertogh (n130) 61-62.
[203] Canon(n5) 81-82.
[204] Lewis A Kornhauser, Lewis, 'Is Judicial Independence a Useful Concept? In Steven B. Burbank & Barry Friedman (eds) *Judicial Independence at the Crossroads: An Interdisciplinary Approach (* Sage, 2002) 45-55, 48.
[205] Jeffrey K Staton & Will H Moore, 'Judicial Power in Domestic and International Politics' (Summer 2011) 65(3) *International Organization* 553-587, 559.

The court should also have judicial effectiveness, that is, ability to see that its decisions are complied with.[206]

As Cavallaro and Brewer argue regarding regional litigation, '[t]he mounting evidence that greater institutionalization of human rights protection at the supranational level does not necessarily increase respect for human rights on the ground' and this 'points to the need for a new model of how and when supranational litigation can positively affect domestic human rights practices.'[207] Helfer observes that, 'compliance with international law [on ESR] increases when international institutions— including tribunals— can penetrate the surface of the state to interact with government decision-makers'.[208] Thus, it is argued that there should be a cooperative approach by the courts, not only in their dealings with the national executive and legislative branches on ESR realisation,[209] but such an approach should also feed into national courts-international courts/committees engagement with the political branches[210] on ESR.

At the international level, there are enforcement-centric scholars such as Steiner who argues that 'Institutions make rights more effective by threatening or taking actions that may lead a state to comply…'.[211] Corroboratively, Watson states that 'What human rights advocates are seeking is a supranational order of the hierarchical, coercive type prevalent in domestic systems to act as a check on government malfeasance'.[212] However, the opposing voluntariness-centric

[206] Ibid. Also see Laurence R Heifer & Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication (1997)107 (2) *Yale Law Journal* 273-391.
[207]Cavallaro & Brewer (n82)769.
[208] Laurence R Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *EUR. J. INT'L L.* 125, 132.
[209] Roberto Gargarella, 'Dialogic Justice in the Enforcement of Social Rights' in Siri Gloppen & Alicia Yamin (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2011) 232—245; Rodriguez-Garavito, 'Beyond the Courtroom' (n98) 1669-1698; Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5(3) *International Journal of Constitutional Law* 391-418.
[210] Huneeus, 'Courts Resisting Courts' (n8); Staton & Moore (n205).
[211] Henry J Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in P. Alston & J. Crawford (eds) *The Future of United Nations Treaty Monitoring* (Cambridge University Press, 2000) 15.
[212] JS Watson, 'Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law' (1979) *University of Illinois Law Forum* 609.

scholars, argue that enforcement or threat of it has not yielded much result, hence the need to envision what make States to voluntarily comply with international obligations and how to encourage such compliance in a consistent manner. Thus, Helfer and Slaughter argue that, 'Supplementing and surrounding this core of potential coercion, however, is the power of legitimacy: a court's ability to command acceptance and support from the community so as to render force unnecessary'.[213] Further, even in the UN Human Rights Committees workings, the outcomes of the various complaint mechanisms, though may be couched in a command and control style, often lack strong enforcement mechanisms, thus subject to a voluntary compliance from States.[214]

Therefore, it is unsurprising that the CESCR recognises the importance of voluntary compliance by seemingly incorporating a collaborative network into its system. Thus, Article 7 of the Optional Protocol innovatively and clearly provides for a friendly way of settling ESR matters. It states that, 'the Committee shall make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant. An agreement on a friendly settlement closes consideration of the communication under the present Protocol'.[215]

The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights also use the friendly settlements mechanism to facilitate resolution of disputes between victims of rights violation and the State concerned.[216] Just like most domestic courts, the compelling decisions of the African Court and Commission are not being complied with. Thus, Chenwi observes that 'The [African] court has a serious non-compliance crisis. About

[213] Heifer & Slaughter (n206) 273-284.
[214] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, 1994) 98-104, 202-204.
[215] Optional Protocol, Art.7.
[216] Victor Oluwasina Ayeni & Tajudeen Ojo Ibraheem, 'Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System' (2019) 10 *Beijing Law Review* 406-422, 411.

75% of states do not comply with its decisions, and there are no built-in consequences in its protocol'.[217] This further reinforces the argument for a cooperative judicial approach that might attract a higher compliance level.

Although the African Charter[218] recognises the power of these (quasi) judicial bodies to deploy amicable settlement only in respect of cases involving States, the rules of procedure of the bodies have extended this power to cases involving individuals.[219] Thus, in *Rencontre Africaine pour la Defence des Droits de l'Homme v Zambia,*[220] although the African Commission held that Zambia had unlawfully deported some West Africans from the country, it opted for an amicable settlement of the case instead of issuing compelling orders. Also in *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti*,[221] the African Communication engaged the parties in an amicable settlement, despite establishing the existence of human right violation against the government of Djibouti. This approach led to a timely and amicable settlement of the issues. Similarly, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) recently in 2016 relied on its amicable settlement framework,[222] in the case *of Institute for Human Right and Development in Africa v Malawi*.[223] Because of the friendly approach that the ACERWC adopted, the Malawian government voluntarily complied with the outcome of the amicable settlement, by amending its constitution to confer child's rights on children below 18 years of age. The foregoing demonstrates the social effectiveness that is associated with a cooperative judicial approach. Further, the approach

[217] Lilian Chenwi, 'Successes of African Human Rights Court undermined by Resistance from States' (*The Conversation,* 31 August 2021), available at https://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454 (accessed on 02 September 2021).
[218] Art. 52.
[219] See Rule 90 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2010) and Rules 56 & 57 of the Rules of Procedure of the African Court on Human and Peoples' Rights.
[220] Communication 71/92 *Rencontre Africaine pour la Defence des Droits de l'Homme v Zambia.*
[221] *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000).
[222] Rule XIII (2) of the ACERWC Revised Guidelines for the Consideration of Communications (2014).
[223] Communication No 004/Com/001/2014 *Institute for Human Right and Development in Africa v Malawi*

'...shorted-circuited the unnecessary delay and waiting period' that the adversarial method would have occasioned, even as it 'demonstrates the capacity of the amicable settlement procedure to induce constructive dialogue and engagement as well as voluntary compliance by states'.[224]

Although Courtis and Rossi commend the inclusion of the friendly settlement scheme in the Optional Protocol to the ICESCR, in that it may lead to a speedy resolution of ESR cases and establish a direct channel of dialogue between the State and the victims of ESR violation, they also entertain the fear that it may be subject to abuse by States that may want to use it to delay the CESCR proceedings even when they know that they would not abide by the eventual terms of settlement.[225] It is argued that this is a genuine fear that should be addressed.

To address this, Courtis and Rossi suggest that, contrary to the provisions of Article 7 of the Optional Protocol above which says upon a friendly settlement agreement the CESCR proceedings on the communication terminates, the CESCR should rather insist that its proceedings would only terminate upon compliance with the agreement or that alternatively, non-compliance would reawaken an already closed communication.[226] This thesis aligns with the authors' view but it adds that such a CESCR's position should be communicated in a discursive manner so as to sustain the collaborative approach adopted or leading to the terms of settlement. It is further argued that this collaborative approach should be adopted or where it already exists, sustained, both at the national and global levels when dealing with ESR cases. The political branches are more likely to promote the realisation of ESR where they are approached in a friendly manner rather than being commanded and controlled to fulfil obligations, the non-fulfilment of which they could easily give reasonable and somewhat

[224] Ayeni & Ibraheem (n216) 417.
[225] Christian Courtis & Julieta Rossi, 'Individual Complaints Procedure' in Malcolm Langford, *e tal* (eds) *Optional Protocols to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria University Press, 2016) 46, 79-80.
[226] Ibid.

unreasonable excuses for. A collaborative approach would lead to a more efficacious and practical realisation of ESR in terms of remedying ESR deprivations. As Courtis and Rossi argue, '…the active involvement of the State in the definition of the remedy could positively impact its actual implementation'.[227]

Thus, it has been argued that, under the Inter-American Human Rights System, the compliance or implementation level is higher where States are involved in a collaborative process aimed at coming up with a friendly settlement of rights issues.[228] It has also been observed that, '…available evidence demonstrates that the Inter-American Court wields *less* rather than *more* political power to cause governments to undertake human rights reforms'.[229] This court also holds informal follow-up meetings with affected countries' rapporteurs and petitioners with a view to getting its decision collaboratively implemented.[230]

Similarly, the Colombian Constitutional Court usually appoints voluntary technical experts and holds meetings with them, the petitioners and civil society organisations thereby opening up a discursive space for ESR realisation.[231] As would be seen in the next chapter, the Indian Supreme Court also uses a similar method to promote a collaborative rights realisation mechanism. The same deliberative approach obtains in the European Court of Human Rights where there is a 'deliberative compliance model'[232] which gives room for a collaborative resolution of human rights issues. This is an approach worth considering by the Nigerian and

[227] Ibid.
[228] Victor Abramovich, 'Remedies Under the Inter-American System' 1 (unpublished manuscript) (on file with ESCR-Net), http://www.escr-net.org/sites/default/files/Abramovich_-_Remedies_Under_the_Inter-American_System_0.pdf) 5; Victor Abramovich, Remedios de alcance colectivo y obstáculos en la ejecución de decisiones en el Sistema Interamericano, draft paper for ESCR-Net Conference on Enforcement of ESCR Judgments, (Bogota, May 2010), cited in Courtis & Rossi (n225) 79.
[229] Cavallaro & Brewer (n81) 774, citing Thomas Buergenthal, 'New Upload—Remembering the Early Years of the Inter-American Court of Human Rights' (2005) 37 *N.Y.U. J. INT'L L. & POL* 259, 276 –277.
[230] Yamin and Duger (n169) 112.
[231] Ibid 115. One of the fruitful outcomes of such engagements is the lobbying for and eventual passage of the Colombian Statutory Law on Health 2015 which incorporates the CCC's decision in T—760/2008.
[232] Basak Cali & Anne Koch, 'Enforcing Civil and Political Rights: Lessons from European Court of Human Rights', Presentation at the Enforcement of ESC Rights Judgments— International Symposium (May 7, 2010).

African courts, given the political class' proclivity for unwillingness to self-implement (and most likely to implement judicial decisions on) ESR.

It is argued that the individual complaint procedure under the Optional Protocol to the ICESCR provides a nuanced and interactive approach and leverages for States' implementation of ESR in their jurisdictions. For example, although Article 8(4) requires the CESCR to consider the reasonableness of the State's steps taken to fulfil the ESR allegedly violated under a given communication, the same Article states that the CESCR should note that States could adopt a range of possible policy measures for implementing ESR, thereby creating some flexibility in favour of the States. Further, the procedure in Article 9 of the Optional Protocol requires the CESCR to communicate its views and recommendations to the State which is required to submit to the CESCR, within 6 months of receiving the recommendations, a written response on actions taken to meet the views and recommendations on ESR realisation. This sort of approach gives the States the opportunity to weigh available options and make concrete plans in an atmosphere devoid of threats of being held in contempt for disobeying an order issued in a command-and-control style.

It has been seen from the above impact assessment discussion that, in terms of material and direct impact, a confrontational judicial approach has not fully been a useful tool without some external considerations. As it is at the domestic level, so it is at the international level. Thus, Samvel states that, '…confrontational and competitive international adjudication has not proved to be an effective strategy for improving state compliance with international…obligations'.[233] As Yamin and Duger also argue, '…in the context of adjudicating cases under the Optional Protocol, the ESC Rights Committee will have to be strategic in selecting remedies that are realistic and can be monitored effectively. Low levels of implementation or efficacy of remedies may potentially undermine the credibility of the

[233] Gor Samvel (n131) 1.

ESC Rights Committee'.[234] Therefore, it is argued that courts and tribunals that have adopted a more deliberative approach should continue to do so more regularly, while those which still adopt a confrontational approach should introduce some cooperative approach into their judicial process, with a view to advancing, not impeding ESR realisation.

A collaborative approach will not only recognise and resolve 'a "means-ends" problem by structuring the implementation process in such a way as to allow technical expertise [from the political branches] to inform choices among alternative policy options',[235] but it may also reduce 'decision costs'[236] that flow from the judicial decision. While courts may possess the evaluative competence on constitutionally required outcomes, they may not stand in a better position than the political branches (that have an array of in-house policy experts), when it comes to designing the specific policies to effectuate those outcomes.[237] If the political branches 'are determined to resist a judicial decision and will defy even the clearest judicial order, specific demands by a court only serve to highlight the relative lack of judicial enforcement power'. [238] Thus, '…it is both appropriate and necessary for courts to be aware of their factual and political surroundings to maximize their relevance and effectiveness…'[239] by engaging in collaboration with relevant stakeholders before, during and after judgment on ESR cases.

Even at the international level, it has been argued that '…while the court can facilitate compliance when governments want the court to facilitate compliance, the court cannot do so otherwise…. the court's ability to enforce compliance with the regime's rules is limited by the willingness of other governments to enforce the court's rulings'.[240] Cavallaro and Brewer add

[234] Yamin & Duger (n169) 110.
[235] Jeffrey K. Staton & Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance and Judicial Opinions' (2008) 52(3) *American Journal of Political Science* 504-519, 506.
[236]Cass R.Sunstein, 'Forward: Leaving Things Undecided' (1996) 110(1) *Harvard Law Review* 4–101, 17.
[237] Jeffrey K. Staton & Georg Vanberg (n234) 506.
[238] Ibid. 107.
[239] Cavallaro & Brewer (n82) 777.
[240] Clifford J. Carrubba, 'Courts and Compliance in International Regulatory Regimes' (Aug. 2005) 67(3) *The Journal of Politics* 669-689, 677.

that 'courts will often lack the power to trigger lasting improvements in the protection of human rights simply by directing governments to change their practices'.[241] A non-compliance with judicial decision has a negative impact on both the political branches and the courts.

On the one hand, the non-compliance could lead to an electoral punishment or public outcry against the political branches. On the other hand, a defiance to court's decision could lead to erosion of the integrity and respect for the court, as the general public may follow the political branches in disobeying court orders.[242] While Warwick has observed that, 'The meagre use of social rights and the frail CESCR response to … crises is a case study of the space (perhaps the chasm) between the promise and reality of social rights enforcement',[243] it is to be added that the CESCR, and the domestic courts, in pursuing the realisation of ESR should 'create additional space for dialogue with and between parties to communications, such as through …hearings and other fact-finding procedures as well as …follow-up procedures…'.[244] This collaborative approach to ESR realisation would provide the needed opportunities that will not only make remedial recommendations, but that would further open up channels of communication between State authorities and the complainants to ensure their participation in the identification and implementation of appropriate remedial measures.[245] This will help to avoid the unfruitfulness associated with the international human rights mechanisms that is 'overly focused on the capacity … to *directly* coerce or cajole the *compliance* of state actors-an optic that is at its weakest "relentlessly and bluntly Austinian" in nature…'.[246]

---

[241] Cavallaro & Brewer (n82) 770.
[242] Ibid.
[243] Ben T.C. Warwick, 'Debt, Austerity, and the Structural Responses of Social Rights' in Ilias Bantekas and Cephas Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press, 2018) 382.
[244] Viviana Krsticevic & Brian Griffey, 'Interim Measures' in Malcolm Langford *etal* (eds) *The Optional Protocol to the International Covenant on Economic Social and Cultural Rights: A Commentary*, (Pretoria University Law Press, 2016) 93-325.
[245] Ibid.
[246] Obiora Chinedu Okafor, 'The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding *within* African States' (Winter 2004) 8(4) *International Journal of Human Rights* 413-450, 414 (footnote omitted).

5.7 Conclusion

This chapter has critically examined judicialisation as a tool for realising ESR. It unpacked judicialisation, the conditions and legal framework for its operation as well as employed interdisciplinarity to discuss the metrics for impact assessment of the concept. The chapter also engaged in a brief country impact discussion for the purposes of advancing an argument for a more cooperative judicial approach, not for the purpose of undermining the fact that judicialisation indeed has an impact.

While the findings reveal that it is indeed a veritable tool for effecting symbolic social transformation, the present configuration of judicialisation has its downside, vis-à-vis ESR practical impact. The findings also reveal that the present approach to judicialization sometimes tends to favour the rich and middle class, to the detriment of the very poor. The chapter has therefore argued for a remodelling of judicialisation by introducing a collaborative or cooperative approach. In order to ensure 'the possibility of producing concrete effects in the daily lives of the practices of social actors' and that judicialisation is 'not reduced to the mere affirmation of this right [ESR] as a constitutional norm, insofar as it seeks to incorporate social and citizenship characteristics in its content and in the establishment of effective strategies',[247] this chapter has called on the court to embrace a more discursive and collaborative judicial approach. In the chapter that follows this, the workings of the proposed collaborative approach will be discussed.

[247] Asensi (n18).

CHAPTER SIX

PROTECTION OF ECONOMIC AND SOCIAL RIGHTS: A COLLABORATIVE APPROACH TO JUDICIALISATION

6.1 Introduction

Having examined the concept judicialisation for the protection of economic and social rights (ESR) and the likely ineffectiveness of its present conception to fully realise ESR in chapter five, it has become necessary to explore an alternative judicial approach that might bring about an enhanced ESR realisation regime in Nigeria. The discussion on judicialisation and constitutionalisation has revealed that it may not be enough to enact ESR into the constitution, neither does merely judicially pronouncing them as rights guarantee citizens' full enjoyment of them. As Lord Lester and O'Cinneide argue 'there are limits to what can be achieved by the[traditional] judicial process in implementing fundamental rights…'.[1]

Most States have continuously disregarded the need to protect or realise ESR. This inability of the States is an invitation to an inevitable crisis because of the acute deprivation which the absence of the ESR realisation ushers in, which in turn could lead to rampage. According to David Barash and Charles Webel,

> It is very difficult to be tranquil, calm, or satisfied when denied such basic needs as food, clothing, shelter, education, and medical care ... [and when people] perceive that their economic conditions are far inferior to those of others.[2]

Corroboratively, the late South African Clergyman, Desmond Tutu stated that, social and economic grievances that are left unattended are a powder keg of resentment and frustration that can threaten social order.[3] Failure of ESR realisation has a dangerous signal for democracy. As Christopher Reenock *e tal* have argued, 'The intense concentration of society's resources in the

[1] Lord Lester & C O'Cinneide, 'The Effective Protection of Socio-Economic Right' in Yash Ghai & Jill Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing, Economic, Social and Cultural Rights* (Commonwealth Secretariat, 2004) 19.
[2] David P Barash & Charles P Webel, *Peace and Conflict Studies (*Sage, 2002) 485.
[3] BBC, '"Powder Keg" in South Africa – Tutu,' BBC News, 7 October 2006.

hands of a narrow elite [is] an important cause of democracy's failure'.[4] The reason for this is that, if democracy is said to be people-dictated and yet the people are deprived of basic necessities of life, chances are that they would take up arms or take any other course that might undermine democracy. Hence, to forestall social crisis, it is necessary to think beyond traditional conception of constitutionalisation and judicialisation with a view to designing workable alternatives for the realisation of ESR.

Therefore, the aim of this chapter is to take forward the foregoing arguments in the preceding chapter, that is, a re-imagination of judicialization in order to operationalise ESR realisation more effectively. Webber has argued that courts should not stand in the way of the other arms of government without justification. According to him, '...democratic institutions should be permitted to make decisions and carry them into effect. The nullification of statutes through judicial review therefore requires specific justification'.[5] While this statement makes sense, it is to be added that since democratic institutions are made up of humans who are prone to abuse of power, it is not in every case that absolute permission to make decision should enure in their favour without some external control mechanism like the court process.

What should rather be advocated is that the court should not *always* be confrontational in calling the other arms of government to order; it should rather adopt a cooperative approach in certain cases, especially in cases that have resource implications. While there are situations where the court's adoption of a confrontational approach may be justifiable on grounds of principles, there may also be situations, for example ESR adjudication which impacts on resources greatly, where the court will need to adopt a cooperative or collaborative approach, either alone or in combination with a confrontational approach, on grounds of pragmatism. Thus, as Roux argues,

[4] Christopher Reenock, Michael Bernhard & David Sobek, 'Regressive Socioeconomic Distribution and Democratic Survival' (2007)51(3) International *Studies Quarterly* 677–699.

[5] Jeremy Webber, 'Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere)' (2003) 9(1) *Australian Journal of Human Rights* 135-182,139.

> some combination of principle and pragmatism seems likely to provide the best way for a constitutional court in a new democracy to establish its legal legitimacy while safeguarding its institutional security. "Principle," because deciding cases according to law is what legitimates courts in the legal sense; and "pragmatism," because constitutional courts in new democracies, given the inherent weakness of their position, must perforce temper their commitment to principle with strategic calculations about how their decisions are likely to be received.[6]

Hence, adopting a collaborative approach will ensure that a court's ESR decision is well received and implemented by the political branches, thereby giving the court sociological legitimacy and sustaining its institutional security in relation to the political branches. A court should not always rely on legal legitimacy to pursue a confrontational approach which might lead to a conflict with the political branches. As has been observed, 'it would seem to be fruitless for a constitutional court …to pursue legal legitimacy at the expense of its institutional security… it would seem to make sense for a court to trade off some gains in legal legitimacy in exchange for protecting its institutional security'.[7]

The first part of this chapter introduces the work while the second part examines the concept of institutional collaboration whereby the respective players in the collaborative chain are discussed and their role explained. Following that is a discussion on the role of social movements in the protection of ESR. The last part of the chapter concludes the work.

6.2 Institutional Collaboration

The general thinking has always been that courts should not listen to the opinions of political or elected officials when deciding cases before them, so as to protect judicial independence.[8] However, as argued in chapter one of this thesis, a collaborative approach does not necessarily attenuate judicial independence or separation of powers, but it may lead to an enhanced rights realisation, through the utilisation of 'fruitful conflicts'. This thesis argues that an effective

[6] Theunis Roux, 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *I-CON* 106, 108.
[7] Webber (n5) 110.
[8] *Ibid*.136.

institutional collaboration among the key players in the ESR field would lead to a more efficacious realisation of the rights. Effective collaboration here means the needed cooperation among the different actors in the ESR realisation chain which cooperation could lead to a practical or demonstrably valuable impact on the lives of the rights claimants.

Put differently, the courts should be mindful of the fact that achieving ESR realisation is not a one way-traffic task; there should be 'a reciprocal process of interaction, rather than one where the causal arrows go only in one direction'.[9] The task involves teamwork between the three branches of government (executive, legislature and judicial) and other key players. For example, if the court pronounces that the right to healthcare is enforceable but the legislature and executive think otherwise, there is a possibility that such political posture would impede the impact of the judicial pronouncement on the lives of citizens. It thus becomes necessary for the framers and interpreters of the constitution and other rights-protecting statutes to 'structure the institutional relationship in a variety of ways to achieve a desired balance in legislative [, executive] and judicial roles'.[10]

Thus, the interdependence of these arms of government as well as the various legal, administrative and political strategies in the realisation of ESR cannot be downplayed. Each of them depends or should depend on the other to attain a successful ESR regime, and one should not be seen as asserting superiority over the others.[11] As Scott and Sturm state:

> Many problems of public concern result from social practices and the dynamic interaction between culture, cognition, and context. Their remediation cannot be reduced to a single explanatory theory or rule violation. They involve a combination of scientific and political judgment. Reflective, participatory deliberation, evaluated in relation to benchmarks of participation, epistemic adequacy, transparency, impartiality, and principled decision-making, can be better suited than detached logical consideration for producing the situated knowledge needed to determine the normative significance of complex or novel

[9] Joanne Scott & Susan P Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13(3) *Columbia Journal of European Law* 565-594, 570.
[10] Ibid 138.
[11] M Goodale, 'Locating Rights, Envisioning Law between the Global and the Local' in M Goodale & SE Merry (eds)*The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press, 2007) 1-38, 8-9.

> problems, as well as how they can be remedied. The legitimacy and efficacy of normative elaboration may well depend upon the interaction of multiple decision bodies, using different forms of normative elaboration, which are accountable to each other.[12]

The foregoing brings to the fore a need for inclusion of all 'individuals, institutions, states, international agencies, and so on, who practise human rights…'.[13] At any given time, the court should be able to identify who human rights user are and what role each of them need to play in the effective realisation of ESR.

6.2.1 Types of Human Right Users

To fashion out an effective institutional collaboration, it is apposite to identify who rights users are. According to Helfer and Slaughter,

> Individuals and their lawyers, voluntary associations, and nongovernmental organizations are ultimately the users and consumers of judicial rulings to redress a particular wrong or advance a particular cause or set of interests.... [A]ppreciation of the relationship between these social actors and the institutions of state government opens the door to deploying them as forces for expanding the power and influence of supranational tribunals.[14]

In Desmet's view[15], there are four types of human rights users. These are rights claimants, rights realisers, supportive rights users and judicial users.[16] While rights claimants are those in whose favour the rights tilt, the rights realisers are the state authorities charged with the responsibility of providing the conducive atmosphere for rights enjoyment. Supportive rights users are human rights supporters who are not the beneficiary of the rights but who support the cause of the(would-be) beneficiaries. Non-Governmental Organisations such as the Socio-Economic Rights and Accountability Project (SERAP), Socio-Economic Rights Action Centre

---

[12] Scott & Sturm, 'Courts as Catalysts' (n9).
[13] Goodale, 'Locating Rights'(n11).
[14] Laurence R Heifer & Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication (1997)107 (2) *Yale Law Journal* 273-391, 312. Also see K Sikkink, 'Human Rights, Principled Issue-Networks, and Sovereignty in Latin America' (1993) 47(3) *International Organization* 411; T Risse & K Sikkink, 'The Socialization of International Human Rights Norms into Domestic Politics: An Introduction' in T Risse & K Sikkink (eds) *The Power of Human Rights* (Cambridge University Press, 1999) 6 and Margaret E Keek & K Sikkink, *Activists Beyond Borders* (Cornell University Press, 1998)1.
[15] E Desmet, 'Analysing Users' Trajectory in Human Rights: A Conceptual Exploration and Research Agenda' (2014) 8(2) *Human Rights and International Legal Discourse* 121-141,129-131.
[16] *Ibid.*

(SERAC), the Nigerian National Human Rights Commission, the Nigerian Bar Association and other professional bodies that are pro-human rights, human rights activists and groups in Nigeria fall within supportive users. So, court decisions (especially on ESR realisation) will generally have the greatest impact when courts' procedures and judgments are relevant to the actors, including not only state agents but also human rights organisations, social movements, and the media, working to advance specific human rights. [17] On its part, the judicial users refer to the courts and other adjudicative bodies vested with the powers to make judicial pronouncement on human rights implementation.

Similarly, on their part, but regarding human rights localisation vis-à-vis the roles of human rights actors, Dibbets and Eijkman state:

> …[T]hree recurring types of actors with corresponding roles can be identified. State actors are most frequently mentioned, and their role involves various measures aimed at the local realization of human rights. Another type of actor is the right holder who plays a role in claiming individual rights…. Civil society actors support the right holders through local advocacy or act as intermediaries between the local level and the international human rights system.[18]

There is thus a need to galvanise and sample the views of the various rights users in a bid to realise ESR. An effective way through which this could be done is institutional collaboration.

6.2.2 The need for Institutional Collaboration

If there is any issue that the South African case of *Government of the Republic of South Africa & Ors v Grootboom & Ors*[19] has thrown up, it is the fact that mere constitutionalisation and judicialisation of ESR may not be enough to engender a truly effective realisation of the rights. The basis of this statement is that, despite the South African constitutional provisions on ESR and the Constitutional Court's pronouncement that Grootboom and those who were in desperate need of housing were entitled to be so provided for, the practical effect was lost on

[17] James Cavallaro & Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102(4) *American Journal of International Law* 768-827, 775.
[18] Alicia Dibbets & Quirine Eijkman, 'Translators, Advocates or Practitioners? Social Workers and Human Rights Localization' (2018) 10 *Journal of Human Rights Practice* 212-228,215.
[19] 2000 (11) BCLR 1169(CC).

the applicants. In the years following the *Grootboom case,* it has become apparent that the Court's decision in fact did little to change the *status quo* in South Africa with regard to a right to basic welfare.[20] It was reported that Grootboom remained homeless despite the court victory, thus showing the hollowness of the paper judgment handed down to her by the court.

Tony Prosser points out that:

> In the field of social welfare the courts alone are most unlikely to be a useful vehicle for achieving social change… While the courts cannot be ignored, they cannot be relied upon to be friends of the poor…The role of courts is overall marginal.[21]

Moreover, when one recalls the institutional incapacity and the court's lack of true independence, one cannot but suggest an institutional collaboration. According to Rosenberg (who believes that litigation is overrated in the fight for social rights because it really has not been able to bring about a full realisation of rights), judicial role could be examined from either of two views: the dynamic court view and the constrained court view. While the dynamic view sees courts as 'powerful, vigorous, and potent proponents of change', the constrained view sees courts as 'weak, ineffective, and powerless'.[22] Rosenberg further states that from available data, the constrained court view seems to dominate and that the view holds sway because (a) the bounded nature of constitutional rights claims excludes more creative and normative ambitious forms of social activism; (b) the judiciary lacks the independence to carry out their work fearlessly; and (c) the judiciary lacks the proactive tools required to order any significant reform.[23] So, the conclusion drawn by him, which appears true as far as the Nigerian situation is concerned, is that the courts alone cannot effect any significant social change or social

[20] Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited' (2007) 5(3) *I-CON* 391-218,392. Also see Anashri Pillay, 'Implementing Grootboom: Supervision Needed' (2002) 3 *ESR Review* 13. Dennis Davis, 'Socioeconomic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) 5 *ESR Review* 35.
[21] Tony Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare* (Child Poverty Action Group, 1983)83-86.
[22] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*? (2nd Ed., University of Chicago Press, 2008) 21-27.
[23] Ibid 10-21.

reforms, or to use his own words, the courts cannot effect, 'policy change with nationwide impact' through mere judicial decisions.[24]

It is argued that the other arms of government are imbued with enormous powers and 'power is indeed a key aspect that cannot be ignored'.[25] Therefore, 'the state being a complex player which sometimes violates and being used to violate rights, remains a major mechanism through which poorer nations can act in response to the power of the market, thereby making its role in socioeconomic issues worth re-examining'.[26]

Consequently, the view being expressed in this thesis is that there should be an institutional collaboration between the various arms and institutions of government. The court does not have to be confrontational in its decisions relating to ESR realisation. Rather, it should seek to work with the executive and legislative arms, with a view to seeing how the allocative policies can effectively impact on the protection of the rights. Even where the constitutional text leans towards absolute obligations of the State, for example, as it is in section 19 of the Constitution of Finland or the case in South Africa where there is a constitutional commitment that any limitations to ESR should be reasonable and justifiable,[27] the Court should still take the resource implication of meeting the obligation into account in the course of discharging its obligation. As King states,

> …to disregard resource scarcity is to be blind to the dynamic implications of ordering the provisions of resources, blind to where the resources will come from and what its impact on others will be. And it could supplant a more rational (even if imperfect) legislatively and administratively led scheme of resource allocation…with a system that responds to whomever gets to court first to demonstrate the non-satisfaction of the interest.[28]

[24] Ibid4-5.
[25] Ismael Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *The International Journal of Transitional Justice*163–182, 179.
[26] Ibid
[27] Section 36, Constitution of the Republic of South Africa 1996. See also Dixon, 'Creating Dialogue' (no2) 404.
[28] Jeff King, J*udging Social Rights* (Cambridge University Press, 2012)102.

From King's statement, it could be deduced that even in rare occasions where judicialisation may bring real ESR realisation, it does not necessarily salvage the situation of the needy, but it only meets the needs of those who get to court first. Such persons are often the already well-to-do members of society. A major way to remove or forestall this judicial blindspot is to effectively collaborate with the other arms of government with a view to knowing what resources are available and how to allocate them towards satisfying competing interests. Thus, the court's approach and rules on standing and remedial awards should be recalibrated to accommodate more level of flexibility and interinstitutional conversation.

There should be a synergy, championed by the courts among governmental and non-governmental actors, to ensure that ESR are practically valuable in the lives of the citizens. Such synergy would also be necessary between national bodies and international human rights actors like the CESCR with a view to making sure that local circumstances are taken into account when using global human rights standards to effectuate these rights.[29] If courts want to issue strong or confrontational rights and remedies in their interpretive and enforcement role, they would likely be prone to failures of responsiveness in the process of constitutional rights-enforcement.[30]

Thus, what is advocated here is an institutional collaboration using dialogue and cooperation whereby court's intervention in ESR realisation would be 'aimed at introducing new ideas, perspectives, or even equilibrium into the political process, all with a view to encouraging the legislature and the broader constitutional culture to reconsider its allegiance to the previous status quo'.[31] If the court wishes to do otherwise, it might end up creating what Dixon calls 'reverse burdens of inertia', that is, strong form of judicial intervention which 'will have the

[29] Ore G Aguilar, The *Local Relevance of Human Rights: A Methodological Approach* (University of Antwerp, 2008).
[30] Dixon, 'Creating Dialogue' (n 20)406-407.
[31] Ibid; Max du Plessis, 'Between Apology and Utopia-The Constitutional Court and Public Opinion'(2002) 18 *S. Afr. J. Hum. Rts.* 1,28- 34.

potential to cause reverse burdens of inertia as well as to counter legislative inertia'.[32] In other words, the court should not be seen as causing an obstruction in the way of realising ESR in its innocent attempt to protect same rights. Whatever it does should be done with the consciousness of projecting a positive impact of ESR. However, one question that arises is on what institutions should the court collaborate with. To this this thesis now turns.

5.2.3 Institutional Players in the Collaborative ESR Realisation Mechanism

To ensure a fruitful collaboration between the court and other agencies or stakeholders, it is important to identify, at least, some of those other stakeholders whose role is key in the protection of ESR. Identifying them enables the court to recognise them when approached or when the court itself invites them for institutional collaboration. These key players include the legislature, executive, citizens, NGOs/CSOs as well as other courts (national and international judicial collaboration).[33]

a. Courts and Legislature

The place of the legislature in governance cannot be over-emphasised. According to King, 'The main engine for protecting social rights is and always will be primary legislation adopted by a representative legislature, and so any good-faith commitment begins here'.[34] Although King's position may not be entirely convincing in that the political direction and will of the executive plays a more fundamental role in the practical realisation of ESR, the fact remains that it is the legislative framework of a given country's legislature that normally triggers the nature of justiciable rights, determines on whose head the duty to protect the rights lies as well as the respective institutional mechanisms for seeking remedies in the event of breach of such

[32] Dixon, 'Creating Dialogue' (n 20)406-407; James Allan, 'The Author Doth Protest Too Much, Methinks: A Review of K. Roach, "The Supreme Court on Trial: Judicial Activism or Democratic Dialogue"' (2003) 20 *N.Z.U.L.* 519, 531.

[33] Anne Meuwese & Marnix Snel, 'Constitutional Dialogue: An Overview', (2013) 9 *Utrecht Law Review*, 123 at 128.

[34] King, *Judging Social Rights* (n28) 41.

rights. [35] It would, therefore, be detrimental to ignore the position of the legislative arm of government which not only makes laws but also plays a key role in budget vetting and approval for ESR and other governmental objectives,[36] which King calls 'the power of the purse' in a democratic setting. [37]

Democracy, which has been defined as '…the political regime where the will of the people *ex ante* becomes the law of the country (legal order) *ex post'*[38] is relevant in the discourse on realisation of ESR. Whether viewed from the model of majoritarian, consociational, Madisonian, populist, constitutional, pluralist, participatory, deliberative or even economic democracy,[39] it opens up the channels that would help drive the realisation of ESR. This is because, unlike military or other dictatorial regimes, a democratic regime gives the people the opportunity to protest against economic and social deprivation; it provides an avenue for civil society organisations who are sympathetic to ESR realisation to organise and galvanise support as well as lobby for the provision of social amenities that would lead to the enjoyment of ESR. In order to sustain democracy and its benefits, the legislature has to be taken into confidence by the other arms of government through an effective collaboration, because, presumably, the legislators are democratically elected to represent the people.[40] This collaboration 'in a general sense, …assumes that two or more persons, recognized as equal partners, exchange words, ideas, opinions, feelings, emotions, intentions, desires, judgments, and experiences together within a shared space of inter-subjective meanings'.[41] The essence of judiciary-legislature collaboration is well captured by Meuwese and Snel:

---

[35] Ibid.
[36] Section 81 of the Nigeria's Constitution gives the Nigerian National Assembly the power to approve public spending by the federal executive.
[37] King, *Judging Social Rights* (n 28) 44.
[38] Ersson Svante & Jan-Erik Lane, *Democracy: Comparative Approach* (Routledge, 2003)2.
[39] Ibid.
[40] There are, of course, exceptional cases. For example, in the US, the law in 36 States allows Governors to appoint Senators when there are vacancies before elections: http://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate.aspx (accessed on 02 February 2020).
[41] Luc Trenblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 *International Journal of Constitutional Law* 617.

> the core of constitutional dialogue between the judiciary and the legislature is that they engage in a conversation about constitutional meaning [and contents of social rights], in which both actors (should) listen in order to learn from each other perspectives, which can then lead to modifying their own views accordingly.[42]

As already noted, confrontational judicial pronouncements on issues relating to ESR would not bring about the desired full and practical realisation of the rights. Thus, instead of declaring that a person has a right to food, for example, even when it is obvious from the disposition of the other arms of government that they are not willing to push for or implement such rights, the courts should rather seek the input of those other arms on better and mutually agreeable ways to protect the right. This institutional collaboration would lead to a situation where 'courts and legislatures participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate'.[43] However, the court's attitude or belief about what its role entails in rights protection, has a way of determining the extent of institutional interaction it receives from the other arms.[44]

Furthermore, quite apart from enabling the court to navigate through the democratic legitimacy conundrum or counter-majoritarian difficulty,[45] institutional collaboration between the court and legislature also provides:

> The dialogue paradigm … as a middle way between judicial supremacy on the one hand, and legislative supremacy on the other. It is an ongoing dialogue because the judiciary does not necessarily have the last word with respect to constitutional matters and policies; the legislature would almost always have the power to reverse, modify, or make void a judicial decision nullifying legislation. Judicial review, accordingly, is not a veto on the politics of the nation, but rather the beginning of a dialogue as to how best to reconcile individual rights with the accomplishment of social and economic policies for the benefit of the community as a whole.[46]

---

[42] Meuwese & Snel, 'Constitutional Dialogue: An Overview' (n 33) 128.
[43] Tremblay (n41)617.
[44] Webber, 'Institutional Dialogue between Courts and Legislatures' (n5)149.
[45] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics (*Yale University Press, 1986).
[46] Monica Claes & Maartje de Visser, 'Are you Networked Yet? On Dialogues in European Judicial Networks' (2012) 8(2)*Utrecht Law Review* 102-103.

To achieve a fruitful collaboration, such collaboration need not be conversational but deliberative. According to Tremblay, a conversational dialogue or collaboration is one that has no focused goal or defined purpose.[47] Here, 'there is equality, no hierarchy between the participants, a free exchange of ideas and each of the participants may take something home from the conversation, but the aim is not to achieve a common goal, a decision, or even agreement.'[48] On the other hand, a deliberative collaboration-which is advocated here- is one in which there is a clear and definite purpose or goal to be achieved before the commencement of the process. It is one which 'aims at reaching a common agreement, at solving problems collectively and determining collectively which opinion or solution is right or best'.[49]

The value of deliberative collaboration lies in its features or condition precedent. These conditions include the participants' recognition of equality among them and their views a process of rational persuasion, not coercion, with all partners being open to critical analysis of their views, and a clear intention to achieve an end result.[50].

In essence, by giving room for dialogue and collaboration and the concomitant public debate, the court would be promoting deliberative democracy, thereby, perhaps, resolving the thorny criticism that usually follows its attempt to judicially enforce ESR.[51] No doubt, the courts are in a vantage position to occupy this proposed position of championing institutional interaction and collaboration. As Gargarella notes:

> …when we accept that judges are subordinate to- indeed, servants of public debate, then we may begin to see the judiciary as a crucial engine of public debate. In effect, judges are exceptionally well situated for fulfilling this task… Institutionally speaking, the judiciary represents the main channel that disadvantaged groups have for becoming heard…. Judges are exceptionally

[47] Trenblay, 'The Legitimacy of Judicial Review' (n 43).
[48] Claes & de Visser, 'Are you Networked Yet? (n46).
[49] Ibid.
[50] Ibid.
[51] An example of such criticism can be found in Cass Sunstein, *The Second Bill of Rights: The Last Great Speech of Franklin Delano Roosevelt and America's Unfinished Pursuit of Freedom* (Basic Books, 2004), 57 where the author states that, 'A judicial effort to protect social and economic rights might seem to pre-empt democratic deliberation on crucial issues. It would undermine the capacity of citizens to choose, in accordance with their own judgments, the kinds of welfare and employment programs that they favor'.

> well placed to require a better justification of their decisions from the people and their representatives.[52]

It is, perhaps, necessary to clarify the point that the means through which Gargarella wants the court to require and obtain the 'better justification' from the people's representatives might not be the usual judicial 'command and control' or hard review mechanism. On the contrary, such outcome should be based on collective discussions and participation of everyone affected by a decision in the decision-making process. Thus, the author enthuses that, '…deliberative democracy requires public decisions to be grounded on an ample consensual base, shaped by the participation of different sections of society… Ample collective intervention is an essential precondition for that impartiality.'[53]

While it is conceded that the peculiarities between the two different arms of government (judicial and legislative arms) would make it impossible to reach an agreement in all conceivable ESR issue, or any issue for that matter, one should not, however, lose sight of the promises that collaboration heralds. There is no perfect system or rights enforcement mechanism anywhere in the world. That said, it seems that institutional collaboration is a better model than hard judicial posture towards the other stakeholders in the ESR realisation chain, considering the sense of belonging it confers on the other stakeholders-including the legislature.

There is therefore a need to test-run the institutional collaboration or cooperative judicial approach in the Nigerian context to project ESR realisation. This collaborative and dialogic approach which originated as an explanatory theory in Canada can be explored between Nigeria's courts and legislature.[54]

---

[52] Roberto Gargarella, 'Theories of Democracy, the Judiciary and Social Rights', in R Gargarella, P Domingo & T Roux, (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*? (Ashgate Publishing Limited, 2006) 1, 28.

[53] Ibid 27; Carlas Santiago Nino, *The Ethics of Human Rights* (Clarendon Press, 1991).

[54] For a detailed discussion of dialogue under the Canadian Charter, see Peter Hogg, etal, 'Charter Dialogue Revisited-or Much Ado about Metaphors Charter Dialogue: Ten Years Later' (2007) 45 *Osgoode Hall Law Journal* 1-65; RF Devlin, 'The Charter and Anglophone Legal Theory' (1997) 4(1) *Review of Constitutional Studies*31; S Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8

b. Courts and Executive

On its part, the executive arm of government also plays a critical role in the protection of social rights, and indeed in the execution of all government projects and policies. It is the executive that usually prepares and submits most of the bills, including the Appropriation Bill for consideration and approval by the legislature. Even after the bills have been passed into Acts of Parliament, the duty of implementation is that of the executive arm which comprises the Cabinet, civil service and the MDAs at the federal, state or local level.[55]

It would, therefore, be in the interest of ESR realisation for the courts to collaborate with this vital arm of government, instead of giving a stern or terse judicial interpretation that would be ignored by the other arms of government. Such a collaborative disposition is especially necessary in Nigeria's constitutional setting where social rights are currently framed in the form of mere governmental aspirations,[56] since such non-justiciable aspiration merely 'confers on public authorities a range of discretionary powers that allow but do not oblige them to distribute public goods'.[57]

There are several factors that determine compliance with court's decisions. These include the balance of power in the political setting, the political will to obey court decisions (on ESR), political culture in the court and the financial, administrative and institutional capacity of the executive to implement or comply with the court's decision.[58] Consequently, it would be more fruitful to involve the executive in collaborative discussion on the way and manner to protect ESR. Such collaboration would give an 'institutional efficacy' to the rights protection

International Journal of Constitutional Law 167-206; Rosalind Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (2009) University of Chicago Public Law and Legal Theory Working Paper No,285; Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue & Deference' (2009) 47 *Osgoode Hall Law Journal* 235.

[55] Paul Craig, *Administrative Law*, 6th edn (Sweet & Maxwell, 2008) chapters 2-6.

[56] See Chapter II of the Nigerian Constitution.

[57] Jeff King, *Judging Social Rights (*n28) 48.

[58] Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework' in R Gargarella, P Domingo & T Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*? (Ashgate Publishing Limited, 2006)35, 55.

mechanism, since dialogue and collaboration would reveal the financial and other capacities of the executive even before the decision on the rights is made. A discussion with the political branches to know their financial strength would help to prioritise certain ESR over others, instead of a blanket but futile drive to realise all ESR at the same time.

c. Courts and Courts

Another way the court can collaborate is through intra-judicial and inter-judicial dialogue. There should be 'cooperation between constitutional or the highest courts or …different levels within the judiciary'.[59] Nigeria has federal and state courts. More often than not, one division of a court (for example, Court of Appeal) would give a decision that is clearly at variance with that of another division of the same court.

For instance, in *Lagos Sharaton Hotel & Towers v Hotel and Personal Services Senior Staff Association*[60] *and Local Government Service Commission Ekiti State v Mr M K Bamisaye*,[61] the Lagos and Ado-Ekiti Divisions of the Court of Appeal arrived at two diametrically opposed decisions. Both cases related to the question as to whether there is an automatic right of appeal from non-fundamental rights decision of the National Industrial Court (NIC) to the Court of Appeal. Whereas the former division held that by virtue of the provisions of the Constitution and other enabling statutes, only decisions of the NIC relating to fundamental rights issues and criminal matters are appealable, the latter division held otherwise, stating that the Court of Appeal can entertain appeals from decision arrived at in matters other than fundamental rights and criminal cases.

If this ugly incident must be prevented in the future, then there should be harmonious and collaborative workings among the different divisions and layers of courts. This becomes particularly necessary in view of the fact that the above cases have something to do with ESR

[59] Meuwese & Snel, 'Constitutional Dialogue: An Overview' (n 33).
[60] (2014) 9 CLRN, 61.
[61] (2013) LPELR- 20407 (CA).

in that they touched on labour or workers' rights (termination of employment). There should be no room for contradiction and inconsistency if judicial precedent and judicial sympathy towards ESR is to work effectively. To forestall this contradiction, there should be judicial collaboration and dialogue, intra or inter-judicial.

According to Rosas,[62] there are categories of judicial dialogue. First, there is a vertical dialogue among courts that belong to the same national system (like the Nigeria's federal courts) with a hierarchical ordering. Second, there is a special dialogue between the national courts and other regional courts like the Court of Justice of the European Union (CJEU) or Ecowas Court, in which case there is no vertical hierarchical relationship since the decisions of the latter are not generally binding on the former. The third category is what Rosas calls 'semi-vertical' relation which could exist between the CJEU and the European Court of Human Rights (Strasbourg Court or ECtHR)[63] or between Ecowas Court and African Court on Human and Peoples' Rights or the African Commission or other judicial and quasi-judicial bodies like the World Trade Organization Appellate Body, or United Nations bodies where customary international law have evolved some dispute resolution strategies.

The fourth and last category of judicial dialogue is horizontal dialogue whereby the courts more or less belong to the same level, whether nationally or internationally. A good example of this is the Nigerian Court of Appeal divisions examined in the above cases or it could be the dialogue that may exist between a Nigerian High Court and its Kenyan counterpart.

There is a lot to be gained when Nigerian courts collaborate among themselves and other international courts, with a view to sharing knowledge and ideas as to how best to realise ESR. This collaboration is not limited to judges only but it should also extend to the judiciary-support staff.

[62] Allan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1(2) *European Journal of Legal Studies* 1-16, 6-13.
[63] Ibid.

Thus, it has been asserted that, 'dialogue among courts operates through those courts' personnel…who operate the system, people of flesh and blood'.[64] Although it has been observed that '[t]he preliminary reference procedure and case law, the formal and official channels of communication available to courts, seem to score relatively low when seen in the light of the standards of both conversational and deliberative dialogue',[65] it has been suggested that unofficial personal contacts or communication could or should have impact in bringing about an effective judicial dialogue. Thus, there is a suggestion that extrajudicial exchanges, both in writing and via personal contacts, score much higher as 'they allow for a free exchange of ideas and arguments on a more equal footing and even give room for deliberation on common issues'. [66] It is however recommended that both judicial and extra-judicial communications, nationally and internationally, should be explored in finding a common ground for protecting ESR.

d. Courts and Citizens

This chapter had earlier referred to the concept of deliberative democracy and that concept reverberates in the dialogue and collaboration between courts and citizens. Owing to the legitimacy crisis that courts usually face in the context of ESR realisation, it is pertinent that the people, whose interests or ESR the courts seek to protect, are carried along in the judicial decision-making process. That way, the counter-majoritarian difficulty would have been resolved or at least minimised. Thus, it is suggested that the courts should champion some sort of public debate among the people as to how best to realise the rights under consideration.

Such debate should de-emphasise government and centre on new governance. New governance canvasses for a shift from state-centric governance to society-centric governance whereby the citizens and civil society are viewed as a key voice in the running of their political, social and

[64]Monica Claes & Maartje de Visser, 'Are you Networked Yet? (n 46).
[65] Ibid, 106.
[66] Ibid.

economic affairs.[67] Put differently, new governance seeks an interaction between people in government and outside government with a view to solving socioeconomic issues which the government alone may not be able to appreciate and resolve.[68]

Such interaction would lead to social coordination which means tackling socioeconomic problems through a collective deliberation by various actors.[69] There is some truth that the court has the capacity to facilitate general debates on issues of constitutional law, including ESR.[70] Scott and Sturm support this position when they state that, 'Courts are poised to act as arbiters of interaction across different levels of governance and institutional roles. They can facilitate much-needed information-sharing across diverse domains encompassing new governance'.[71]

The above point underscores the crucial role of court in evolving a deliberative process among the citizenry. This, of course, means that the courts may have to be more inquisitorial than adversarial in the way they perform their functions. Going out of the usual adversarial judicial mechanism to directly engage citizens on rights issues would usher in a more robust rights protection regime in Nigeria. It will herald 'an incentive structure for participation, transparency, principled decision-making, and accountability which in turn shapes, directly and indirectly, the political and deliberative process'.[72] This can be achieved by gathering and sieving public opinion through community or town hall meetings, NGOs' representations, electronic and print media publications analysis, etc, on a given issue. However, this deliberative approach is not without its downside.

---

[67] Myungsuk Lee, 'Conceptualizing the New Governance: A New Institution of Social Coordination', a paper presented at the Institutional Analysis and Development Mini-Conference, May 3rd and 5th, 2003, Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, Indiana, USA, 9.

[68] G Stoker, 'Governance as Theory: Five Propositions' (1998)50(*1) International Social Science Journal 17-28, 18.*

[69]D Beetham, *Bureaucracy*. 2nd ed (Open University Press, 1996) 20-21; J Pierre, *Debating Governance* (Oxford University Press, 2000).

[70] Barry Friedman, 'Dialogue and Judicial Review' (1993) 91 *Michigan Law Review,* 577-682.

[71] Scott & Sturm, 'Courts as Catalysts' (n7) 566.

[72] Ibid.

The dark side of this approach is that the court might simply 'cherry-pick' from a wide range of public opinions the opinion that furthers or perpetuates its entrenched political values.[73] Despite this downside, the process can serve as a useful tool for legal and mass mobilisation in terms of ESR realisation.

Generally, since the era of social media, it seems people have become more interested in what happens in the political space. For example, the recent October 2020 nationwide #ENDSARS protests in Nigeria was planned, organised and executed through the effective deployment of Social Media platforms like Twitter and Facebook.[74] Through these media, the Nigerian youths were able to draw international attention to police brutality or power abuse, and the end result is the ongoing government engagement with the youth, through various judicial panels of enquiries, aimed at not only ending the brutality but also at resolving the root causes that invariably implicate ESR realisation in Nigeria

Thus, it has been observed that, these days 'more direct forms of participation, such as public consultation and citizens' initiatives, are being introduced, requiring not only new institutional norms, but also different judicial responses'.[75] The courts, therefore, need to harness this burgeoning interest among the people to activate interaction. The fact remains that, the degree of sanctity enjoyed by any right depends on institutional relationship that exists among all the actors in the political scene, not merely on entrenchment of the rights in lawbooks.[76]

6.2.4 Determination of Appropriate Collaborators

In deciding on whom among the various actors to collaborate with at any time, the court would have to consider the peculiarities of the issues involved. That is to say, the issue at hand would

[73] For a detailed discussion of this in the context of comparative law, see Sandra Fredman, *Comparative Human Rights Law* (OUP,2018)17.
[74]Shayera Dark, '#EndSARS: How Nigerians harness Social Media against Police Abuse' *Aljazeera* (25 October 2020) available at https://www.aljazeera.com/news/2020/10/25/endsars-how-nigerians-use-social-media-against-police-brutality ; Stephanie Busari, ' Nigeria's Youth finds its Voice with the EndSARS Protest Movement, CNN (25 October 2020), available at https://edition.cnn.com/2020/10/25/africa/nigeria-end-sars-protests-analysis-intl/index.html (accessed on 10 November 2020).
[75] Meuwese & Snel, 'Constitutional Dialogue: An Overview' (n33)132.
[76] Webber, 'Institutional Dialogue between Courts and Legislatures' (n 5)149.

depend on the type of supportive human rights users/NGO and right realisers that would be invited to the collaboration table. If for instance, the right of the homeless to have access to healthcare is being addressed, the human rights users to be involved might include health service providers, homeless hostels, the homeless families themselves, the human rights CSOs/NGOs that have experience in that field.[77] So, to some scholars, the relevant actors to be involved in the institutional collaboration 'depend entirely on the context of the human rights issue'.[78] While not dismissing the assertion that the context of the human rights issue is a key consideration, it is argued that the statement is rather too general when it says it depends 'entirely on the context'.

Context is just one of several factors to be considered. The court may also consider other actors as relevant actors even where they do not directly work in the area of human rights concerned. For example, in the case of ESR, the court may invite the *amicus* or officials of Budget Office as a key actor, even when it may not have any direct relationship with the ESR at issue, to provide information that would indirectly enable the court and other collaborators to resolve the issue at hand. In making selection of collaborators, the head of the appropriate court may liaise with the National Human Rights Commission to ensure that those who are genuinely committed to ESR realisation are those to be invited.

6.2.5 Outcome of Institutional Collaboration

The consequence of an effective collaboration is that it douses tension or friction among the institutional players in the ESR realisation chain. This is due to the fact that it makes the judges' opinion suggestive rather than mandatory. This in turns makes the other stakeholders to have a commitment towards realising the rights, against the backdrop that the judicial opinion was not foisted on them but comes as a result of deliberative or collective process.

---

[77] M Struttaford, G Lewando Hundt & P Vostanis 'Sites for Health Rights: The Experiences of Homeless Families in England' (2009) 1(2) *Journal of Human Rights Practice*257-276.
[78] Dibbets & Eijkman, 'Translators, Advocates or Practitioners?' (n18).

At the end of the collaborative discussion, the courts would have several responses to rights protection, based on the interactions had. According to Gargarella, the court:

> could require the political branches to give more explicit reasons as to why they have excluded or disregarded certain demands, they could ask them to rethink or re-elaborate their reasoning, or they could order them to provide solutions to certain unresolved problems. Judges could define guidelines that authorities should follow, rather than direct orders dictating particular solutions. They could even propose the adoption of certain particular outcomes, without imposing them on the legislature [or executive], who could then adopt these suggestions or try different alternatives.[79]

While the above quoted statement is a possible outcome, there is a problem with the author's use of such words as 'require' and 'order'. Such words are capable of defeating the very essence of institutional collaboration that this thesis proposes. Words like 'request' or 'suggest' would be better in this context, to indicate that there is a collaborative engagement between the court and the other branches of government.

Furthermore, on the outcome of collaboration, the court could pronounce on ESR by using what Webber refers to as 'framing norms', that is, leaving the meaning and normative value of a right open rather than closed. Such open-endedness gives the courts the opportunity to 'set the framework' while 'the legislature determines the means'.[80] Similarly, the court could decide ESR cases by interpreting the constitutional or other legislative instrument as providing a minimum guarantee or what King calls 'social minimum'[81] without necessarily delving into the details of what the core contents of the rights are. In the spirit of collaboration, such details should be left for the other arms of government.[82]

One other way that the courts can ensure an effective collaboration is by way of structural injunction. If the courts must issue an order compelling the State to realise ESR, especially where there is no evidence of resource constraint but presence of legislative 'blind spots and

[79] Gargarella, 'Theories of Democracy' (n52) 29.
[80] Webber, 'Institutional Dialogue between Courts and Legislatures' (n5)154.
[81] King, *Judging Social Rights* (n28).
[82] Webber, 'Institutional Dialogue between Courts and Legislatures' (n5)149.

burdens of inertia',[83] such order should not be confrontational. The political branches should be invited and given some structural injunction where they could make periodic report to court on progress made on the realisation of ESR. This method was used in the South African cases of *Pheko and Others v Ekurhuleni Metropolitan Municipality*[84] and *Schubart Park Residents Association and Others v City of Tshwane and Others*[85] where the court did not only order the State to meaningfully engage with the residents before evicting them, but also to report to the court on progress made in terms of alternative accommodation arrangements. While such court supervision would 'go some way towards ensuring that engagement does not descend into a top-down exercise in information provision by governmental officials',[86] it is argued that it would also give the government a sense of belonging that it is not being ordered around by the court but being taken into confidence.

Further, apart from issuing structural injunctions, another way the courts can promote institutional collaboration is by appointing experts to help them fill the epistemic gap in the often highly technical socioeconomic rights litigations. Pillay states that the Indian Supreme Court adopts this method. According to her,

> …[T]he Indian Supreme Court has also appointed socio-legal commissions to conduct research into complex matters. These remedies are an attempt to preserve respect for the democratic authority of legislative bodies and the expertise of executive authorities, whilst at the same time, moving the implementation of social and economic guarantees forward... they do have the effect of encouraging an ongoing debate… about how best to broaden access to goods such as shelter, education, water, food, etc. Furthermore, they play an educative role in generating societal acceptance of the importance of ESR and the fact that social advocacy groups need to consider how best to use the courts, with all their limitations, in creating greater access to socioeconomic goods.[87]

[83] Dixon, 'Creating Dialogue'(n20) 402.
[84] 2012(2) SA 598 (CC); 2012(4) BCLR 388 (CC).
[85] 2012 ZACC 26.
[86] Pillay Anashri & Wesson Murray, 'Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa' in Aoife Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2016)335-365, 364.
[87] Anashri Pillay, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014)63 *International and Comparative Law Quarterly* 385-408,406.

However, whether a given court judgment on ESR is more or less dialogically and collaborative effective depends on the court's choices regarding three components of the ruling: the substantive declaration of the content of the right, the remedies provided and the monitoring mechanism.[88] At the level of declaration, and using Tushnet's typology,[89] the choices the court makes could be to affirm the justiciability of ESR and determine the extent of the contents of the rights at stake. The court-defined content of the rights could be strong or weak.

As to the component of remedies, the court's remedies to the applicant for violation of their right could either be weak or strong. While the monologic and confrontational judicial disposition tends towards giving precise, outcome-oriented orders, the dialogic and collaborative judicial approach offers an outline of procedure and broad goals and, in line with the principle of separation of powers, placing the burden on government agencies to design and implement policies,[90] which makes the dialogic remedy weak. What this simply suggests is that monologic and confrontational judicial approach tends to give hard and stern ESR decisions without considering the position or likely reaction of the other arms of government in terms of compliance. It is a kind of 'you must do what I say' judicial behaviour towards the other arms. Put differently, the monologic idea portrays a situation where a person or institution (in this case court) seeks to convey a meaning with all sense of autonomy and authority. That is, the monologic approach '… is by its very nature authoritative, not open to questions or alternative perspectives,… it resists dialogue'.[91]

On the other hand, a dialogic and collaborative judicial approach takes the psychology of the officials of the other arms of government into account and fashions the judicial decision in such

[88] Cesar Rodriguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1669,1691.
[89] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press,2008) 21.
[90] Rodriguez-Garavito, 'Beyond the Courtroom'(n88)1691.
[91] Gordon Wells, 'Monologic and Dialogic Discourses as Mediators of Education' (Nov. 2006) 41(2) *Research in the Teaching of English* 168-175, 169.

a way that the other arms would feel carried along in the identification of a common ESR issue while seeking solution or resolution of the same. While monologic judicial disposition may promote stability and continuity, and perhaps judicial independence, it deprives the rights protection process of innovative contributions from the other key players, [92] thereby weakening the potential for ESR realisation.

Whereas there is a reason to support a dialogic and collaborative judicial approach as it leads to institutional collaboration than confrontation, one should not be unmindful of the fact that it has its own downsides. For example, if not well managed, it could lead to over-indulgence on the part of the judiciary or judicial servitude that would in turn do a grave violence to the principle of separation of powers, which it seeks to protect in the first place. However, as argued in chapter one of this thesis, the implications of this judicial approach on the doctrine of separation of powers and judicial independence are largely dependent on how well the courts calibrate the approach. A collaborative approach is not of itself an attenuating factor for judicial independence or separation of powers, provided it is deployed to promote a 'fruitful conflict'.

The third component of monitoring mechanism, which is absent from Tushnet's typology, but promoted by Rodriguez-Garavito[93] is factually and analytically distinct from remedies.[94] Thus, Rodriguez-Garavito posits that:

> …Regardless of the strength of their decisions' rights and remedies, courts face the choice of whether to retain supervisory jurisdiction over the implementation of those decisions. Dialogic decisions tend to open a monitoring process that encourages discussion of policy alternatives to solve the structural problem detected in the ruling….Dialogic courts often issue new decisions in light of progress and setbacks in the process and encourage discussion among actors in the case through deliberative public hearing..[95]

[92] For a detailed discussion on the comparative advantages of monologic and dialogic discourses, see YM Lotman, 'Text within a Text' (1988) 26(3) *Soviet Psychology* 32-51, cited in Gordon Wells, 'Monologic and Dialogic Discourses' (n92) 170.
[93] Rodriguez-Garavito, 'Beyond the Courtroom' (n 88) 1691.
[94] Ibid.
[95] Ibid 1691-1692.

In this monitoring process, the court involves or should involve a broader spectrum of stakeholders. In other words, 'In addition to the court and state agencies directly affected by the judgment, implementation involves victims whose rights have been violated, relevant civil-society organizations, and other actors whose participation is useful for the protection of the rights'.[96]

Rodriguez-Garavito's argument is that it is not enough to issue a decision that is dialogic and collaborative in nature. To him, post-judgment judicial mechanism should be empanelled to monitor progress in the implementation of the ESR concerned, or if the need arises, to reconsider the decision of the courts. This goes to show that the monitoring stage of the ESR realisation regimes involves more stakeholders and as such, it should not be neglected if there must be an effective realisation of the rights. It is argued that a weak right, moderate remedies and strong monitoring model is best for Nigeria.

Put differently, the Nigerian courts should give a weak declaration on ESR, grant moderate remedies for their violation but ensure a strong monitoring of the implementation or enforcement of the decision. A court-affirmed strong right without a good remedy and strong implementation monitoring may become worthless. Rodriguez-Garavito's analysis of the Colombian Constitutional Court's Judgment T-025 of 2004[97] reveals that the impact of this model is far more reaching and effective in Latin America than the strong right-moderate remedies-weak monitoring and the strong right-strong remedies-weak monitoring models. It helps to diffuse political resistance and it lubricates active participation of relevant stakeholders, thereby engaging in collaborative search for solutions among experts and non-experts. This process unlocks policy processes and improves coordination among disconnected

[96] Ibid.

[97] Corte Constitucion [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op, at 1) cited in Rodriguez-Garavito, 'Beyond the Courtroom'(n88) 1670, 1695.

state agencies as well as signals a collaborative formulation of progress indicators on the fulfilment of ESR.[98]

However, the fear has been expressed that institutional collaboration might weaken the independence and responsibility of the judiciary.[99] It is argued that this fear, though genuine, is not well grounded to displace the benefits inherent in institutional collaboration. It is argued that, given the present position of ESR realisation in Nigeria, institutional collaboration promises a better deal than a confrontational judicial enforcement or approach that would remain a mere paper judgment on the shelf. What is advocated here is not an abdication of judicial powers and responsibility but a more measured and cooperative approach to utilisation of the powers.

There is no sense and essence in having judicial decisions that are not self-enforcing or that cannot secure respect and compliance commitment from the political branches. Thus, what should be promoted is inter-dependence rather than unrewarding independence. As Dixon advances, a dialogic and collaborative approach does not mean a complete abdication of judicial responsibility. Rather, the judicial officers would only be required, under the model being propounded here, to defer to the other arms of government only in sufficiently deliberative and representative legislative position which are in tune with the broader constitutional culture,[100] or which enhances rather than destroys institutional integrity and independence of each arm of government.

[98] Rodriguez-Garavito, 'Beyond the Courtroom'(n88)1696.
[99]Tremblay, 'The Legitimacy of Judicial Review' (n 41)634-638.
[100]Dixon, 'Creating Dialogue'(n20). Also see Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' (2004) 23 *Supreme Court Law Review* 7, 46.

6.3 Social Movements and Protests

The existence of a vibrant social movement regime which is poised to galvanise citizen action through education and participation in the budget process, protest, legislative lobbying and pressure, etc will provide the needed impetus for the realisation of ESR. [101]

Using Dibbets and Eijkman's social workers' analogy, social movements can play the role of advocates -as part of the supportive human rights user discussed earlier- for the realisation of ESR.[102] The role of social movement in ESR realisation in this regard could either be case-based advocacy or cause-based advocacy. With reference to social workers and human rights advocacy, Steen, *et al* define case-based advocacy as that which makes the social workers (in this case the social movements) defend the rights of the individual clients while cause-based advocacy involves the social workers (again, social movements) to fight human rights violation on a pedestal that is higher than individual right claimant's level.[103] This means social movements' role at the case-based advocacy level would see them supporting ESR right claimants or holders, in their individual bid to obtain remedies or protection of their rights. On the other hand, in cause-based advocacy, social movements play a role greater than that of merely supporting right holders at the individual level; they are expected to champion fundamental changes and mount pressure on the relevant authorities until such changes are effected. Hence, cause-based advocacy would be a better way of galvanising for ESR realisation, because it brings with it a more encompassing or systemic result. This is owing to the fact that it 'focuses on structural changes through lobbying or by acting as a whistle-blower while using human rights as a frame of reference'.[104]

---

[101] Nana Tawiah Okyir, 'Towards a Progressive Realisation of Socio-Economic Rights in Ghana: A Socio-Legal Analysis' (2017) 25(1) *African Journal of International and Comparative Law* 91-113,112.
[102] Dibbets & Eijkman, 'Translators, Advocates or Practitioners?' (n18)217.
[103] AS Steen, *e tal*, 'Human Rights: Its Meaning and Practice in Social Work Field Settings' (2017) 62(1) *Social Work*, 9-17, 10-11.
[104] Dibbets & Eijkman, 'Translators, Advocates or Practitioners?' (n 18) 217.

The October 2020 #ENDSARS nationwide protests against police brutality in Nigeria unveiled the potential of social movement and protests to drive fundamental changes in the system. From early till late October 2020, there were pockets of protests among the youths. Their grievances were against the now disbanded Police Special Anti-Robbery Response Squad (SARS). SARS was notorious for its deviation from its core mandate of fighting armed robbers as it became a tool of oppression in the hands of the politically and economically powerful. SARS killed, raped and maimed several innocent Nigerians on issues ranging from debt collection to domestic or lovers' affairs.[105] Thus, the youths went on protest which did not only shut down the Nigerian political and economic space, but also drew wide international attention and support from prominent figures such as Twitter Founder Jack Dorsey.[106]

Consequent upon the protesters' demands which included the disbandment of SARS, increase in salaries of Police Officers to make them more humane and monetary compensation for victims of police brutality,[107] the Nigerian Federal Government has since disbanded SARS and proposals have already got to advance stage in terms of salary increment and compensation.[108] This goes to show that if the Nigerian people are determined to deploy Social Movement to operationalise the realisation of ESR, there would be some positive outcome. This is because, the power in the people is greater than the people in power.[109]

---

[105] For a detailed account of the #ENDSARS protest, see Abosede George, 'The Roots of the #EndSARS Protests in Nigeria' *The Washington Post* (25 October 2020), available at https://www.washingtonpost.com/outlook/2020/10/25/roots-endsars-protests-nigeria/ (accessed on 10 November 2020).

[106] Alistair Bunkall, 'End SARS: Why Nigeria's Anti-Police Brutality Protests have gone global' *Sky News* (21 October 2020), available at https://news.sky.com/story/end-sars-why-nigerias-anti-police-brutality-protests-have-gone-global-12107555; Morgan Winsor 'Senior US Delegation meets with Nigeria's Vice President, after killing of #EndSARS Protesters' *ABC News* (23 October 2020), available at https://abcnews.go.com/International/senior-us-delegation-meets-nigerias-vice-president-killing/story?id=73782243. (accessed on November 2020).

[107] The Cable, 'FULL LIST: The Demands of #EndSARS Protesters' *The Cable* (13 October 2020) available at https://www.thecable.ng/full-list-the-demands-of-endsars-protesters (accessed on 10 November 2020).

[108] Agency Report, '#EndSARS: FG pledges to implement Protesters' Demands' *Premium Times Newspaper (*21 October 2020) available at https://www.premiumtimesng.com/news/top-news/422157-endsars-fg-pledges-to-implement-protesters-demands.html (accessed on 10 November 2020).

[109] Wael Ghonim, *Revolution 2.0: The Power of the People Is Greater Than the People in Power* (Houghton Mifflin Harcourt, 2012).

Further, social movements can play the role of 'human rights translators'[110] by being the middlemen or to use the words of Merry, 'people in the middle',[111] who help to translate local experiences to global human rights and clarify the meaning of human rights at the local level, thereby influencing the interpretation, and perhaps application of human rights at the global level.[112] In other words, in their role as human rights translators, social movements would be 'creating links between global [human rights] norms and local experiences'[113] or circumstances.

6.5 Conclusion

This chapter has examined and suggested an innovative way to 'judicialise' ESR in Nigeria with a view to heralding a practical realisation of the rights. Essentially, it has argued for a more dialogic and collaborative judicial approach to ESR adjudication. The suggested approach would serve as a linchpin to addressing the counter-majoritarian difficulties and legitimacy crisis of judicial intervention. It is pertinent to state that this chapter and indeed this thesis does not oppose the constitutionalisation and judicialisation of ESR. Rather, what it has done is to tease out some more cooperative mechanism as tools to make constitutionally and judicially inhered protection of rights more effective for ESR realisation. In other words, the thesis does not intend to dismiss the use of court neither does it intend to discard the idea of constitutionalising bills of rights altogether. However, it argues that there should be some trade-offs between the various players in the ESR rights protection chain. Thus, this chapter has made an attempt to identify these players as well as open up discussions on the shape and nature of the suggested collaboration. Detailed discussion on the court's procedural and administrative processes to drive the dialogic and collaborative approach is outside the scope of this thesis and the same is left for future research.

---

[110] Dibbets & Eijkman, 'Translators, Advocates or Practitioners?' (n 18), 217.
[111] SE Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006)108(1) *American Anthropologist,* 38-51, 39-40.
[112] Dibbets & Eijkman, 'Translators, Advocates or Practitioners?' (n 18) 217-218.
[113] Ibid. 222.

This chapter has also highlighted the importance of social movements and protests for the realisation of ESR. It discussed the usefulness of the recent #ENDSARS protests in Nigeria to address police brutality. It thus argued that such protests should also be deployed to harness and enhance the realisation of ESR of the Nigerian people. The next chapter summarises the thesis and draws necessary conclusions.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This thesis has made an attempt to design a cooperation model for realising economic and social rights (ESR). The central argument it has made is that, nationally, a cooperative judicial approach, as opposed to a 'command and control' judicial approach towards ESR cases would enhance the practical impact of the rights. This argument is reinforced by the fact that, receiving the cooperation of and collaborating with the political branches would make the enforcement of judicial decisions more forceful, as such branches would perceive the decisions as an outcome of an institutional dialogue and collaboration in which they have played a key role. On the contrary, where a court imposes a 'monologically conceived' ESR decision on the political branches, it may meet with resistance which would then attenuate the potential for individual and system-wide impact of such decisions.

At the international level, the thesis has also argued for an effective deployment of international cooperation and assistance, not in the form of some charity, but as a legally binding obligation on the developed countries in favour of developing countries. Drawing on several normative instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the thesis deploys a Third World Approach to International Law (TWAIL) to argue that the developed countries have a duty to help the developing countries in meeting the ESR needs of the latter's citizens, in terms of provision of economic, financial and technical assistance and influence. This chapter is a summary of what has been discussed in the preceding chapters.

7.2 Findings

There are several findings in this thesis. The thesis found in chapter two that, although there are some strong arguments against the justiciability of ESR, such arguments are not enough to displace the equally strong arguments that support their justiciability. Through the prism of

separation of powers, resource constraints, lack of legitimacy, judicial competence or polycentricity arguments, the thesis found that ESR are as valid and should be as justiciable as their counterpart civil and political rights.

In chapter three, the thesis has unpacked the legal status of ESR in Nigeria. The findings reveal that there is some ambivalence of opinions on whether ESR are justiciable in Nigeria. As discussed in the chapter, some scholars and courts have argued that the rights are not justiciable simply because they are domiciled in Chapter II of the Constitution of the Federal Republic of Nigeria which is framed in the form of Directive Principles and which section 6(6)(c) of the Constitution has rendered generally non-justiciable. On the other side of the divide, the findings also reveal that some other scholars and courts have contended that the rights are justiciable within the context of the Constitution and other regional and international human rights instruments which Nigeria has ratified. This thesis has aligned with the latter school of thought that states that the rights are justiciable, and it has provided a reasoned opinion for the stand taken.

Chapter four which kickstarts the thesis' main contributions to knowledge, has found that while domestic constitutionalisation of ESR has a useful role in the projection and realisation of ESR, it has its limits. Thus, this thesis has argued for a global constitututionalisation which would bring about a more effective and practical realisation of ESR. It, therefore, calls for a cooperative and persuasive approach among the governments of the world to engender a better ESR delivery. Specifically, the thesis found that there is an unexplored or under-explored normative framework that may effectively drive ESR realisation in Nigeria. That is, the place of international cooperation and assistance has not been explored by scholars on ESR realisation in Nigeria. Therefore, in this chapter, the thesis teases out a legally binding obligation on developed countries in favour of developing countries. Drawing on existing normative and jurisprudential framework from ICESCR and the Committee on Economic,

Social and Cultural Rights (CESCR), it argues that there is a legal obligation on the developed countries to internationally cooperate with and assist the developing countries in the latter's efforts to meet ESR realisation.

In chapter five, the thesis found that many calls have been made for the judicialisation of ESR. However, it further found that a 'command and control' model of judicialisation may not always herald an effective realisation of ESR. The countries that the chapter discussed reveal that a traditional approach to judicialisation may not always lead to social effectiveness that would drive ESR realisation. The discussion also reveals that in cases where judicialisation has had some modicum of impact, there were some external factors that informed or aided such impact or government compliance with court decisions on ESR. To bring about a better compliance with court ESR decisions, the chapter calls for cooperative, rather than a coercive adjudication and framing of remedies.

In chapter six, the thesis found that there are some prospects with judicial cooperation, collaboration, and dialogue with the political branches and other stakeholders. The chapter has further advanced the argument that was made in chapter five by designing a model for institutional collaboration and dialogue for the realisation of ESR. The chapter has designed the role of courts as that of a facilitator of dialogue and collaboration among the branches of government and other stakeholders in the ESR realisation chain. It argues that the court should embark on an institutional collaboration with relevant actors and take a moderate remedial approach to ESR cases.

7.3 Recommendations

Flowing from the foregoing findings, this thesis makes the following recommendations.

The Nigerian judiciary should embrace a cooperative and collaborative approach in the interpretation of ESR provisions of applicable laws. Such an approach does not only have the potential to promote the practical realisation of ESR, but it also holds the prospects of engendering less inter-institutional friction among the branches of government. A

collaboratively designed judicial resolution of ESR cases would lead to both instrumentalist and non-instrumentalist or direct and indirect impact on the individual litigant and the society. Further, the Nigerian government and indeed governments in developing nations should explore the provisions of the ICESCR and CESCR General Comments that have been analysed in this thesis, with a view to drawing on international cooperation and assistance from the developed nations. On their part, the developed nations should take their extraterritorial obligation to realise ESR seriously, by using their influence and voting powers in international financial bodies like the International Monetary Fund and World Bank to promote the cancellation of bad debts owed by developing countries, by providing direct technical and financial assistance and facilities needed for the realisation of ESR or by holding their multinational companies to account, as to the companies' commitment to ESR realisation in their host countries. Moreover, as has been argued in this thesis, the developing nations which are recipients of international cooperation and assistance should be accountable by ensuring that they do not mismanage the funds and facilities received. The political leaders of the developing nations should not see international assistance as an opportunity to loot, thus the international community through the UN should coordinate the receipt and effective utilisation of international cooperation and assistance.

7.4 Areas for Future Research

This thesis has introduced an innovative talking point into the judicial approach in Nigeria, as well as the role of international cooperation in ESR realisation. While the thesis has developed a cooperation model to enhance the realisation of ESR, much work however remains to be done on the procedural and administrative side of things. For example, future research is needed to consider the way or manner that the Nigerian courts can use to turn the cooperation model that has been recommended in this thesis into practice. Although the thesis has highlighted the importance of amicable/friendly settlement which Nigerian courts often adopt in other civil cases, whether such approach would be accepted within the present judicial architecture in core human rights cases needs to be further researched and analysed in future works. This thesis is but a first step in a journey towards a calibration of judicial attitude towards ESR realisation. More steps are needed, going forward.

7.5 Conclusion

This chapter has summarised the key findings in this thesis, by taking a chapter-by-chapter recourse into the major issues that have been discussed in the thesis. Further, the chapter has summed up the central arguments and recommendations that the thesis has proffered. These include the need for courts to engage political branches in a cooperative and dialogic discussion and the need for the international community and developed nations to engage in international cooperation and assistance for the realisation of ESR in developing nations. Lastly, the chapter has identified the issues that are outside the scope of this thesis which will be the focus of future research.

BIBLIOGRAPHY

Books

Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics (*Yale University Press, 1986).

AM Slaughter, *A New World Order* (Princeton UP, 2004).

Amitai Etzioni, *The Active Society: A Theory of Societal and Political Processes (*Free Press, 1968).

Andrew Dunsire, *Control in a Bureaucracy* (Martin Robertson, 1978).

Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press, 2014).

Bob van Gestel and Jurgen de Poorter, *In the Court We Trust, Cooperation, Coordination and Collaboration between ECJ and Supreme Administrative Courts* (Cambridge University Press, 2019).

B.O. Nwabueze, *Constitutional Law of the Nigerian Republic*, (Butterworths, 1964).

Bradley C. Canon & Charles A. Johnson, *Judicial Policies: Implementation and Impact* (2nd ed, CQ Press. 1999) 17.

Carlas Santiago Nino, *The Ethics of Human Rights* (Clarendon Press, 1991).

Cass Sunstein, *The Second Bill of Rights: The Last Great Speech of Franklin Delano Roosevelt and America's Unfinished Pursuit of Freedom* (Basic Books, 2004).

César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015).

Chantal Moufe, *On the Political* (Routledge, 2005).

Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009).

Christopher Ansell, *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford University Press, 2011).

Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism,* 2d ed. (Oxford University Press, 2001) 22.

D. Beetham, Bureaucracy, 2nd ed (Open University Press, 1996)

J. Pierre, *Debating Governance* (Oxford University Press, 2000).

David Lax & James Sebenius, *The Manager as Negotiator* (Free Press, 1986).

David Horowitz, *The Courts and Social Policy* (The Brooking Institute, 1977).

David P. Barash & Charles P. Webel, *Peace and Conflict Studies (*Sage, 2002).

David W. Johnson & Roger T. Johnson, *Cooperative Learning* (Innovación Educatión, University of Minnesota, 2017).

Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press, 2016) 1.

Dominic McGoldrick, The Human Rights Committee (Oxford University Press, 1994) 98.

Donald A. Schoen and Martin A. Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (Basic Books, 1994).

Duncan Kennedy, *A Critique of Adjudication: {fin de siecle}* (Harvard University Press, 1997) 2.

Durga Das Basu, *Introduction to the Constitution of India* (Prentice Hall of India, 1993).

Edward Newman, Ramesh Thakur & John Tirman, *Multilateralism Under Challenge? International Order, and Structural Change* (United Nations University Press, 2006).

Elliot Sober & David Sloan Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behavior* (Harvard University Press, 1998).

Ersson Svante & Jan-Erik Lane, *Democracy: Comparative Approach* (Routledge, 2003).

Femi Falana, *Nigerian Law on Socioeconomic Rights* (LegalText Publishing Company Limited, 2017).

Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991).

H. Keller, M. Forowics & L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (University of Oxford, 2010).

H. Stumpf, *American Judicial Politics* (2nd ed, Upper Saddle River, NJ: Prentice Hal, 1998).

Hakeem Olasunkanmi Ijaiye, *Judicial Approach to Interpretation of Constitution: A Study of Nigeria, Australia, Canada and India,* (Malthouse Press Limited, 2017).

Henry Shue, *Basic Rights: Sustenance, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

Henry Shue, *Basic Rights*, 2nd edn. (Princeton University Press, 1996).

Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach*, (Cambridge University Press, 2019).

J.N. Pandey, *Constitutional Law of India* (Central Law Agency, 1982).

Jeff King, *Judging Social Rights* (Cambridge University Press, 2012).

Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice Hall, Inc 1973) 55.

John Linarelli, Margot E. Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press, 2018).

John Locke, *The Second Treatise of Government (*Bobbs-Merrill, 1952).

Joseph Grieco, *Cooperation among Nations: Europe, America, and Non-Tariff Barriers to Trade* (Cornell University Press, 1990).

Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (Public Affairs, 2004).

L. Festinger. *A Theory of Cognitive Dissonance* (Row Peterson, 1957).

M.N. Shaw, *International Law* (Cambridge University Press, 2005).

Magdalena Sepulveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003).

Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008).

Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

Margot E. Salomon, *Global Responsibility for Human Rights- World Poverty and the Development of International Law,* (Oxford University Press, 2007).

Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008).

Martha Finnemore, *National Interests in International Society* (Cornell University Press, 1996).

Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House, 2001).

Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995).

Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: Chicago University Press, 1994).

Michel Rosenfeld, *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Duke University Press 1994).

Mohammed Bedjaoui, *Towards a New International Economic Order* (Oxford & IBH, 1979).

Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press, 2015).

Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2012).

Ore G Aguilar, *The Local Relevance of Human Rights: A Methodological Approach* (University of Antwerp, 2008).

Osita Eze, *Human Rights in Africa: Some Selected Problems*, (Nigerian Institute of International Affairs and Macmillan Publishers, 1984).

P. Veerman. *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff Publishers, 1992).

Patterson E. Thomas, *The American Democracy*, (3rd ed, Mcgraw-Hill Companies Inc., 1997).

Paul Craig, *Administrative Law*, 6th edn (Sweet & Maxwell, 2008).

Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, 2012).

Peter Worsley, *The Three Worlds: Culture and World Development* (The University of Chicago Press, 1984).

Peters Guy, *The Politics of the Bureaucracy* (Longman Publishers, 1995).

Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford University Press 2002).

Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984).

Roger Cotterrell, *The Sociology of Law: An Introduction* 2d ed (Butterworth, 1992).

Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford University Press, 2002).

Sandra Fredman, *Comparative Human Rights Law* (OUP,2018).

Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta & Company Ltd, 2010).

Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, (Intersentia, 2006).

Stephen L. Wasby, *The Supreme Court in the Federal System* (4th ed, Nelson-Hall Publishers, 1993).

Stuart Scheingold, *The Politics of Rights* (Yale University Press, 1974).

Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press & Clarendon Press, 1995).

Thomas Paine and Hypatia Bradlaugh Bonner. *Rights of Man* (Watts, 1921).

Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (J.S. Jordan, 1791).

Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2008).

Tony Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare* (Child Poverty Action Group, 1983).

Varun Gauri & Daniel M. Brinks. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008).

Vianna Luiz J. Werneck, *et al, Body and Soul of the Brazilian Judiciary (*Iuperj, 1997).

Wael Ghonim, *Revolution 2.0: The Power of the People Is Greater Than the People in Power* (Houghton Mifflin Harcourt, 2012).

Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964).

Y. Akinseye-George, *Improving Judicial Protection of Human Rights in Nigeria* (Centre for Socio-Legal Studies, 2012) 38.

Journal Articles

A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan JIL*.

A.S. Steen, A.S., M. Mann, N. Restivo, S. Mazany, and R. Chapple, 'Human Rights: Its Meaning and Practice in Social Work Field Settings' (2017) 62(1) *Social Work.*

Ainul Jaria Maidin, etal, 'Sustaining Development Through Socio-Economic Rights: Prospects and Challenges in Selected African Countries' (2011) 7(13) *Journal of Applied Sciences Research*.

Ainul Jaria Maidin, *etal,* 'Sustaining Development Through Socio-Economic Rights: Prospects and Challenges in Selected African Countries' (2011) 7(13) *Journal of Applied Sciences Research*.

Ajepe Taiwo Shehu, 'The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience' (2013), 2(1) *Afe Babalola University Journal of Sustainable Development Law and Policy*.

Alastair Iain Johnston, 'Treating International Institutions as Social Environments'(2001) 45 *Int''l Stud. Q*.

Alec Stone Sweet, 'Judicialization and Construction of Governance' (1999) 32(2) *Comparative Political Studies*.

Alexander Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44(3) *Cornell International Law Journal*.

Alicia Dibbets & Quirine Eijkman, 'Translators, Advocates or Practitioners? Social Workers and Human Rights Localization' (2018) 10 *Journal of Human Rights Practice*.

Alicia Ely Yamin & Angela Duger, 'Adjudicating Health-Related Rights: Proposed Considerations for the United Nations Committee on Economic, Social and Cultural Rights, and Other Supra-National Tribunals' (2016) 17(1) *Chicago Journal of International Law*.

Allan Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1(2) *European Journal of Legal Studies*.

Amanda Cahill, 'The Human Right to Water - A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 *INT'L J. Hum. RTS*.

Amnon Lehavi, 'Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property' (2015) 15(2) *Chicago Journal of International Law*.

Anashri Pillay 'Implementing Grootboom: Supervision Needed' (2002) 3 *ESR Review*.

Anashri Pillay, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014)63 *International and Comparative Law Quarterly*.

Andre Francovits & Patrick Earle, 'The Rights Way to Development: Manual for a Human Rights Approach to Development Assistance', in the Human Rights Council of Australia, INC. 68 (1998).

Andreas L. Paulus, 'The International Legal System as a Constitution' in Jeffrey L. Dunoff & Joel P. Trachtman, Ruling the World? (Cambridge University Press, 2009).

Ania Kwadrans, 'Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?' (2016) 25 *Journal of Law and Social Policy* 78.

Anne Meuwese & Marnix Snel, 'Constitutional Dialogue: An Overview'(2013) 9 *Utrecht Law Review* 123.

Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law*.

Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009)155.

Antony Anghie, 'TWAIL: Past and Future' (2008) 10 *Int'l Comm L Rev* 479.

Aoife Nolan, Bruce Porter & Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (July 16, 2009). CHRGJ Working Paper No. 15, 13. Available at SSRN: https://ssrn.com/abstract=1434944 (accessed on 14 April 2019).

Asbjørn Eide, 'Human Rights Requirements to Social and Economic Development' (1996) 21 (1) *Food Policy* 23.

Atudiwe P. Atupare, 'Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria' (2014), 27 *Harvard Human Rights Journal 71*.

Audrey R. Chapman AR, 'A "Violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) *Human Rights Quarterly* 23.

Avitus A Agbor, 'Shifting the Matrix from Legal Passivity to a New Domestic Legal Order: Towards the Justiciability of Economic, Social and Cultural Rights in Cameroon' (2017) 25 *Afr J Int'l & Comp L* 176.

B de Villiers, 'The Protection of Social and Economic Rights-International Perspectives', (1996), *Occasional Paper 9,* Centre for Human Rights 2.

B. Fassbender, 'The United Nations Charter As Constitution of the International Community', (1998) 36 *Colm. J. Transnat'l L.* 529.

B. Obinna Okere, 'Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution' (1983), 32(1), *International and Comparative Law Quarterly 214.*

B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3.

Bardo Fassbender 'The United Nations Charter as Constitution of the International Community' (1998) *Columbia Journal of Transnational Law* 38.

Barry Friedman, 'Dialogue and Judicial Review' (1993) 91 *Michigan Law Review* 577.

Basak Cali & Anne Koch, Presentation at the Enforcement of ESC Rights Judgments—International Symposium: Enforcing Civil and Political Rights: Lessons from European Court of Human Rights (May 7, 2010).

Borges, D.C. L. and Uga, M.A.D., 'Conflicts and Impasses in the Judicialization of the Supply of Medicine: Circuit Court Rulings on Claims brought against the State of Rio de Jaheio, Brazil, in 2005' *(2010)26(1) Cad. Saude Publica* 59.

Brian Fitzgerald, 'Software as Discourse? A Constitutionalism for Information Society' (1999)24 (3) *Alternative Law Journal*.

Brian Fitzgerald, 'Software as Discourse? The Challenge for Information Law' (2000) 22(2) *European Intellectual Property Review* 47.

C.O. Adekoya, 'Navigating the Hurdle of Justiciability and Judicial Review of Socio-economic Rights in Nigeria' (2011) 1(1) *Olabisi Onabanjo University Journal of Public Law* 2.

Camila Gianella-Malca, Siri Gloppen and Elizabeth Fosse, 'Giving Effect to Children's Right to Health in Colombia? Analysing the Implementation of Court Decisions Ordering Health System Reform', (2013) 5(1) *Journal of Human Rights Practice* 153.

Cass R.Sunstein, 'Forward: Leaving Things Undecided' (1996) 110(1) *Harvard Law Review* 4.

Cécele Fabre, ‘Constitutionalising Social Rights’, (1998) 6(3) *The Journal of Political Philosophy*.

Cesar Rodriguez-Garavito, Cesar, ‘Beyond the Courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America’ (2011) 89(7) *Texas Law Review* 1669.

Charles A. Johnson ‘Judicial Decisions and Organizational Change: A Theory’ (1979) 11 *Administration & Society* 27.

Charles R Beitz, 'Economic Rights and Distributive Justice in Developing Societies' (1981) 33 *World Pol* 321.

Christian Courtis & Magdalena Sepulveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR' (2009) 27 *Nordisk Tidsskrift for Menneskerettigheter* 54.

Christoper P. Manfredi, ‘The Day the Dialogue Died: A Comment on Sauve v. Canada’ (2007) 45(1) *Osgoode Hall Law Journal* 105.

Christopher Reenock, Michael Bernhard and David Sobek, ‘Regressive Socioeconomic Distribution and Democratic Survival’ (2007)51(3) *International Studies Quarterly* 677.

Claudia Marcela Vargas-Peláez, etal, ‘Right to Health, Essential Medicines, and Lawsuits for Access to Medicine- A Scoping Study’ (2014) *121 Social Science & Medicine* 48.

Clifford J. Carrubba, ‘Courts and Compliance in International Regulatory Regimes’ (Aug. 2005) 67(3) The *Journal of Politics* 669.

Cohin Gonsalves, ‘The Right to House-The Preserve of the Rich’ (2005) 1(2) *Housing and Economic, Social and Cultural Rights Litigation Quarterly* 1.

Colter Paulson, ‘Compliance with Final Judgments of the International Court of Justice since 1987’ (2004) 98(3) *American Journal of International Law 434.*

Cordell Hull, ‘The War and Human Freedom: Radio Address Delivered on July 23, 1942’, 7 U. S. D 7 U. S. Dept. Of State Bull. 161 (1942), reprinted in 382 *Int'l Conciliation (1942)*381.

Courtney Jung, Ran Hirschl and Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *Am J Comp L* 1043.

Craig Burnside & David Dollar, ‘Aid, Policies and Growth’ (2000) XC 4 *American Economic Review* 847.

Craig Scott & Philip Alston, ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise’ (2000) 16 *S. AFR. J. ON HUM. RTS.* 206.

Craig Scott, ‘The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’, (1989)27 *Osgoode Hall LJ*, 769.

Daniel Aguirre, 'Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation' (2011) 42 *Cal W Int'l LJ* 123.

Daniel Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues' (2010) 38 *Ga. J. Int'l & Comp. L*. 511.

Daniel M. Brinks and Valun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (June 2014) 12(2) *Perspectives on Politics* 375.

Daniel M. Brinks, Varun Gauri & Kyle Shen, 'Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular' (2015) 11(289-308) *Annual Review of Law and Social Science.*

Darren A. Wheeler, 'Methodological, Theoretical and Topical Challenges in Judicial Implementation and Impact Studies' (2010/2011) 13 *Indiana Journal of Political Science* 18.

Darren Hawkins & Melissa Humes, 'Human Rights and Domestic Violence' (2002) 117 *POL. SCI. Q.* 231.

Darren Hawkins & Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights', (2010) 6 *J. INT'L L. & INT'L REL*. 45.

David Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 *International Journal of Constitutional Law* 710.

David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 *S. AFRICAN L.J.* 484.

David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) *South African Journal on Human Rights* 1.

Deborah Z. Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', (2001)12 *EJIL* 39.

Dennis Davis, 'Socioeconomic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) 5 *ESR Review* 35.

Diana Kapiszewski and Matthew M. Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings'(Fall 2013)38(4) *Law and Social Inquiry* 803.

Diane A. Desierto, 'ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises' (2012) 44 *GEO. WASH. INT'L L. REV.* 473.

DJ Whelan and J Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908.

DM Davis 'The Case against the Inclusion of Socio-economic Demands in a bill of Rights except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475.

Duncan Snidal, 'The Limits of Hegemonic Stability Theory' (1985) 39(4) *International Organization* 207.

Duncan Snidal, 'Relative Gains and the Pattern of International Cooperation' (1991) 85(3) *The American Political Science Review* 701.

E. Desmet, 'Analysing Users' Trajectory in Human Rights: A Conceptual Exploration and Research Agenda' (2014) 8(2) *Human Rights and International Legal Discourse*.

E.W. Vierdag, 'The Legal Nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law 73.*

Ebenezer Durojaye & Enoch MacDonnell Chilemba 'The Judicialisation of the Right to Adequate Food: A Comparative Study of India and South Africa' (2017)43(2) *Commonwealth Law Bulletin* 255.

Edoardo Celeste, 'Digital Constitutionalism: a New Systematic Theorisation' (2019) *International Review of Law, Computers and Technology,* 33(1) 76.

Edwin Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria', (2007)51(2) *Journal of African Law* 249.

Elena Pribytkova 'What Global Human Rights Obligations Do We Have?' (2020) 20(2) *Chicago Journal of International Law* 386.

Eoin Carolan, 'Dialogue isn't working: The Case for Collaboration as a Model of Legislative– Judicial Relations' (2016)36(2) *Legal Studies.*

Erika De Wet, 'The International Constitutional Order' (2006) 55 *ICLQ*.

Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

F.G. Jacobs, 'The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights' (1978)3(3) 172.

Faranaaz Veriava, 'The Limpopo Textbook Litigation: a Case Study into the Possibilities of a Transformative Constitutionalism' (2016) 32(2) South *African Journal on Human Rights* 321.

Felipe Dutra Asensi, 'Judicialization or Juridicization? Legal Institutions and their Strategies in Health' (2010) 20(1) *Physis Rio de Janeiro 33.*

Fen Osler Hampson and Paul Heinbecker, 'The "New" Multilateralism of the Twenty-First Century' (July-September 2011) 17(3) *Global Governance (Emerging Powers and Multilateralism in the Twenty-First Century) 299.*

Flavia Piovesan, 'Social, Economic and Cultural Rights and Civil and Political Rights, (2004) 1 *SUR-Int'l J. Hum. Rts* 21.

Flora Alohan Onomrerhinor, 'Re-Examination of the Requirement of Domestication of Treaties in Nigeria' (2016) *NAUJILJ* 23.

Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11(1) *Human Rights Law Review* 1.

Frans Viljoen & Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004', (2007) 101 *AJIL* 1.

Furkan A. Gur, Joshua S. Bendickson & Shelby J. Solomon, 'Executive Antecedents of Interfirm Cooperation' (2020) 37(3) *Canadian Journal of Administrative Sciences* (John Wiley & Sons, Inc.), 300.

G. Stoker, 'Governance as Theory: Five Propositions' (1998)50(*1) International Social Science Journal 17.*

Gauthier De Beco, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68(1) *ICLQ* 141.

Gbadegesin O. Alawode & David A. Adewole, 'Assessment of the Design and Implementation Challenges of the National Health Insurance Scheme in Nigeria: A Qualitative Study among Sub-national level Actors, Healthcare and Insurance Providers' (2021) 21 *BMC Public Health.*

Geoffrey Cowan & Amelia Arsenault, 'Moving from Monologue to Dialogue to Collaboration: The Three Layers of Public Diplomacy' (2008) 616 ANNALS.

George S. McGraw,'Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence' (2011) 8 *LOY. U. CHI. INT'L L. REV.* 127.

Geraldine Van Bueren, 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52.

Gerard Hogan, 'Directive Principles, Social and Economic Rights and the Constitution' (2001)36 *Irish Jurist* 174.

Goldenziel, Jill I. 'Regulating Human Rights: International Organizations, Flexible Standards, and International Refugee Law' (2014) 14(2) *Chicago Journal of International Law* 478.

Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) *Transnational Environmental Law*.

Gordon Wells, 'Monologic and Dialogic Discourses as Mediators of Education' (Nov. 2006) 41(2) *Research in the Teaching of English* 168.

Govid Persad, 'The Medical Cost Pandemic: Why Limiting Access to Cost-Effective Treatments Hurts the Global Poor' (2015) 15(2) *Chicago Journal of International Law* 610.

Gretchen Vogel, 'The Evolution of the Golden Rule' (2004) 303 *Science*.

Hakeem O. Yusuf, 'Colonialism and the Dilemmas of Transitional Justice in Nigeria', *(2018), 12 International Journal of Transitional Justice*.

Hannes Mosler, 'Judicialization of Politics and the Korean Constitutional Court: the "Party Chapter Abolition Case"' (2014)47(3) *Law and Politics in Africa, Asia and Latin America*.

Helen Block Lewis, 'An Experimental Study of the Role of the Ego in Work. I. The Role of the Ego in Coöperative Work' (1944) 34(2) *Journal of Experimental Psychology*.

Herbert C. Kelman, 'Compliance, Identification, and Internalization: Three Processes of Attitude Change' (1958) *Journal of Conflict Resolution*.

Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53 *International Organizations*.

Ibironke T Odumosu, 'Challenges for the (Present/) Future of Third World Approaches to International Law' (2008) 10 *Int'l Comm L Rev*.

Illari Aragon Noriega, 'Judicial Review of the Right to Health and its Progressive Realisation: The Case of the Constitutional Court of Peru' (2012)1(1) UCL *Journal of Law and Jurisprudence*.

Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 37 *Common Market Law Review*.

Ingrid Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socieeconomic Rights Protection' (2015)16(1) *German Law Journal*.

Irina G Belyaeva, 'Dialog, Communication, Cooperation, and Collaboration: Facets of Human-Computer Interaction' (2021)2(4) *Technology and Language.*

Ismael Muvingi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009)3*The International Journal of Transitional Justice* 163.

Iyabode Ogunniran, 'Enforceability of Socio-economic Rights: Seeing Nigeria through the Eyes of other Jurisdictions' (2010) *JILJ*

J. Levine, 'Methodological Concerns in Studying Supreme Court Efficacy' (1970) 4 *Law and Society Review*.

J.B. Maller, 'Co-operation and Competition: An Experimental Study in Motivation' (1929) 384 *Teach. Contrib. to Educ.*

J.K. Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6(4) *The International Journal of Human Rights*.

J.R. Schermerhorn, 'Determinants of Interorganizational Cooperation' (1975) 18(4*) Academy of Management Journal*.

Kevin Watkins & Ngaire Woods, 'Africa Must Be Heard in the Councils of the Rich' *International Herald Tribune* (02-03 October 2004).

Malcolm Langford, ‘The Impact of Public Interest Litigation: The Case of Socio-economic Rights (2021)27(3) Australian Journal of Human Rights

Marc Hertogh, ‘Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands’ (2001)23(1) *Law and Policy*.

Miles Kahler, ‘Multilateralism with Small and Large Numbers’ (1992) 46 *International Organization*.

Monica Claes & Maartje de Visser, ‘Are you Networked Yet? On Dialogues in European Judicial Networks’ (2012) 8(2) *Utrecht Law Review*.

Muftahu Jibirin Salihu & Hazril Jamil, ‘Policy of Universal Basic Education in Nigeria: An Examination of its Effectiveness on Implementation and Management’ (2015)5(6), *American International Journal of Contemporary Research*.

Nana Tawiah Okyir, ‘Towards a Progressive Realisation of Socio-Economic Rights in Ghana: A Socio-Legal Analysis’ (2017) 25(1) *African Journal of International and Comparative Law*.

Nico Schrijver, ‘Fifty Years International Human Rights Covenants: Improving the Global Protection of Human Rights by Bridging the Gap between the two Covenants’ (2016) 41(4) *NTMINJCM-Bull. Jrg.*

Nicolas Suzor, Nicolas, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) 4(3) *Social Media+Society.*

Nsongurua J. Udombana, ‘Keeping the Promise: Improving Access to Socioeconomic Rights in Africa’, (2012) 18 *Buffalo Human Rights Law Review.*

Obiora Chinedu Okafor, ‘Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective’ (2005) 43 *Osgoode Hall LJ*.

Obiora Chinedu Okafor, ‘The African System on Human and Peoples’ Rights, Quasi-Constructivism, and the Possibility of Peacebuilding *within* African States’ (Winter 2004) 8(4) *International Journal of Human Rights*.

Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *Int'l Comm L Rev*.

Odeyemi Jacob Oluwole, ‘A Political History of Nigeria and the Crisis of Ethnicity in Nation-Building’, (2014)3(1), *International Journal of Developing Societies*.

Olisa Agbakoba & U. Emelonye, ‘Test of Progressive Realisation of Economic, Social and Cultural Rights in Nigeria’ (1990-1999 Budget Analysis) (2001) *HURILAWS*.

Onora O'Neill`, ‘The Dark Side of Human Rights’ (2004) 8(2) *International Affairs*.

Opeoluwa Adetoro Badaru, 'The Right to Food and the Political Economy of Third World States' (2014) 1 *Transnat'l Hum Rts Rev.*

P.E. Standaert, ‘The Friendly Settlement of Human Rights Abuses in the Americas’ (1999) 9 *Duke Journal of Comparative and International Law*.

Paul Berman,'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 *University of Colorado Law Review*.

Paul W. Kahn,'Interpretation and Authority in State Constitutionalism' (March 1993) *Harvard Law Review* 106(5).

Peter Hogg, etal, 'Charter Dialogue Revisited-or Much Ado about Metaphors Charter Dialogue: Ten Years Later' (2007) 45*Osgoode Hall Law Journal*.

Peter W. Hogg & Allison A. Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 *Osgoode Hall L.J*.

Peters, Anne, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 *Leiden Journal of International Law*.

Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *HUM. RTS. Q.*

Philip Alston, 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights (1987) 9 *Hum. RTs. Q.*

Philip Alston, 'U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy' (1990)84(2) *The American Journal of International Law*.

Pooja Parmar, 'TWAIL: An Epistemological Inquiry' (2008) 10 *Int'l Comm L Rev*.

R. Singh, 'The Use of International Law in the Domestic Courts of the United Kingdom' (2005), 56(2) *Northern Ireland Legal Quarterly*

R.F. Devlin, 'The Charter and Anglophone Legal Theory' (1997)4(1) *Review of Constitutional Studies.*

Rafal Manko, 'Judicial Decision-Making, Ideology and the Political: Towards an Agonistic Theory of Adjudication' (2022) 33 Law and Critique.

Ralf Michaels, 'Global Legal Pluralism' (2009) 5 *Ann. Rev. L & Soc. Sci*. 243.

Ramesh Thakur, 'Global Norms and International Humanitarian Law' (2001) 841 *International Review of the Red Cross*.

Ran Hirsch, 'The New Constitution and the Judicialization of Pure Politics Worldwide' (2006)75 *Fordham L. Rev*.

Rita Bruun, 'The Boldt Decision: Legal Victory, Political Defeat' (1982) 4 *Law & Pol'y*.

Robert E. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Right' (Nov.1994) 16(4) *Human Rights Quarterly*.

Roger Handberg ‘Judicialization across Societies: The Spread of Judicial Power and Societal Change’ (1999) 22(8) *International Journal of Public Administration.*

Roland Burke, ‘Some Rights Are More Equal than Others: The Third World and the Transformation of Economic and Social Rights ‘(2014) 3 *Humanity Journal*.

Rosalind Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007)5(3) *International Journal of Constitutional Law*.

Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue & Deference' (2009) 47 *Osgoode Hall Law Journal*.

Rossana Deplano, ‘Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry’ (Spring/Summer 2013) 6 *European Journal of Legal Studies*.

Russell Menyhar,’Changing Identities and Changing Law: Possibilities for a Global Legal Culture’ (Summer 2003)10(2) *Indiana Journal of Global Legal Studies*.

Ruti Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ (1997) 106 *Yale Law Journal*.

Ryan Goodman & Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 *DukeL.J*.

S. Gardbaum, ‘Reassessing the New Commonwealth Model of Constitutionalism’ (2010) 8 *International Journal of Constitutional Law*.

S.E. Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108(1) *American Anthropologist.*

Sahar Sega, ‘The International Human Right to Adequate Housing: An Economic Approach’ (2020) 20(2) *Chicago Journal of International Law*.

Sandra Liebenberg, ‘The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa’ (1995)11(3) *South African Journal on Human Rights*.

Sanna Hyttinen, ‘A Second View from Elsewhere - The EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse’ (2006) 24 *Nordisk Tidsskrift* for *Menneskerettigheter* .

Scott Leckie, ‘Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20(1) *Human Rights Quarterly*.

Shai Dothan, ‘Judicial Tactics in the European Court of Human Rights’ (Summer 2011) 12(1) *Chicago Journal of International Law*.

Stanley Ibe, ‘Beyond Justiciability: Realising the Promise of Socio-economic Rights in Nigeria’ (2007) 7 *African Human Rights Law Journal*.

Stanley Ibe, ‘Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities’ (2010) 10 *African Human Rights Law Journal*.

Sueli Gandolfi Dallari, et al. ‘Health Advocacy in Contemporary Brazil’ (1996) 30(6) *Revista de Saúde Pública*.

Surya Deva, ‘Access to Justice for Socio-Economic Rights: Lessons from the Indian Experience’, (2017) *Völkerrechtsblog*.

T. Barkhuysen and M. L. M. Hertogh ‘Effectieve bescherming van mensenrechten: Rechter, ombudsman en artikel 13 EVRM," *NJCM Bulletin* 6:751.

Theunis Roux, ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2009) 7 *I-CON*.

Thomas Buergenthal, ‘New Upload—Remembering the Early Years of the Inter-American Court of Human Rights’ (2005) 37 *N.Y.U. J. INT’L L. & POL*.

Thomas Cottier and Maya Hertig, ‘The Prospects of 21st Century Constitutionalism’ (2003) 7 *Max Planck UNYB.*

Thomas Fossen, ‘Agonistic Critiques of Liberalism: Perfection and Emancipation’ (2008) 7(4) *Contemporary Political Theory.*

Thomas M. Franck, ‘Community Based on Autonomy’ (1997) 36 *Colum. J. Transnat’l L*.

Thomas Pogge, ‘Priorities of Global Justice’ (2001) 32(1& 2) *Metaphilosophy (SPECIAL ISSUE: GLOBAL JUSTICE).*

Thomas Pogge, ‘Recognized and Violated by International Law: The Human Rights of the Global Poor’ (2005) 18 *Leiden Journal of International Law*.

Thomas Risse, ‘“Let’s Argue!”: Communicative Action in World Politics’(2000) 54 *International Organizations*.

Tom Ginsburg & Daniel Abebe, ‘The Dejudicialization of International Politics?’ (2019) 63(3) *International Studies* Quarterly

Torbjorn Vallinder, ‘The Judicialization of Politics: Meaning, Forms, Background, Prospects’ (1992) *Acta Societatis Juridicae Lundensis*.

Vanice Regina Lírio Do Valle, ‘Judicial Adjudication in Housing Rights in Brazil and Colombia: A Comparative Perspective’ (2014) 1(2) *Revista de Investigações Constitucionais, Curitiba* .

Victor Oluwasina Ayeni & Tajudeen Ojo Ibraheem, ‘Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System’ (2019)10 *Beijing Law Review*.

Victor Sidel, ‘The Right to a Just and Peaceful Social and International Order’ (1998) 3 *Health & Hum. Rts*.

Virginia A Leary 'The Right to Health in International Human Rights Law' (1994) 1 *Health and Human Rights.*

Wahab O. Egbewole & Taofeeq N. Alatise, 'Realising Socio-Economic Rights in Nigeria and the Justiciability Question: Lessons from South Africa and India', (2017) VIII, (8.3) Quarter III, *International Journal of Politics and Good Governance.*

Wayne E. Nafziger, 'The Political Economy of Disintegration in Nigeria' (1973) 11(4) *The Journal of Modern African Studies*.

Y.M. Lotman, 'Text within a Text' (1988) 26(3) *Soviet Psychology*.

Zachary Elkins and Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harv Int'l LJ*.

Book Chapters in Edited Collections

A.O. Popoola, 'Fundamental Objectives and Directive Principles of State Policy: Executive Responsibility and the Justiciability Dilemma' in E. Azinge and B. Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Nigerian Institute of Advanced Legal Studies, 2010).

Alastair Iain Johnston, 'The Social Effects of International Institutions on Domestic (and Foreign Policy) Actors' in Daniel W. Drezner (ed), *Locating the Proper Authorities: The Interaction of Domestic and International Institutions* (University of Michigan Press, 2002).

Amartya K. Sen, 'The Right Not to Be Hungry' in P Alston & K. Tomasevski (eds) *The Right to Food* (Martinus Nijhoff, 1984) .

Anne Peters, 'Constitutionalisation' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Edward Elgar Publishing Ltd, 2019).

Anne Peters, 'The Globalisation of State Constitutions' in Janne E. Nijman and André Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007).

Aoife Nolan, 'Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell & Colin Harvey (eds), *Human Rights and Public Finance: Budgets & the Promotion of Esconomic and Social Rights* (Hart Publishing Ltd, 2013).

Aoife O'Donoghue & Ruth Houghton, 'Can Global Constitutionalisation be Feminist?' in Susan Harris Rimmer and Kate Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing, 2019).

Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Right' in Asbjrn Eide, Catarina Krause & Allen Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (M. Nijhoff Publishers, 2001).

Asbjorn. Eide, 'Economic and Social Rights' in Janusz Symondies (ed) *Human Rights: Concepts and Standards* (Ashgate Dartmouth UNESCO, Hampshire, 2000).

B Simma, 'Reservations to Human Rights Treaties—Some Recent Developments' in G Hafner (ed), Liber Amicorium Professor Ignaz Seidl-Hohanveldern (Kluwer, 1998).

B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie *et al* (eds), *The Third World and International Order: Law, Politics And Globalization* (Brill | Nijhof, 2003).

Ben T.C. Warwick, 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Economic Crisis' in Gillian MacNaughton & Diane F. Frey (eds) *Economic and Social Rights in a Neoliberal World* (Cambridge: Cambridge University Press, 2018).

Ben T.C. Warwick, 'Debt, Austerity, and the Structural Responses of Social Rights' Ilias Bantekas and Cephas Lumina (eds), *Sovereign Debt and Human Rights* (Oxford University Press, 2018).

Ben T.C. Warwick, 'Social Minima at the UN Treaty Bodies: Minimal Consistency?' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Oxford: Hart Publishing, 2019).

Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (NYU School of Law Public Law Research Paper No. 11-05, of February 2011, available at https://ssrn.com/abstract=1753015.

Bradley C. Canon, 'Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches' in Marc Hertogh and Simon Halliday (eds) Judicial *Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2004).*

Brigit Toebes, 'The Right to Health' in Asbjrn Eide, Catarina Krause & Allen Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (M. Nijhoff Publishers, 2001).

Burns H. Weston, 'Human Rights' in Richard Pierre Claude & Burns H. Weston (eds*) Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, 1989).

C. Tomuschat, 'International Law as the Constitution of Mankind' in United Nations (ed), International Law on the Eve of the Twenty-first Century: Views from the International Law Commission (1997).

Cesar Rodriguez-Gavarito, 'Beyond Enforcement: Assessing and Enhancing Judicial Impact' in Malcolm Langford, Cesar Rodriguez-Gavarito and Julieta Rossi (eds) *Social Rights Judgments and the Politics of Compliance: Making It Stick (*Cambridge University Press, 2017).

Charles R. Beitz, 'Human Rights and Social Justice' in Peter G. Brown and Douglas MacLean (eds) *Human Rights and U.S. Foreign Policy* (Lexington Books, 1979).

Charles Doran, 'The Two Sides of Multilateral Cooperation' in William I. Zartman & Saadia Touval (eds) *International Cooperation: The Extents and Limits of Multilateralism (*Cambridge University Press, 2010).

Christian Courtis & Julieta Rossi, 'Individual Complaints Procedure' in Malcolm Langford, et al (eds) *Optional Protocols to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (Pretoria: Pretoria University Press, 2016).

Christian Walter, 'International Law in a Process of Constitutionalization' in Janne E. Nijman and André Nollkaemper (eds) *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007).

Colm O'cinneide 'Giving Legal Substance to the Social Minimum' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Oxford: Hart Publishing, 2019).

Colm O'Cinneide, 'The Constitutionalisation of Social and Economic Rights' in Helena Alviar Garci´a, Karl Klare & Lucy A. Williams (eds) Social and Economic Rights in Theory and Practice (Routledge 2015).

Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty & Virginia Mantouvalou (eds), *Debating Social Rights* (Bloomsbury, 2010).

D. P. Kommers and W.J. Thompson, 'Fundamentals in the Liberal Constitutional Tradition', in J.J. Hesse and V. Wright(eds) *Constitutional Policy and Change in Europe* (1995).

Dimitrios Kagiaros, 'Vulnerability as a Path to a 'Social Minimum'? An Analysis of ECtHR Jurisprudence' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Oxford: Hart Publishing, 2019).

Esin Oriici, 'The Core of Rights and Freedoms: The Limits of Limits' in Tom Campbell *etal* (ed) *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1986).

F. Spagnoli, 'The Horizontal Priority of Economic Rights' in N. Udombana & V. Nesirevic (eds.) *Re-thinking Social Economic Rights in an Insecure World* (Central European University Press, 2006).

Fen Osler Hampson, 'Deconstructing Multilateral Cooperation' in Saadia Touval & William 1. Zartman (eds) *International Cooperation: The Extents and Limits of Multilaterism* (Cambridge University Press, 2010).

Fons Coomans, 'In Search of the Core Content of the Right to Education, in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (Pretoria: Protea Book House, 2002).

Genevra Richardson, 'Impact Studies In The United Kingdom' in Marc Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2004)*

Geraldine Van Bueren, 'Of Floors and Ceilings: Minimum Core Obligations and Children' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (Pretoria: Protea Book House, 2002).

Gerard Hogan, 'Judicial Review and Social and Economic Rights' in Binchy and Sarkin (eds), *Human Rights, the Citizens and the State: South African and Irish Approaches* (Dublin: Roundhall Sweet and Maxwell, 2001).

Henry J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in P. Alston and J. Crawford (eds) *The Future of United Nations Treaty Monitoring* (Cambridge University Press, 2000).

Hertogh, M. & Halliday, S. (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* Cambridge University Press, 2004).

Ignatius Akaayar Ayua and Dakas C.J. Dakas. 'Federal Republic of Nigeria', in Kincaid John and Tarr G. Alan (eds), *Constitutional Origins, Structure, and Change in Federal Countries*, (Quebec: McGill-Queen's University Press, 2005).

Ingrid Leijten, 'Potential and Pitfalls of Indivisible Judicial Protection of a Social Minimum: From Inflation to Procedural Protection?' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds) *Specifying and Securing A Social Minimum in the Battle Against Poverty* (Hart Publishing, 2019)

J.A. Frowein, 'Konstitutionalisierung des Vólkerrechts' in K. Dicke, W. Hummer, D. Girsberger, et tal (eds) Public Law and Private International Law in a Globalising International System (Berichte der Deutschen Gesellschaft fúr Vólkerrecht 39, 2000).

James A. Caporaso, 'International Relations Theory and Multilateralism' in John Gerard Ruggie (ed) *Multilateralism Matters*: *The Theory and Praxis of an Institutional Form* (Columbia University Press,1993).

James Fearon & Alexander Wendt, 'Rationalism v. Constructivism: A Skeptical View' in Walter Carlsnaes et al.(eds) *Handbook of International Relations* (Sage Publication Ltd, 2002).

James Thuo Gathii, 'Third World Approaches to International Economic Governance' in R. Falk, B. Rajagopal, and J. Stevens (eds), *International Law and the Third World: Reshaping Justice (Routledge,* 2008).

Javier A. Couso, 'The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity', in Roberto Gargarella, Pilar Domingo & Theunis Roux (eds), *Courts and Social Transformation in New Democracies*: *An Institutional Voice for the Poor*? (Aldershot, UK: Ashgate Publishing Limited, 2006).

Jean-Claude Berthélemy, 'Asymmetrical Cooperation in Economic Assistance' in William Zartman & Saadia Touval (eds) *International Cooperation:The Extents and Limits of Multilateralism* (Cambridge University Press, 2010).

Jeffrey K. Tulis, 'Deliberation Between Institutions' in (James S. Fishkin & Peter Laslett(eds) *Debating Deliberative Democracy (*John Wiley & Sons, 2003).

Josh Curtis and Shane Darcy 'The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future*, (Edward Elgar Publishing: 2012)

Karsten Nowrot, 'Global Governance and International Law' in Christian Tietje and others (eds), Beiträge zum Transnationalen Wirtschaftsrecht (Institut für Wirtschaftsrecht, Martin-Luther-Universität, 2004).

Katharine G. Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G. Young (ed) *The Future of Economic and Social Rights* (Cambridge University Press, 2019).

L. Festinger L., 'An Analysis of Compliant Behavior' in M. Sherif & M.O. Wilson (eds) *Group Relations at the Crossroads* (Harper, 1953).

L. Uzoukwu, 'Constitutionalization and Judicialization of Directive Principles of State Policy' in D. Olanrewaju (ed) *Law and Its Leeway*: *Essays in Honour of Emeritus Professor Isaac Oluwole Agbede* (GEN Communications Resources, 2014).

Langford M., Coomans F. and Gomez Isa F., 'Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2012).

Lewis A. Kornhauser, Lewis, 'Is Judicial Independence a Useful Concept? In Steven B. Burbank and Barry Friedman (eds) *Judicial Independence at the Crossroads: An Interdisciplinary Approach (*New York: Sage, 2002).

Lisa Martin, 'Interests, Power and Multilateralism' in Charles Lipson and Benjamin J. Cohen (eds) *Theory and Structure in International Political Economy* (MIT Press,1999).

Lord Lester & C. O'Cinneide, 'The Effective Protection of Socio-Economic Right' in Yash Ghai & Jill Cottrell (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing, Economic, Social and Cultural Rights* (Commonwealth Secretariat, 2004).

Lucy A. Williams, 'Resource Questions in Social and Economic Rights Enforcement' in Rights' in Helena Alviar Garci´a, Karl Klare & Lucy A. Williams (eds) *Social and Economic Rights in Theory and Practic*e (Routledge, 2015).

M. Goodale., 'Locating Rights, Envisioning Law between the Global and the Local' in M. Goodale and S.E. Merry (eds)*The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press, 2007).

M.A. Ajomo, 'Human Rights under the Nigerian Constitutions' in Y. Osinbajo and A. Kalu (eds.), *Democracy and the Law,* (Federal Ministry of Justice Law Review Series, 1991).

Marc Galanter, 'The Radiating Effects of Courts', in Keith O. Boyum and Lynn Mather (eds) *Empirical Theories about Courts* (New Orleans: Quid Pro Books, 2015).

Marc L.M. Hertogh, 'The Policy Impact of the Ombudsman and Administrative Courts: A Heuristic Model' in International Ombudsman Institute & Linda C. Reif, *The International Ombudsman Yearbook* (Vol 2, Kluwer Law International, 1998)

Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin(eds)*The Twilight of Constitutionalism?* (Oxford University Press,2010).

Matthew Craven, 'The Violence of Dispossession: Extra-territoriality and Economic, Social and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007).

Maurice Cranston, 'Human Rights, Real and Supposed' in D.D. Raphael (ed) *Political Theory and the Rights of Man* (Macmillan, 1967).

Maurice Sunkin, 'Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies', in Marc Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge: Cambridge University Press, 2004).*

Monica Hakimi, 'Human Rights Obligations to the Poor', in KN Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor*(Cambridge University Press, 2013).

N. Johnson, 'Constituionalism: Procedural Limits and Political Ends' in J.J. Hesse and V. Wright(eds) *Constitutional Policy and Change in Europe* (1995).

Neal C. Tate, 'Why the Expansion of Judicial Power?' in Neal Tate and Torbjörn Vallinder (eds*) The Global Expansion of Judicial Power* (New York: New York University Press,1995).

Neil MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State' in *Constittronalism in Transformation: European and Theoretical Perspectives* 141 (Richard Bellamy & Dario Castiglione eds., 1996).

Neil Walker 'Post-national Constitutionalism and the Problem of Translation' in Joseph HH Weiler and Marlene Wind (eds) *European Constitutionalism beyond the State* (Cambridge: CUP 2003).

Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional* (UK: Hart Publishing, 2001).

Nigel Rodley 'International Human Rights Law' in Malcolm D. Evans (ed) *International Law* (4th ed. Oxford University Press, 2010).

P. Anyebe, 'Enforcing the Good Governance Charter: Judicial and non-judicial approaches to Economic, Social and Cultural Rights under Chapter Two of the 1999 Constitution' in E. Azinge and B. Owasanoye (eds) *Justiciability and Constitutionalism: An Economic Analysis of Law* (Nigerian Institute of Advanced Legal Studies, 2010).

P. Stiegart, 'International Human Rights Law: Some Current Problems' in Robert Blackburn & John Taylor (eds) *Human Rights for the 1990s: Legal, Political and Ethical Issues* (Mansell, 1991).

Peter Cane, 'Understanding Judicial Review and its Impact' in Marc Hertogh and Simon Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (Cambridge University Press, 2004).*

Pierre de Vos, 'The Essential Components of the Human Right to Adequate Housing-A South African Perspective' Dimensions' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Protea Book House, 2002).

Pillay Anashri and Wesson Murray, 'Recession, Recovery and Service Delivery: Political and Judicial Responses to the Financial and Economic Crisis in South Africa' in Aoife Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, 2016).

R. Gambitta, 'Litigation, Judicial Deference and Policy Change' in R. Gambitta, M. May and J. Foster (eds), *Governing Through Courts* (New York, Sage, 1981).

Ralph Wilde, 'Socioeconomic Rights, Extraterritorially' in Eyal Benvenisti & Georg Nolte (eds) *Community Interests Across International Law* (OUP, 2018).

Raymond Breton, 'Identification in Transnational Political Communities' in K Knop, et al (eds), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World, (*UBS Press, 1995).

Roberto Gargarella, 'Dialogic Justice in the Enforcement of Social Rights' in Siri Gloppen and Alicia Yamin (eds) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2011).

Roberto Gargarella, 'Theories of Democracy, the Judiciary and Social Rights', in R. Gargarella, P Domingo, & T. Roux, (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*? (Ashgate Publishing Limited, 2006).

Rodrigo Uprimny Yepes, 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds) *Courts and Social Transformation in New Democracy: An Institutional Voice for the Poor?* (Ashgate Publishing Limited, 2006).

Rolf Kúnnermann, 'The Right to Adequate Food: Violations related to its Minimum Core Content' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Protea Book House, 2002).

Ruth Gavison, 'On the Relationship between Civil and Political Rights, and Social and Economic Rights'in Jean-Marc Coicaud, Michael W. Doyle & Anne-Marie Gardner (eds) *The Globalization of Human Rights* (United Nations Publications, 2003).

S Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System needing Reform' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000).

S. Halliday, 'Researching the "Impact" of Judicial Review on Routine Administrative Decision-Making' in D. Cowan (ed), *Housing: Participation and Exclusion* (Dartmouth, Aldershot, 1998).

Saadia Touval, 'Negotiated Cooperation and its Alternatives' in William Zartman & Saadia Touval (eds) *International Cooperation:The Extents and Limits of Multilateralism* (Cambridge University Press, 2010)

Sage Russell, 'Minimum State Obligations: International Dimensions' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and Internationsl Perspectives* (Pretoria: Protea Book House, 2002).

Sakiko Fukuda-Parr, 'International Obligations for Economic and Social Rights: The Case of the Millennium Development Goal Eight' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007).

Samuel Bowles & Herbert Gintis, 'Origins of Human Cooperation' in Peter Hammerstein (ed) *The Genetic and Cultural Origins of Cooperation* (MIT Press, 2003).

Sandra Lienbenberg, 'Social and Economic Rights' in M. Chaskalson *etal* (eds) *Constitutional Law of South Africa* (Cape Town: Juta, 1996).

Sigrun I. Skogly & Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel & Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press,2007)

Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework' in Roberto Gargarella, Pilar Domingo & Theunis Roux (eds), *Courts and Social Transformation in New Democracies*: *An Institutional Voice for the Poor*? (Ashgate Publishing Limited, 2006).

T. Risse & K. Sikkink, 'The Socialization of International Human Rights Norms into Domestic Politics: An Introduction in T. Risse & K. Sukkink (eds) *The Power of Human Rights* (Cambridge University Press, 1999).

Thomas Pogge, 'Severe Poverty as a Human Rights Violation', in Thomas Pogge (ed)*Freedom from Poverty as a Human Right* (Oxford University).

Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds)*The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999).

U.K. Preuss, 'Patterns of Constitutional Evolution and Change in Eastern Europe' in JJ Hesse and V Wright(eds) Constitutional Policy and Change in Europe (1995)

Varun Gauri & Daniel M. Brinks, 'Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights' in Varun Gauri & Daniel M. Brinks (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008).

William Zartman & Saadia Touval, 'Introduction: Return to the Theories of Cooperation' in Saadia Touval & William 1. Zartman (eds) *International Cooperation: The Extents and Limits of Multilaterism* (Cambridge University Press, 2010).

Others

Abosede George, 'The Roots of the #EndSARS Protests in Nigeria' *The Washington Post* (25 October 2020), available at https://www.washingtonpost.com/outlook/2020/10/25/roots-endsars-protests-nigeria/ (accessed on 10 November 2020).

Afe Babalola, 'Time for FG to Re-establish Education Bank to boost Education among youths (2)', Vanguard Newspaper, November 7, 2018, available at https://www.vanguardngr.com/2018/11/time-for-fg-to-re-establish-education-bank-to-boost-education-among-youths-2/ (last accessed on 13 March, 2019).

Agency Report, '#EndSARS: FG pledges to implement Protesters' Demands' *Premium Times Newspaper (*21 October 2020) available at https://www.premiumtimesng.com/news/top-

news/422157-endsars-fg-pledges-to-implement-protesters-demands.html (accessed on 10 November 2020).

Alexander Hamilton, James Madison and John Jay, The Federalist Papers, 1969 Paper No. 33

Alistair Bunkall, 'End SARS: Why Nigeria's Anti-Police Brutality Protests have gone global' *Sky News* (21 October 2020), available at https://news.sky.com/story/end-sars-why-nigerias-anti-police-brutality-protests-have-gone-global-12107555 (accessed on 10 November 2020).

Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (2007) Centre for Human Rights and Global Justice Working Paper Number 15, available at http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf (last accessed on 26September , 2020).

Bruce Jones, 'Making Multilateralism Work: How the G-20 Can Help the United Nations', Policy Analysis Brief, Stanley Foundation, April 2010, available at www.stanleyfoundation .org/publications/pab/Jones_PAB_410.pdf (accessed on 04 November 2020).

Chidi Odinkalu, 'The Imperative of Justiciability of Socioeconomic Rights in Nigeria' being a text of Lecture in Honour of Femi Falana, SAN, Bayo Aborishade (ed), (Ibadan: Centre for Labour Studies, 2013).

Courtney Hillebrecht, 'From Paper Tigers to Engines of Change: The Effect of International Human Rights Tribunals on Domestic Practice and Policy' 21 (May 10, 2010) (unpublished Ph.D. dissertation, University of Wisconsin-Madison.

Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict', 46 available at: https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf (accessed on 19 October 2020).

DI Denga, 'Evolving a New Education Culture: The Universal Basic Education Focus' , available at https://www.researchgate.net/publication/313559647_Evolving_a_new_education_culture_The_Universal_Basic_Education_focus (last accessed on 06 March, 2019).

Duru, Onyekachi, 'The Justiciability of the Fundamental Objectives and Directive Principles of State Policy Under Nigerian Law' (June 2, 2012). Available at SSRN: https://ssrn.com/abstract=2140361 or http://dx.doi.org/10.2139/ssrn.2140361 (last accessed on 04 March, 2019).

E.Remi Aiyede & V. Adefei Isumonah, 'Towards Democratic Consolidation in Nigeria: Executive-Legislative Relations and the Budgetary Process', being a Research Report No. 52 submitted to the Development Policy Centre, Ibadan-Nigeria in June 2002.

FAO Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Justiciability of the right to food: Information Paper, (FAO Document IGWG RTFG/INF (2004).

FAO, 'Legal Developments in the Progressive Realisation of the Right to Adequate Food' (2014).

Fereydoun Hoveyda, ‘Not All Clocks for Human Rights Are the Same’ New York Times (USA, 18 May 1977).

Franklin D. Roosevelt, ‘State of the Union Message’, 90-91 Cong. REC.

Frans Viljoen, 'The Justiciability of Socio-economic and Cultural Rights: Experiences and Problems' (2006) 1 (unpublished).

Hans Dembowski, ‘Two-pronged Global Crisis’, being a blog post in *Development and Cooperation* on 21 March 2020, available at: https://www.dandc.eu/en/article/covid-19-requires-global-cooperation-protect-human-health-and-prevent-economic-depression (accessed on 08 April 2020).

Inga T. Winkler, ‘Respect, Protect, Fulfil: Implementation of the Human Right to Water in South Africa’, Water Law at the Crossroads in India, 423, available at http://www.ingawinkler.com/uploads/4/8/6/0/48601803/respect_protect_fulfill.pdf , (accessed on 10 April, 2018).

J. Sachs, *Etal* ‘The Sustainable Development Goals and COVID-19’ *Sustainable Development Report* (Cambridge University Press,2020) 13. Available at https://s3.amazonaws.com/sustainabledevelopment.report/2020/2020_sustainable_development_report.pdf (accessed on 27 July 2020).

James Alm and Jameson Boex, ‘An Overview of Intergovernmental Fiscal Relations and Subnational Public Finance in Nigeria’ (2002) *ISP Working Paper* Number 02-1. Andrew Young School of Policy Studies, Georgia State University.

James G. March & Johan P. Olsen, ‘The Logic of Appropriateness’, ARENA Working Paper 04109, available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/ working-papers2004/wp04_9.pdf (accessed on 02 April 2020).

Jeffrey K. Staton & Alexia Romero, ‘Clarity and Compliance in the Inter-American Human Rights System’ (2011) available at http://biblioteca.cejamericas.org/bitstream/handle/2015/448/Clarity-and-Compliance-in-the-Inter-American-Human-Rights-System.pdf?sequence=1&isAllowed=y (accessed on 17 May 2020).

Jens Martens, ‘Multistakeholder Partnerships – Future Models of Multilateralism?’ (2007) Dialogue on Globalization Occasional Paper 29. Berlin: Friedrich Ebert Stiftung

Jeremy Waldron, ‘Constitutionalism: A Sceptical View’ (2010) *Philip A. Hart Memorial Lecture*, March. https://scholarship.law.georgetown.edu/hartlecture/4.

John Tasioulas, ‘Minimum Core Obligations: Human Rights in the Here and Now’ Research Paper (Nordic Trust Fund, World Bank, 2017).

Kenneth Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013).

Malcolm Lanford, 'The Responsive Court: Social Rights, Democracy and Transformation' (2012)1, 14-15, available at https://www.jus.uio.no/smr/english/research/projects/socio-economic-rights-ml/docs/draft-intro.pdf

Morgan Winsor 'Senior US Delegation meets with Nigeria's Vice President, after killing of #EndSARS Protesters' *ABC News* (23 October 2020), available at https://abcnews.go.com/International/senior-us-delegation-meets-nigerias-vice-president-killing/story?id=73782243. (accessed on November 2020).

Myungsuk Lee, 'Conceptualizing the New Governance: A New Institution of Social Coordination', a paper presented at the Institutional Analysis and Development Mini-Conference, May 3rd and 5th, 2003, Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, Indiana, USA.

Nsongurua J. Udombana, 'Constitutional Restructuring in Nigeria: An Impact Assessment' (April 25, 2017), p. 5, available at SSRN: https://ssrn.com/abstract=2960030 or http://dx.doi.org/10.2139/ssrn.2960030 (last accessed on 28 February 2019).

OAS, 'Friendly Settlements', available at http://www.oas.org/en/iachr/friendly_settlements/default.asp (accessed on 11 August 2020).

Philip Alston, 'The Parlous State of Poverty Eradication: Report of the Special Rapporteur on Extreme Poverty and Human Rights' 9, para. 35 (02 July 2020), available at https://chrgj.org/wp-content/uploads/2020/07/Alston-Poverty-Report-FINAL.pdf (Accessed on 26 July 2020).

Philip Oamen, 'Realisation of the Right to Health in Nigeria: The Prospects of a Dialogic Approach' (August 13, 2020). Available at SSRN: https://ssrn.com/abstract=3673480 or http://dx.doi.org/10.2139/ssrn.3673480).

Rosalind Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?' (2009) University of Chicago Public Law and Legal Theory Working Paper No 285.

S. Langer, Grundlagen einer internationalen Wirtschaftsverfassung: Struck-turprinzipen, Typik und Persapectiven anhand von Europáischer Union und Weltandelsorganisation, 1995.

Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment' (2008) Economics Working Papers 200822.

Shayera Dark, '#EndSARS: How Nigerians harness Social Media against Police Abuse' *Aljazeera* (25 October 2020) available at https://www.aljazeera.com/news/2020/10/25/endsars-how-nigerians-use-social-media-against-police-brutality (accessed on 10 November 2020).

Stephanie Busari, 'Nigeria's Youth finds its Voice with the EndSARS Protest Movement, CNN (25 October 2020), available at https://edition.cnn.com/2020/10/25/africa/nigeria-end-sars-protests-analysis-intl/index.html (accessed on 10 November 2020).

The Cable, 'FULL LIST: The Demands of #EndSARS Protesters' *The Cable* (13 October 2020) available at https://www.thecable.ng/full-list-the-demands-of-endsars-protesters (accessed on 10 November 2020).

The World Justice Project Rule of Law Index 2020, available at: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf (accessed on 17 May, 2020).

Tom Ginsburg & Rosalind Dixon, 'The South African Constitutional Court and Socio-Economic Rights as "Insurance Swaps"' (2013) University of Chicago Public Law & Legal Theory Working Paper No. 436.

UNAIDS, 'Uniting behind a People's Vaccine against COVID-19' *UNAIDS Feature Story* 14 May 2020 available at https://www.unaids.org/en/resources/presscentre/featurestories/2020/may/20200514_covid19-vaccine-open-letter (accessed on 31 May 2020).

Victor Abramovich, Remedios de alcance colectivo y obstáculos en la ejecución de decisiones en el Sistema Interamericano, draft paper for ESCR-Net Conference on Enforcement of ESCR Judgments, (Bogota, May 2010).

Victor Abramovich, 'Remedies Under the Inter-American System' 1 (unpublished manuscript) (on file with ESCR-Net), http://www.escr-net.org/sites/default/files/Abramovich_-_Remedies_Under_the_ Inter-American_System_0.pdf) 5 (accessed on 18 May 2021).

Viviana Krsticevic, 'Implementation of the Decisions of the Inter-American System for Human Rights: Suggestions for Legislative Processes' 1, 10 (Center for Justice and International Law ed., 2009).