

THE IMPERATIVES OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DEVELOPMENT OF NASCENT DEMOCRACIES: AN INTER-JURISDICTIONAL VIEW¹

Abstract

Economic, social and cultural rights remain the bedrock of good governance, which is a prerequisite for sustainable democracy. The obligations of any democratic government are founded on this principle. The desideratum for the recognition of any government as civilized and responsive is its respect for the socio-economic rights of the people. This research was aimed at situating the contemporary implementation of ESC rights. It was also aimed at identifying the impeding dichotomy of the generations of rights. The work also sought to highlight the imperatives of ESC rights in the development of nascent democracies. The methodology employed in this research work is basically doctrinal. The analysis of relevant statutory and judicial authorities was adopted in this work. Materials from journals and the internet were also considerably utilized. It was found that ESC rights suffered tremendous inhibitions in their implementations. It was further found that most nascent jurisdictions hide under presumed poor economy to undermine their obligations under the Fundamental Objectives and Directive Principles, thereby denying their citizens of their fundamental rights. It is therefore recommended that government should formulate policies in practical compliance with their obligations under the fundamental objectives and directive policies. The budgetary allocations of government should be directed towards realizing the economic, social and cultural rights of the people as the assured pathway to the development of our democracy.

Key words: *Economic, Social, Cultural, Development and Democracy*

I. Introduction

Before any discussion in this regard, it is pertinent to briefly explain the concept of democracy. As noted by Abdellatif, 'Democracy' can be understood as an ideology, a concept or a theory. It is an ideology in so far as it embodies a set of political ideas that detail the best possible form of social organization.² Ever since, Abraham Lincoln defined democracy as 'the government of the people by the people and for the people.' The sovereign will of the people which underlies this definition has been reflected in several other definitions or explanations of the concept. David conceives democracy as:

A mode of decision-making about collectively binding rules and policies over which the people exercise control, and the most democratic arrangement is that members of the collectivity enjoy effective equal rights to take part in such decision-making directly—one that is to say which realizes to the greatest conceivable degree the principles of popular control and equality in its exercise.³

The values of freedom, respect for human rights and the principle of holding periodic and genuine elections by universal suffrage are essential elements of democracy. In turn, democracy provides the natural environment for the protection and effective realization of human rights. Thus, there can be no human rights without democracy; neither can there be democracy without human rights. In other words, the regime that is most compatible with the

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²A.M. Abdellatif, 'Good Government and its Relationship to Democracy and Economic Development, *Global Forum III on Fighting Corruption and Safeguarding Integrity Seoul 20-31*.

³B. David, 'Liberal Democracy and the Limits of Democratization', *Political Studies Special Issue*, vol. 40 1992. p. 40.

protection of human rights is the democratic regime. It is on this background that this work shall discuss the imperatives of economic, social and cultural (ESC) rights in this course of democratic experiment.

2. The Historical Development of Economic, Social and Cultural Rights

From time immemorial, issues relating to food, health, education, shelter and work have plagued mankind. Before the emergency of nation-state, when issues such as the ones enumerated above come up and it is clear that specific people or institutions were the cause, there is usually a resistance. Such is usually directed at landowners or local rulers. However, with the emergence and rise of nation-state, institutions or people wielding state power have increasingly been either the principal cause of the problem or have failed in their responsibility to solve it. Thus, rebellion and resistance related to those problems are directed at them.⁴

Unrest and rebellion based on any of the above issues for the most part have gone unrecorded and thus lost to succeeding generations. It is observed that the issue noted above forms part of economic, social and cultural rights. Sometimes such rebellions are beaten down, and what cannot be denied however, is that to a lesser or greater extent, such have succeeded in alleviating the oppressive situation.⁵

In rural settings, resistance arose principally from peasants. Abelmann⁶ notes that the Tonghak Peasant Revolution in Korea (though ultimately unsuccessful) in 1894 was begun by peasants in response to exploitation by a local magistrate, wherein they (peasants) occupied the country office, seized weapons, distributed illegally collected tax rice to the poor. Also in China, according to Hanagana, Moch and Blake,⁷ peasants resisted taxes they perceived as inequitable or that had become particularly onerous as a result of a shortfall in the harvest. Food, particularly bread was a central issue in the French Revolution which led to the deposition of a despotic Monarch, and the Declaration of the Rights of Man and Citizen. Issue of land to peasants was on focus in the early twentieth century Mexican Revolution.⁸

Slaves and those subject to slavery have experienced the greatest abuses of ESC rights. They suffered hunger, lived in miserable conditions; suffered ill-health resulting from poor food, overwork and inadequate medical care; little access to formal education; and hard ceaseless work. When they try to run away, they are mostly recaptured or killed. When they resist or rebel against their condition, they either get killed in the process, or get subjected to worse conditions. Numerous instances of this abound.⁹ It is only in Santo Domingo (present day Haiti) that a large-scale rebellion by slaves ended successfully. This happened at the end of the eighteenth century. It was only in 1890 that the General Act for the Repression of the African

⁴ M. Craven, 'An Historical Perspective on Economic, Social and Cultural Rights' in International Human Rights, Internship program, circle of Rights (2000), available at <http://www1.umn.edu/humanrts/edumat/1HRIP/circle.modules/module2.htm> . Accessed 24/02/2014.

⁵*Ibid.*

⁶ N. Abelmann, *Echoes of the Past, Epics of Dissent: A South Korean Social Movement* (Berkeley: University of California press 1996) p.27.

⁷ M.P. Hanagan, *et al* (ed.), *Challenging Authority: The Historical Study of Contentious Politic* (Minneapolis: University of Minnesota Press, 1998) p. 158.

⁸Craven, *loc.cit.*

⁹ P.G. Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998) pp. 38-45, 52-53; See also A. Hochschild, *King Leopold's Ghost* (New York: Houghton Mifflin Co,1998) pp. 160-66).

Slave Trade was enacted in response to the appealing conditions suffered by slaves.¹⁰ Earlier Acts, Treaties and Declarations have been passed to suppress slave trade but it was this 1890 Act (also known as Brussels Conference Act of 1890) that was signed and ratified by all the major world players at the time.

3. The Cross Road to Development in Global Jurisdiction

Urbanization and industrial revolution in eighteenth century caused a shift in the social and economic problems faced by large portions of the population, towards low wages, dangerous working conditions in factories and mines for both adult and children, and ill health resulting from persistent malnutrition, poor sanitation and urban pollution. These gave rise to public outcry in the media and literature. Industrialization, urbanization and the rise of a working class led to new demands and new ideas about the meaning of a life of dignity. People realized that human dignity required more than the minimal lack of interference proposed by the civil and political rights.¹¹

With individualization came capitalism and its attendant oppression of the working class, who were pushed off the land where they had previously made their living. They became a cheap commodity for the emerging capitalist society.¹² Those not absorbed even at the lowest possible wages were given a modicum of poor relief in order not to die from starvation. This was made possible under the system of welfare capitalism. However, this had the effect of maintaining a social stigma for those who were given relief, with a view to preventing persons from wanting to obtain social assistance.¹³

The appalling conditions of the working class and the exploitation of labour during this individualization and emergence of capitalism provided a fertile ground for the planting of socialist ideals. According to Craven,¹⁴ the first reactions to the horrors of early individualization were manifest in the physical destruction of machines by workers. The writings of Saint-Simon (1760-1825), Charles Fourier (1772-1837), and Robert Owen (1771-1858) discussed the evils of capitalism and proposed alternative in the nature of socialist rules and principles to mitigate the ill effects of industrialization. Consequently, in 1796, the Babeaf's conspiracy attempted an overthrow of the government of France in order to establish a society based on socialist ideals. This was planned by Francois Noel Babeny. The emergence of Karl Marx led to a synthesis of the ideas of socialism. He went on to develop his theory on the foundations and insights provided by other philosophers of his period, particularly George W.F. Hegel and Immanuel Kant. His ideas were summed up in his 'the Communist Manifesto' issued jointly with Fredrich Engels.¹⁵

The publication of the Communist Manifesto in 1848 had a profound impact in European countries. The working class was in revolt in almost every country in Europe. These uprisings led to the overthrow of autocratic governments, the establishment of democracy and, in countries such as Italy and Germany, the unification of nations.¹⁶ In countries after countries,

¹⁰C.L.R. James, *The Black Jacobins: Toussaint L' Overture and the Sam Domingo Revolution* (New York: Vintage, 1963).

¹¹ O.A. Oladimeji, 'Economic, Social and Cultural Rights: Rights or Privileges?', available at: <http://www.ssrn.com/abstract=1320204>, accessed on 4th March 2014.

¹² A. Eide, 'Economic and Social Rights' in J. Symonides, *Human Rights: Concept and Standards* (Great Britain: Dartmouth/Ahgate Publishing Co. Ltd, 2002) p. 114.

¹³*Ibid.*

¹⁴Craven, *loc. cit.*

¹⁵ J.A. Harrayt& P. Gay (eds), *The Columbia History of the World* (New York: Harper & Row, 1987) p. 704.

¹⁶ Craven, *loc.cit.*

social welfare measures were introduced. Factory laws, workmen's compensation provisions, and health, old age and unemployment insurance for workers were adopted. Housing and health were brought under the responsibility of the state. The Russian Revolution was particularly significant because of the substantial role it played in colonial emancipation and was key to the growth of social democracies around the world.

The continued threats and realities of labour unrest pressured industrialists and governments to consider further measures. So, between 1890 and 1905 several meetings were held which eventually led to the adoption of the first two international labour conventions.¹⁷ Further initiatives were interrupted by World War 1. Around this period a list of basic demands relating to working conditions and other issues was developed in a number of international conference. Eventually, the International Labour Organization was established based on the proposal of the Commission on International Labour Legislation established during the Paris Peace Conference.

The Great Depressions which began in US with the crashing of the stock market brought about unemployment due to loss of jobs all over the world. The increased suffering created an impetus for sustained discussion about rights, particularly social and economic rights.¹⁸ It was during this Great Depression that Hitler rose to power. The attendant horrors of that Nazi regime cannot be adequately explained here. The German Jews of that time cannot experience any worse situation. The action of Hitler Nazi regime and other fascist regime in Europe in addition to other factors led to World War II. An international organization was sought as an antidote and to forestall further World Wars; and so the UN was birthed.

The establishment of the United Nations signaled the beginning of a period of unprecedented international concern for the protection of human rights (economic, social and cultural rights inclusive).¹⁹ In Article 55 (a) and (b) of the Charter of the United Nations, it is stated that the UN shall promote higher standards of living, full employment, and conditions of economic and social progress and development; and solution of international economic, social, health and related problems and international cultural and educational co-operation. These and many more were replicated in Articles 22-27 of the Universal Declaration on Human Rights (UDHR) 1948. However, the Declaration was clearly not intended to be an instrument to which states formally bound themselves as a matter of law. It was rather regarded as a 'common standard of achievement' to which states would aspire.

4. Appraising the Impeding Dichotomy of Human Rights in Democratic Development

The Commission on Human Rights after drafting the Declaration set about drafting an international human rights treaty. During deliberations on the matter, dichotomy between the Western/capitalist Block and Eastern Socialist Block on the priority of certain categories of human rights and their method of implementation almost stalled the process. The western states asserted the priority of civil and political rights which they viewed as integral to the foundation of liberty and democracy, and argued strongly for the creation of a committee or court of human rights that would oversee implementation. The socialist states on the other hand asserted the priority of economic, social and cultural rights and the importance of government ensuring that

¹⁷ H. Bartolomei de la Cruz, *et al*, *The International Labour Organization: The International Standard System and Basic Human Rights* (Boulder: Westriew Press, 1966) pp. 3-4.

¹⁸Craven, *loc.cit*.

¹⁹ A. Clapham, *Human Rights: A Very Short Introduction*, (Create Britain: Oxford University Press, 2007) p. 42.

all citizens have adequate food, health care, employment, social insurance and education.²⁰ They also believed that implementation of rights had to be undertaken by political organs, rather than by judicial organs.²¹

This dispute prolonged considerably the drafting process, and eventually the proposed treaty was divided into two parts one dealing with civil and political rights, the other with economic, social and cultural rights²² and each part was drafted as a separate treaty. In 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted.²² However, the ICESCR was to be implemented by the Economic and Social Council, a political organ of the UN, which would oversee the reporting procedure. In 1986, the Committee on Economic, Social and Cultural Rights was created to oversee the implementation of the ICESCR.

Regional organizations, on their part, drafted regional instruments on human rights. In Africa, the African Charter on Human and People's Right deals comprehensively with ESC rights. In Europe we have the European Convention for Human Rights, while in America we have the American Convention on Human Rights. However, economic, social and cultural rights were comprehensively contained in European Social Charter (for Europe) and the Additional Protocol to the American Convention dealing with economic, social and cultural rights.

At the national level, most post-colonial states that emerged in the 1950s and 1960s incorporated some elements of UDHR into their constitutions. While civil and political rights were incorporated as fundamental rights, ESC rights were classified as directive principles and non-justiciable. This dichotomy is gradually being resolved as some countries have incorporated the economic, social and cultural rights as well as the civil and political rights within the fundamental rights provisions of their constitutions, for instance, the 1987 Constitution of the Philippines²³ and the 1996 Constitution of South Africa.²⁴ The Kenyan Constitution of 2010 recognizes socio-economic rights as enforceable rights. Also a constitutional amendment of 2000 and 2002 in Indonesia incorporated international human rights norms in recognizing fundamental rights to civil liberties and economic and social rights incorporating mandatory budgetary resources for education.²⁵ The jurisprudence in India contributed to a constitutional amendment of 2002 incorporating the rights to education as a sub-element of the right to life. More recent jurisprudence in Brazil and Kenya has recognized that socio-economic rights must be implemented as part of the state obligation to fulfill, and cannot be postponed as programmatic intervention.²⁶

No meaningful discourse on the development of economic, social and cultural rights can be successfully embarked upon without recourse to the metamorphosis of human rights generally.

²⁰ G. Willems and D. Shiman, *Economic Social and Cultural Rights as Human Rights: Historical Background* (Minnesota: Human Rights Resources Centre, University of Minnesota, 1999), available at: <http://www.umn.edu/humanrts/edumat/hredusesies/tb16/section1/t61-2htm>, accessed on 4th March 2014.

²¹ Craven, *loc. cit.*

²² General Assembly Resolution 2200 (xxi), 21 UN GAOR Supp (No 16 at 52 and 49 respectively).

²³ The Philippine Constitution, article 13 (which provides for social justice and human rights).

²⁴ The South African Constitution, Chapter 2.

²⁵ S. Goonesekere, 'National Implementation of International Human Rights, Social Inclusion and the Empowerment of People, available for download at <http://www.un.org/esa/socdev/egms/docs/2013/>, accessed on 4th March 2014, p. 5.

²⁶ *Ibid.*, p. 6.

It is a notorious fact that there are three generations of human rights²⁷ following Karel Vasak's scheme of classification.²⁸ Various writers have given various accounts of the evolution of human rights generally, and economic, social and cultural rights in particular. The international law of human right was created immediately following World War II in response to widespread atrocities committed by states against innocent civilians. Human rights law broke new ground in international relations by establishing binding legal duties that governments owed to individuals and groups rather than to other governments.

The founding document of international human right law was the Universal Declaration of Human Right (UDHR) unanimously ratified in 1948. The Universal Declaration established the fundamental vision and principles of the new human rights regime. Under this vision, people were guaranteed civil and political freedom as well as economic and social well-being. Over the past 50 years, ESCR were elaborated through a wide range of international treaties, laws, and principles, despite being neglected in practice. Of primary importance is the International Covenant on Economic, Social and Cultural Rights which has been ratified by over 137 states. Economic, Social and Cultural Rights have been recognized in all major international treaties protecting the human rights of vulnerable groups, such as the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Elimination of all Forms of Racial Discrimination, as well as various treaties of the International Labour Organization. Finally, ESCR have been incorporated into regional law through organizations such as the European Union, as well as the domestic law of many countries in the form of constitutional rights and national/ local legislation.²⁹

5. Situating the Contemporary Development of Human Rights

The first documentary use of the expression 'human rights' is to be found in the Charter of the United Nations, which was adopted (after the Second World War) at San Fransisco on June 25, 1945 and ratified by a majority of its signatories in October that year. The Preamble to this Charter declared that the United Nations shall have for its object, *inter alia*, to reaffirm faith in fundamental human rights.¹³ Bhansali further declared thus:

The first concrete step by way of formulating the various human rights was taken by the U.N. General Assembly, 1948, by adopting the Universal Declaration of Human Rights. It was intended to be followed by an International Bill of Rights which could be legally binding on the covenanting parties.¹⁴

The twin covenants, the International Covenant on Civil and Political Rights 1966, and the International Covenant on Economic, Social and Cultural Rights 1966, came to cure the deficiency of the UDHR which was not of the nature of a legally binding covenant and had no machinery for its enforcement.¹⁵ Hence, the twin covenants brought the character of

²⁷ The first generation rights are civil and political rights, whilst the second generation rights are the economic, social and cultural rights. The peoples or collective rights constitute the third generation rights.

²⁸ A.N. Nwazuoke, *Introduction to Human Rights Law*, (Abakaliki: CopycraffIn't Ltd, 2006), pp. 24-25.

²⁹ 'Economic, Social and Cultural Rights', available at: <http://www.uncoln.edu/criminaljustice/hr/ESCR.htm>, accessed on 19 September 2013; See also, D.A. Shiman, *Economic and Social Justice: A Human Right Perspective [PDF document]*, pp. 2-5.

¹³ *Ibid.*, pp. 8-9; The U.N. Charter, however, was not a binding instrument, and merely stated the ideal which was to be later developed by different agencies and organs.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

enforceability to the provisions of UDHR.¹⁶ On his part, the erudite Muntaqim¹⁷ explained the evolution of ESC rights thus:

Generally, it is said that the struggle for human rights started in the Western World sometimes in the beginning of 13th century, that is, when the great English Charter known as Magna Carta was issued but the fact is that this struggle had started 200 years prior to the issue of this Charter when King Conrad II had issued a Charter determining the rights of the parliament in 1037 A.D. After that, in 1188, King Alfonso has accepted the principle of Habeas Corpus. The second important document was the Draft of Rights, 1688. Other important documents include the English Bill of Rights, 1689, American Declaration of Independence, 1776, French Declaration of the Rights of Man and of the Citizens, 1789 etc.¹⁸

Steiner and Alston began tracing the history of ESC rights from the Universal Declaration of Human Rights which recognizes two sets of human rights: the traditional civil and political rights and the economic, social and cultural rights.¹⁹ They further explained that the ICCPR, 1966 and ICESCR, 1966 transformed the UDHR's provisions into legally binding obligations. The couple equally averted their minds to the controversy over the proper status of economic, social and cultural rights. At one extreme lies the view that these rights are superior to civil and political rights both in terms of an appropriate value hierarchy and in chronological terms. At the other extreme, we find the view that economic and social rights do not constitute rights (as properly understood) at all;²⁰ hence, the ESC rights became an object of cold war between the communist countries and capitalist countries. Regressing a bit in their narration, Steiner and Alston asserted thus:

The historical origins of the recognition of economic and social rights are diffuse. Those rights have drawn strength, for example, from the injunctions reflected in different religious traditions to care for those in need and those who cannot look after themselves. ... Other sources include philosophical analyses as diverse as those of Thomas Paine, Karl Marx, Immanuel Kant and John Rawls.²¹

The co-authors maintained that the International Labour Organization contributed immensely in the development of ESC rights. Quoting them:

In the inter-war years, the ILO adopted international millennium standards in relation to a wide range of matters which now fall under

¹⁶ For an account of the evolution of human rights in Nigeria up to the 1979 Constitution of the Federal Republic of Nigeria, see *Ibid.*, p. 20.

¹⁷ K.A. Muntaqim, *Protection of Human Rights: National and International Perspectives*, First Edition, [Allahabad: Laws Publishers (India) Pvt. Ltd., 2008], p. 5.

¹⁸ *Ibid.*, pp. 5-26 for the texts of some of the above document; G. Ezejiolor, 'The Development of the Concept of Human Rights: Definition and Philosophical Foundations', in Okpara (ed.), *Human Rights Law and Practice in Nigeria*, 2 volumes, Second Edition, [Abakaliki: Publicom International (Nig.) Limited, 2007], volume 1, pp. 55-61.

¹⁹ H.J. Steiner and P. Alston, *International Human Rights in Context, Law, Politics, Morals* (New York: Oxford University Press Inc., 1996), p. 256.

²⁰ *Ibid.*

²¹ *Ibid.*, p. 257.

the rubric of economic and social rights. They included, inter alia, conventions dealing with ... the rights to organize trade unions, ... minimum working age, hours of work, weekly rest, sickness protection, ... mortality and old-age insurance, and freedom from discrimination in employment.²²

In lending his voice, Audi²³ gave account of the evolution of ESC rights from the Magna Carta of 1215 as follows:

The evolution of human rights in Nigeria can be traced to the Magna Carta of 1215, and the Bill of Rights of 1689. Later in 1948, the whole world, through the instrumentality of the United Nations, turned out the Universal Declaration of Human Rights. The Universal Declaration is an authoritative definition of human rights, setting out the principles and norms of securing respect for the rights of man everywhere in the world. It represents a common statement of goals and aspirations – a vision of the world, as the international community would want it to become.²⁴

Audi further explained that the feebleness of the UDHR was reinforced and supplemented with the two complementary covenants.²⁵ Narrowing the history to home country, Nigeria, the writer posited as follows:

Under Nigerian law, human rights started with Sir Henry Willink Commission's recommendations on human rights constitutional conference. The accepted recommendations consequently formed chapter III of both the Independence Constitution of 1960 and the Republican Constitution of 1963. The 1979 constitution made an advance. Chapter II of that constitution contained the fundamental objectives and directive principles of state policy in addition to fundamental rights contained in chapter IV. The aborted 1989 constitution contained chapters on fundamental rights and fundamental objectives and directive principles of state policy. Currently, under the 1999 constitution, the fundamental rights are contained in chapter IV whereas the fundamental objectives and directive principles of state policy are contained in chapter II.²⁶

On their part, Enemo and Olorunfemi declared thus:

... concern for human rights certainly predates the modern era and can be traced from the time of the Greek city states through the various stages of socio-economic formations.... Historically, civil and political rights made their appearance in Europe long before the

²²*Ibid.*, pp. 256 – 260.

²³J.M. Audi, 'Human Rights Enforcement in Nigeria, Towards Ensuing an Enduring Democracy', *Human Rights Review*, vol. 1 no. 1, (2010), pp. 61-89.

²⁴*Ibid.*, pp. 63-64.

²⁵T.O. Elias, *New Horizons in International Law*, (Netherlands: Sijthoff and Noordhoff International Publishers, (1979) p. 162.

²⁶J.M. Audi, op. cit., n. 23, pp. 64 – 65.

nineteenth century. Economic, social and cultural rights followed much later and are to be traced to philosophical thought such as that embodied in Karl Marx's critique of nineteenth century capitalism and in the Roman Catholic Encyclicals (*Rerum Novarum* of Leo XIII, 1891). The English Bill of Rights of 1689 and the Virginia Declaration of Rights in 1776 clearly recognized and protected human rights. Also, the Universal Declaration by the United Nations Organization on December 10, 1948 made human rights an international affair. The United Nations have since then continued to place on its agenda, questions of human rights and the development of the rules.²⁷

Danladi began his version of the account of the history of ESC rights from the UDHR, 1948 which he asserted was not a binding instrument.²⁸ He further posited thus:

Virtually five (now six decades – emphasis is mine) decades after the adoption of the Universal Declaration of Human Rights by the United Nations, the organization brought a legally binding instrument in 1966 that incorporated economic, social and cultural rights and set out the institutional frameworks towards protecting and enforcing them as a binding treaty. This binding treaty is the International Covenant on Economic, Social and Cultural Rights, 1966. The economic, social and cultural rights in the 1966 covenant reflect and affirm the rights under the Universal Declaration of Human Rights and further added more rights and created a mechanism upon which United Nations oversees the ... implementation of the covenant.²⁹

Expatriating on the nature of the twin human rights covenants of 1966, Danladi further maintained that:

At the inception of drafting and implementation of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights in 1961 by the United Nations, many arguments were canvassed by different countries as regarding the justiciability and divisibility of civil and political rights and economic, social and cultural rights. Many countries forwarded their proposal and arguments. While some are pro-justiciability, other [sic] are against. The United Nations Human Right Commission ... rejected the idea of justiciability of economic, social and cultural rights by 12 votes to 5 with 1 abstention.³⁰

Ogbu began tracing the said history from the United Nations Charter, and accordingly opined that:

²⁷ I.P. Enemo and J. Olorunfemi, 'Human Rights and National Development in Nigeria', *Law and Policy Review*, Vol. 2, (2011), pp. 21-44.

²⁸ K.M. Danladi, 'An Overview of Protection and Enforcement of Economic, Social and Cultural Rights under International Legal Regimes Convention,' *Human Rights Review*, vol. 1, no. 1, (2010), pp. 324-341, p. 324.

²⁹ *Ibid.*, pp. 324-325.

³⁰ *Ibid.*, pp.337-338.

The Charter of the United Nations (UN) ushered in a new international law of human rights The Charter of the UN was followed in 1948 by the Universal Declaration of Human Rights (UDHR). The UDHR was later supplemented by two international covenants—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – which were adopted in 1966. They were followed by a myriad of other international instruments.³¹

Furthermore, the international recognition and protection of human rights was followed by regional efforts towards the promotion and protection of human rights. The movement towards the regionalization of human rights was initially not popular with the U.N. The regional efforts were intended to give full effect to UDHR. The movement for regionalization of human rights bodies began in Europe and has spread to every continent in a varying degree with the exception of Asia.³²

Mamman was exceptional in his exposition of the history of economic, social and cultural rights. Prior to the Universal Declaration of Human Rights on 10th December, 1948, ideas about rights, its projection and promotion were carried out within the context of municipalities or nations.³³ He enumerated a couple of major instruments that contributed to the development of ESC rights, viz.: Magna Carta (England, 1215 A.D.); Habeas Corpus (England, 1679); Bill of Rights (England, 1689); Virginia Bill of Rights (U.S.A., June 1776); American Declaration of Independence (U.S.A, July 1776); French Declaration of the Rights of Man and Citizens (France, 1789); French Constitution (France, 1791); Treaty of Versailles, 1919.³⁴ Mamman saw the United Nations Charter to be the first instrument to make an attempt to globally start the process of defining, protecting and promoting rights.³⁵ According to him, the Charter is the first international statement on human rights, and a detailed, wide ranging instrument which envelope civil and political, social, economic and cultural rights thereby blending the differing ideological and political altitudes to rights as well as recognition of duties.³⁶ He further contended that the U.N. Charter acquired legal teeth through two key instruments – the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These broad instruments were complemented by others which targeted certain vulnerable groups in the society for protection such as children, women, religious, migrant workers, indigenous people, etc.

The character of rights has also transformed from the initial focus on property and traditional political rights rooted in the individual to now encompassing economic and social rights and social justice. There is also a further direction towards recognition of group rights.³⁷ Udombana went down the annals of history to declare that the concept of human right as it is known today stem from the natural law theory that individuals in a society possess certain rights, which are inherent, inalienable and fundamental to his existence as propounded by Thomas Hobbes and John Locke, among others. Human right was first formulated conceptually in the United States

³¹ O.N. Ogbu, 'The African Charter on Human and Peoples' Right as Compatible with Despotism: the Nigerian Experience', *University of Benin Law Journal*, 8 (1), (2005), pp. 113-135.

³² *Ibid.*, pp. 115-116.

³³ T. Mamman, 'Beyond Rhetoric: Challenges for the International and regional Human Rights in the New Millennium', *Nigerian Bar Journal*, vol. 1, no. 1, (2004), pp. 1-16, p.2.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, pp. 2-3.

³⁷ *Ibid.*, pp. 3-4.

Bill of Rights and elaborated in the various international human right instruments following the UDHR.³⁸ In addition, Udombana encapsulated the historical perspective of human rights thus:

Human right as we know it today therefore evolved largely as an instrument of revolt against a tyrannical government. It is a concept closely linked to the state or an organized society with a government, and refers to the relationship between the individual and the state or its government; their right to political participation, the freedoms that the individual should enjoy and their claims on the state with regard to the provision of basic needs of life, education, health, among others.³⁹

6. Inter-jurisdictional Jurisprudence of ESC Rights – The Way Forward

There is no gainsaying that for a regime to claim to be democratic, it must accord regard to these lofty set of human rights. But it is regrettable to observe that many democratic states have not only failed to observe and respect these rights, but also insist that the rights are not enforceable if breached. For instance, in Nigeria, and most other countries like India, these rights are codified in their constitution and tagged as ‘fundamental objectives and directive principles of state policy’, which the constitution equally regard as non-justiciable. It is our humble submission, that given the indivisibility of human rights, we must abandon for good the erroneous notion that one class of rights require full recognition and respect, while another class does not require observance of any kind.

The proclamation of Teheran declared that since human rights and fundamental freedoms are indivisible, the full realization of civil and political without the complement of economic, social and cultural rights is impossible.³⁰ The United Nations General Assembly also affirmed in 1977 that the full realization of civil and political rights without the enjoyment of economic, social and cultural right is impossible. The achievement of the lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.³¹ In this regard, it may be necessary to quote extensively from the dissenting judgment of Bhagwati J. in *Kesavenanda Barati v State of Kerala*:³²

There are millions of people in the country who are steeped in poverty and destitution, and for them these civil and political rights have no meaning. It was realized that to a large majority of people who are living in almost subhuman existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitutions, notions of individual freedom and liberty, though representing some of the most cherished values of a free society

³⁸ N.J. Udombana, ‘Human Rights Protection and Good Governance in Nigeria’, *The Justice Journal*, Second Edition, (2011), pp. 34-65p.37. Examples of such subsequent adumbrating instruments are the ICCPR and ICESCR of 1966 as well as the Africa Charter on Human and Peoples’ Rights, 1981.

³⁹ A. Augie, ‘Human Rights and Good Governance in Africa: A Critical Nexus Expanding Human Rights’, a paper presented at the Fourth African Development Forum (ADF-IV) held in Addis Ababa from 11th-15th October 2004 on the theme, Good Governance for a Progressive Africa, available at: <http://www.uneca.org/adflv/documents/speeches-and-presentations/amina.htm>, accessed on 4th December, 2010.

³⁰ Resolution VII titled, ‘Economic Development and Human Rights of the International Conference on Human Rights held in Teheran between April 22 and May 13, 1968.

³¹ General Assembly Resolution 32/130 of 16/12/77.

³² AIR (1973) S.C at 1843.

would sound as empty words bandied about in the drawing rooms of the rich and well to do and the only solution for making these rights meaningful to them was to remake the material condition and usher in a new social order where socio-economic justice would inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured. It was necessary to create socio-economic conditions in which every citizen will be able to exercise civil and political rights and they would not remain the preserve of a few. Fundamental rights are no doubt important and reliable in a democracy, but there can be no real democracy without social and economic justice to everyone which is the theme of Directive Principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy but also becomes a social and economic democracy with fundamental rights available to all irrespective of power, position or wealth. The democratic provisions of Directive principles fertilize the state provisions of fundamental rights. The object of fundamental rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the freedom of the few which is in conflict with the liberty of many... it will, therefore, be seen that if a law is enacted for the purpose of giving effect to a Directive principle and it imposes a restriction on a fundamental right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a Directive principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principles of equality before the law, in its magnitude and dimension, because the equality clause in the constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials, and its consequential and essential ingredient of socio-economic justice.... Fundamental rights, though precious and valuable, have no meaning for the people, downtrodden and economically backward classes of people who unfortunately constitute the buck of the people in India and the only way in which fundamental rights can be made meaningful for them is by implementing the Directive Principles.

It follows from the above observation of Justice Bagwati, that lasting democracy can only be built on the economic and social responsibility of all its citizens, and its success depends on the zeal and sincerity with which social amelioration and economic upliftment are carried out. The

final care of law is the welfare of society. So, in appreciation of this basic fact, we are bound to listen to the cautionary words of Chandrachud C.J., thus:³³

The promise of a better tomorrow must be fulfilled today, day after tomorrow it runs the risk of being conveniently forgotten. Indeed, many tomorrows have come and gone without a leaf turning that today there is the lurking danger that people will work out their destiny through the compelled cult of their own dirty hand.

It is our humble opinion that if we profess to practise democracy in Nigeria, the cognizability and implementation of the provisions of Chapter II of the Constitution should be imperative, notwithstanding the acclaimed non-justiciability. This is because with the established interdependence and indivisibility of human rights, it is imperative that the interpretation of the provisions of the constitution be made as a whole in order to relate and give effect to chapter II of the constitution as practised in some jurisdictions like India.

It is clear in India that even though the non-justiciability clause remains in their constitution, it does not detract from the tremendous importance of the Directive Principles. In that country, the courts strive to ensure that the individual and his personality are harmonized with the collective welfare of all in interpreting the constitution. The motivating factor of government is considered to be the greatest benefit of the largest number, while at the same time care is taken to ensure that the least harm is rendered to the smallest number of people.³⁴ To illustrate this point, in the case of *Mohini Jain v State of Karnataka*,³⁵ it was held that the right to life necessarily includes right to means of livelihood as well as other rights that make enjoyment of the right to life meaningful. The Supreme Court of India further held in *Olga Tellis v Bombay Municipal Corporation*,³⁶ that an important fact of right to life is the right to livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his life would be to deprive him of his means of livelihood.

Similarly, Spanish Court opined that if environmental pollution may affect individuals well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, it is a breach of right to respect for private life.³⁷ There is a significant case of Philippines that worth mentioning. In *Minors Oposa v Factoran*,³⁸ the Philippine Supreme Court ruled that the state should stop providing logging licenses in order to protect the health of present and future generations. The decision was based on the rights of health and ecology. In the same vein, the Colombian Supreme Court ruled in a case that concerned the terminal illness of an AIDS patient, that state was required by the right to health in Colombian constitution to provide special protection when the lack of economic resources prevents a person from decreasing the suffering, discrimination and incurable illness.³⁹ It is our submission that since it has been practicable in other places, it is possible in Nigeria that cognisability and implementation of the provisions of Chapter II should be imperative, notwithstanding their seeming non-justiciability. This is because the full enjoyment of civil and political rights

³³ *Minerva mills v Union of India*, AIR (1980) SC. 1840.

³⁴ M. Uwais, 'Fundamental Objectives and Directive Principles of State Policy: Possibility and Prospects.' in O. Okpara (ed.), *Human Rights Law and Practice in Nigeria*, Vol. 1 (Enugu: Chenglo Limited, 2005) p. 286.

³⁵ A. I. R (1992) SC 1858.

³⁶ A.I. R. (1968) SC 180.

³⁷ M.T. Ladan, *op. cit.*, p. 89.

³⁸ (1993) Supreme Court of Philippine, G.R. No. 101083.

³⁹ M.T. Ladan, *op. cit.*, p. 84.

largely depends on the availability of social and economic rights. Ogbu remarks that right to property is only relevant to a person who has property; right to privacy means nothing to a person who cannot afford the cost of medicine during sickness, and of what significance is right to personal dignity to a person who lives under the bridge?⁴⁰ It is worthy to mention that due to the importance of economic, social and cultural rights to a democratic regime, the Constitution of South Africa has specially provided for the justiciability of political and civil rights as well as socio-economic rights. This was judicially confirmed in the case of *Government of the Republic of South Africa v Grootboom*,⁴¹ where it was held:

Our constitution entrenches both civil and political rights and social economic rights. All the rights in our Bill of Rights are interrelated and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundation values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to people therefore enables them to enjoy the other rights enshrined in Chapter II. The realization of these rights is also the key to advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness, intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

Another approach is the position in the Republican Constitution of Ghana where a clause mandates Government to report to parliament at least once a year on steps taken to ensure the realization of the policy objectives.⁴² According to Umozurike, there is hardly any government today that does not at least profess human rights. The acid test of good government is the level of response to the human rights requirements of the citizens. The protection and promotion of human rights have become the fundamental purpose of government. The level of a state development can be determined by the extent to which its citizens enjoy human rights in their ramifications. Peace, progress and stability are predicated at both national and international levels on respect to human rights.⁴³

Consequently, economic, social and cultural rights must be accorded its pride of place for us to be truly democratic. This is because we live in a world where the rich get richer and the poor get poorer both as individuals and as nations. Within state boundaries there are a lot of

⁴⁰ O.N. Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction*. (Enugu: Cidap Publishers, 1999) pp. 15-16; See also *Deo Singh Tomer v State of Bihar* (1988) AIR SC. 1782, where it was held that the right to life includes the right to live in dignity, so a persons' right to adequate housing was deemed intrinsic to his right to life.

⁴¹(2001) 36 WRN 137 at 162.

⁴² A. Omotesho, *op. cit.*, p. 39.

⁴³ U.O. Umozurike, *The African Charter on Human and Peoples' Rights*, (Kluwa Law Int'l, the Netherlands, 1997) p. 7.

discrepancies in the social conditions of the rich and the poor, the urban and rural dwellers, the political leaders and government officials as well as the ordinary people. The rich and privileged have access to high improved social and recreational facilities, political participation, economic and educational opportunities, security and legal justice while the poor and less privileged people are foreclosed; yet we profess to practise democracy. It is high time we started appreciating the importance of economic, social and cultural rights in curbing the obvious imbalance in our society. Thus, enforceability of the provisions of chapter II of Nigerian Constitution in the courts should be imperative notwithstanding the misplaced dogma of non-justiciability.

7. Conclusion and Recommendations

It goes without saying that the content of economic, social and cultural rights is primarily the welfare of the people. For instance, the right to education guarantees free and compulsory primary education, the right to health guarantees access to adequate health care, nutrition, sanitation, and to clean water and air. The right to housing guarantees access to a safe, habitable, and affordable home with protection against forced eviction. The right to food guarantees the ability of people to feed themselves and also obligates states to cooperate in the equitable distribution of world food supplies. The right to work guarantees the opportunity to earn a living wage in a safe work environment, and also provides for the freedom to organize and bargain collectively. These rights are embodied in the fundamental objectives and directive principles of state policy which remain the pathway leading to sound and effective good governance for every responsible democratic government. It is therefore recommended that governments especially in nascent democratic jurisdictions should mainstream the implementation of economic, social and cultural rights in their governance process. The observance of these objectives and principles will not guarantee the socio-economic rights of the people but will sustain the development of democracy in our jurisdictions.