



**LEAVE
NO RIGHT
BEHIND!**

Abstract

From time immemorial, Economic, Social, and Cultural Rights have not been accorded the same level of commitment as Civil and Political Rights. This has been due, in part, to the assumption that socio-economic rights are, by nature, different from civil and political rights, warranting differential treatment. Reasons adduced by those who place civil and political rights above socio-economic rights include, but are not limited to, the resource dependency, non-justiciability, and interpretation of the obligation on States to “progressively” (or “slowly”) realize these rights. Resultantly, socio-economic rights are, oftentimes, relegated or “left behind” by duty bearers who owe the obligation to respect, protect, and fulfil these rights. This is despite the long-established notion of the interconnectedness and indivisibility of these two domains of rights. This article analyzes the “leaving behind” of socio-economic rights, and proposed five approaches to ensuring these rights are accorded their due commitment.

Introduction

The unprecedented atrocities and barbarous acts that occurred during the Second World War forced nations to come together under the auspices of the United Nations (UN) to decide on measures to prevent a reoccurrence of such large-scale human and material destructions. This consensus led to the adoption of the Universal Declaration of Human Rights in 1948, which affirmed fundamental rights and freedoms based on the dignity and worth of persons. However, in 1966, following an 18-year long debate, these rights were divided based on their nature, obligations, and duties. Thus, the UN adopted two International Covenants, separating rights into Civil and Political Rights[1] (“CP rights”) and Economic, Social, and Cultural Rights[2] (“ESC rights”).

In addition, the Cold War, a period of economic and ideological complexities, and the suppression of political dissent, formed a basis for the separation of the eastern (communist) bloc - focused on ESC rights, and the western (capitalist) bloc - backed by liberal ideologies and focused on CP rights. Indeed, “from the onset, human rights have been strongly influenced by political expediency, and the situation will not change in the foreseeable future.” (Teraya Koji, 2001). The north-south rivalry during the period of decolonization, in addition to other factors, caused a prioritization of ESC rights. States strove to survive independently, especially former colonies for which socio-economic development was crucial to justifying and protecting their newly attained freedom.



During World War II. Source: www.britannica.com

By preventing a non-repetition of large-scale wars, States committed to refraining from interfering in civil and political rights, while advancing socio-economic rights as a way of promoting the inherent dignity of the people they govern. However, of these two domains of human rights, ESC rights have received less attention from States. Many reasons have been adduced for this, ranging from the interpretation of States’ obligation to “progressively realize” ESC rights and its resource dependency to its perceived non-justiciability. This article lays out, first, some of the contemplations that informed the shaping of ESC rights; second, the substantive differences between CP rights and ESC rights; third, some indicators of the differential treatment between CP and ESC rights; and fourth, approaches to be considered in ensuring ESC rights are not left behind in the quest to advance free, just, and equal societies.

Shaping ESC Rights

In shaping rights, several reasonings were considered. There were religious considerations based on different religious injunctions, norms, and practices bothering on the need to care for those in need and those who cannot look after themselves. Political theories also shaped the nature of ESC rights. For instance, Germany, in 1889, became the first country in the world to introduce and adopt social insurance schemes which, at the time, was designed by the then Chancellor of Germany, Otto von Bismarck, who had earlier proposed the idea in 1881. The impact of Bolshevism cannot be dissociated from the shaping of ESC rights. Bolshevism was the communist form of government adopted in Russia following the 1917 Bolshevik Revolution which was motivated by the quest for radical social changes and economic equality towards improving the lives and conditions of ordinary Russians, particularly women, peasants, and industrial workers.



"October Revolution" in Russia, 1917. Source: National Geographic Society: www.nationalgeographic.org
Sign reads: "Long live the council of Workmen's and Soldiers' Deputies"

Socialism was another crucial factor, being a political and economic philosophy of organizing societies with a view to achieving collective ownership and economic equality. In so doing, key public or social spheres (production, trade, distribution, exchange) are owned, managed, administered, and regulated by the community who have (or are expected to have) equal access to the economic resources of a State through the equal allocation of social goods, opportunities, and resources by a democratic government. On the flip side of socialism was the impact of communism, as there was a push by some for economic resources of States to be owned, managed, distributed, and controlled by the State rather than individual citizens. Industrialization became a necessary precursor in ensuring people can work and earn income so as to have economic independence and stability. By being economically stable, people were able to achieve a desired level of human dignity. These, and many other reasonings, made people desire not only State's non-interference with their CP rights, but also the protection of ESC rights.

CP Rights versus ESC Rights

Civil and political rights promote the entitlement of individuals to participate in the civil and political spheres of societies without discrimination and infringement by state (governments) and non-state actors (private business entities, social organizations, and individuals). Breaking this further, while civil rights include rights that promote the physical and mental integrity of individuals, protecting them from the actions of governments, organizations, and other individuals; political rights relate to rights that allow individuals to participate freely in the political systems of societies. The International Covenant on Civil and Political Rights ("ICCPR") guarantees 21 civil and political rights:

Civil Rights:

1. Right to equality between men and women in the enjoyment of the CP rights (Article 3)
2. Right to life and survival (Article 6)
3. Right to liberty of movement and freedom to choose residence (Article 12)
4. Right to privacy and its protection by the law (Article 17)
5. Freedom of thought, conscience, and religion (Art. 18)
6. Freedom of opinion and expression (Article 19)
7. Right to peaceful assembly (Article 21)
8. Right to freedom of association (Article 22)
9. Right to marry and found a family (Article 23)
10. Rights for children relating to their status, nationality, registration, and name (Article 24)

Political Rights:

11. Right to legal recourse when rights have been violated, even if the violator was acting in an official capacity (Article 2)
12. Freedom from inhuman or degrading treatment or punishment (Article 7)
13. Freedom from slavery and servitude (Article 8)
14. Right to liberty and security of the person; freedom from arbitrary arrest or detention (Article 9)
15. Freedom from prison due to debt (Article 11)
16. Right to equality before the law, right to be presumed innocent until proven guilty and to have a fair, and public hearing by an impartial tribunal (Article 14)
17. Right to be recognised as a person before the law (Art. 16)
18. Prohibition of propaganda advocating war or national, racial, or religious hatred (Article 20)
19. Right to participate in the conduct of public affairs, to vote and to be elected and access to public service (Article 25)
20. Right to equality before the law and equal protection (Article 26)
21. Right for members of religious, ethnic, or linguistic minorities, to enjoy their culture, practice their religion and use their language (Article 27)

Economic, social, and cultural rights are the freedoms, privileges, and entitlements that individuals and communities require to live a dignified life. The International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), on its part, guarantees 16 rights encompassing economic rights, social

rights, and cultural rights. The first right, which is the right to self-determination and development (Article 1), cuts across the three spheres of ESC rights, as it guarantees that “[a]ll peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.” The other 15 ESC rights are:

Economic Rights:

1. Right to work (Article 6)
2. Right to a fair wage and safe working conditions (Article 7)
3. Right to form and join trade unions (Article 8)

Social Rights:

4. Right to social security (Article 9)
5. Right of the family (Article 10)
6. Right to an adequate standard of living (Article 11)
7. Right to food (Article 11(2))
8. Right to water (Articles 11 & 12)
9. Right to housing (Article 11)
10. Right to property (Article 11)
11. Right to health (Article 12)

Cultural Rights:

12. Right to education (Articles 13 & 14)
13. Right to take part in cultural life (Article 15(1)(a))
14. Right to enjoy the benefits of scientific progress (Article 15(1)(b))
15. Right to benefit from the protection of moral and material interests resulting from scientific, literary, and artistic productions (Article 15(1)(c))

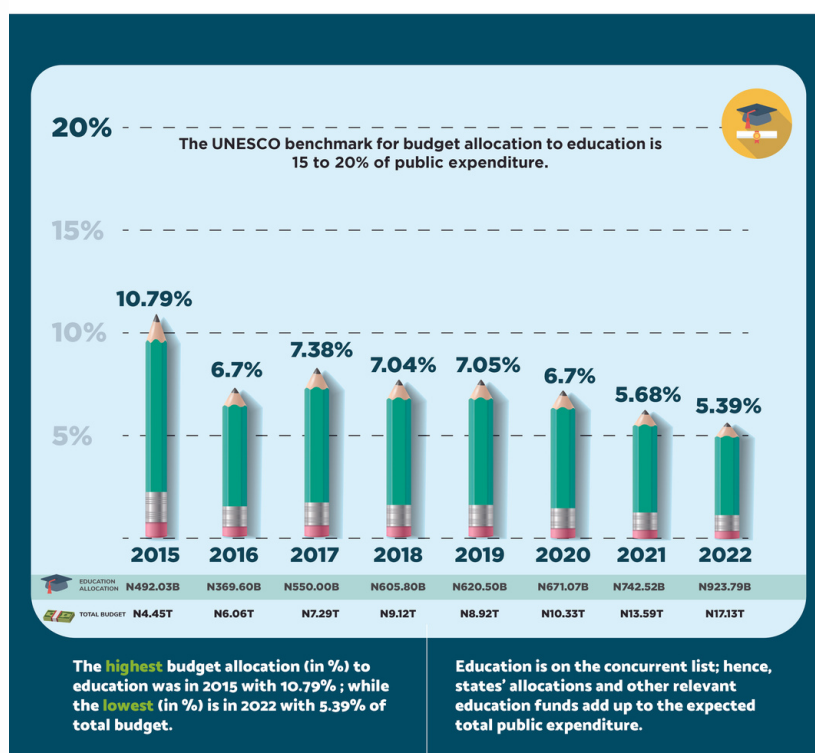


Many countries distinguish these two sets of rights in their domestic legislations. In Nigeria, for instance, ESC rights and CP rights are captured separately in Chapter II and Chapter IV of the 1999 Constitution.[3] This split indicates why these rights are interpreted and promoted in different ways. While Chapter II rights, which are the ESC rights based on the ICESCR, are framed as “Fundamental Objectives and Directive Principles of State Policy,” Chapter IV rights, which are the CP rights based on the ICCPR, are framed as “Fundamental Rights.” This categorization, however, is not peculiar to Nigeria. It is an international problem created by the separation of CP rights and ESC rights in two separate treaties - ICCPR and ICESCR, thus resulting in the hierarchical of one set of rights (CP rights) over the other (ESC rights). This drawback lingers even though it has long been settled that CP rights and ESC rights are mutually reinforcing.

Differential Treatment

There are different ways of examining how rights are treated. One is through the number of cases brought before a court of competent jurisdiction – domestic, regional, or international – regarding the violation of certain rights. This indicates the extent to which right holders are engaging on such rights; which is often based on not only the fact that the rights are codified and can be known, referenced, and demanded for, but also because protection of similar rights by courts have signalled the importance accorded to such rights. Evidently, there are more cases relating to CP rights compared to ESC rights. Case laws aside, another way to determine how a State treats a right is through the investments dedicated to promoting such right. Take Nigeria for example, where the right to education, an ESC right, is guaranteed under section 18 of her Constitution.[4] This right has received very minimal budgetary allocation since the country returned to democracy in 1999.

Budget Allocation to Education (2015 - 2022)
(Federal Government of Nigeria)



Budgetary allocations to education in Nigeria still fall far below the 15–20% of total budget (or 4–6% of GDP) benchmarked for domestic education financing in the 2015 Incheon Declaration.[5] It is noteworthy that total public expenditure to education in Nigeria is drawn from multiple sources; and since education is on the Concurrent List of Nigeria’s Constitution, the obligation to realize this right is dually owned by the Federal and state governments. Basic education is the primary duty of states governments, and their low investment in education have had dire effects, one of which is the fact that Nigeria currently has at least 18.5 million out-of-school children,[6] 60% of whom are girls.[7]

The situation is exacerbated by the incessant attacks on schools, abductions of schoolchildren, regular closure of schools, and withdrawal of schoolchildren from schools for security and financial reasons.

Public tertiary education is under the budgetary purview of the Federal Government of Nigeria, in addition to the Tertiary Education Trust Fund (TETFUND) which disburses, manages, and monitors education tax to government-owned tertiary institutions. A cursory look at the Federal Government of Nigeria's budgetary allocation to education in the last eight years shows a rapid decline. In the 2022 budget, of the N17.13 trillion overall budget, only 5.39% (N923.79 billion) is allocated to education;^[8] which is to be expended on Personnel (N662.7 billion), Overhead (N38.8 billion), and Capital Expenditure (N222.2 billion). This is a paltry 0.29% increase from the 2021 allocation where, out of N13.59 trillion total budget, only 5.68% (N742.5 billion) was earmarked for education. The 5.39% allocation is a 50% reduction from the 10.79% that was allocated in 2015; and the worst Nigeria has had in the last ten years. When subjected to dollar exchange and inflation rates to determine comparative purchasing power in 2015 and 2022, the Naira value shows a slight marginal difference. The unending strikes by the Academic Staff Union of Universities (ASUU) in Nigeria is a grim reminder of the multifaceted implications of low funding of Nigeria's education sector. The ASUU has been asking the Federal Government of Nigeria to fulfil its part of earlier agreements between both parties which, among others, includes increased funding of public universities. Sadly, ASUU strikes mean Nigerian students in government-owned universities are unable to attend school. The current ASUU strike, which is ongoing at the time of writing, has been on since February 14, 2022. Prior, between 1999 and 2021, ASUU strikes cumulatively lasted for 60 months and seven days.

Many reasons have been put forward as to why ESC rights are not being advanced as much as CP rights. These include:

- **Nature of ESC Rights**

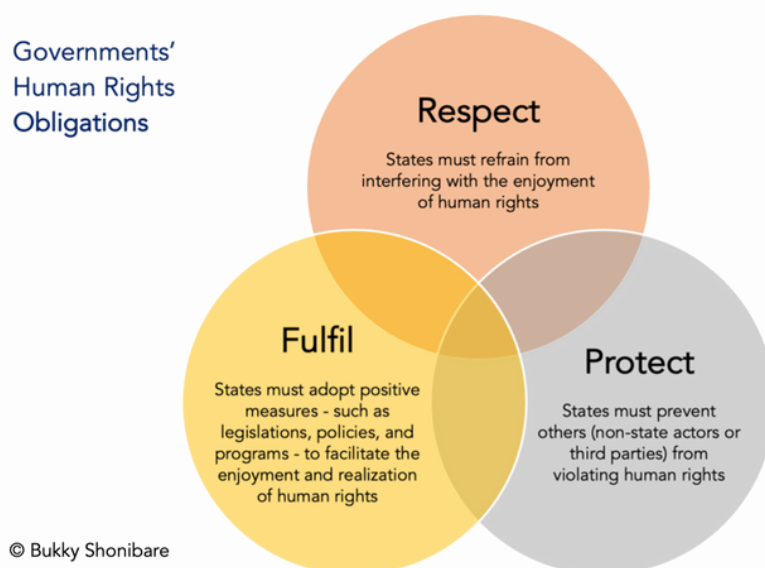
While ESC rights are deemed vague and broad, CP rights are considered clear and precise. CP rights accrue to individuals, thus called "individual rights," while ESC rights are for many people, making them "group rights" or "collective rights"^[9] This distinction raises concerns when rights are violated. CP rights, being individualistic, are considered to have easily determinable perpetrators, victims, scope of violation, and remedy. However, when ESC rights are infringed, the "violators" are often duty bearers (e.g., government, private businesses) while the "victims" are a wide universe of persons who cannot be easily accounted for, and remedies too wide-ranging to be quantified.

In ranking ESC rights lower than CP rights, critics of ESC rights opine that rather than being seen as "rights properly so called," ESC rights are "mere privileges" which governments gratuitously accord their citizens based on the availability of resources, and for which they can decide to provide or not. In a similar vein, some critics say ESC rights are mere "aspirational societal goals" for which States can decide whether to advance or not through laws, policies, and programs. It is no wonder that Nigeria categorizes ESC rights in its Constitution as "Fundamental Objectives and Directive Principles of State Policy."

That the international community labels ESC rights as “second generation rights,” and CP rights as “first generation rights” creates an unnecessary hierarchization of these sets of rights, and the notion that CP rights are greater and of more importance than ESC rights. This has, unfortunately, become the reality of ESC rights in many States, as these rights are relegated and treated with less interest. In fact, those who hold that ESC rights are not rights per se believe that when CP rights are achieved, then ESC rights are also inadvertently realized. This correlation, to this author, lacks coherent reasoning. For instance, how does the prevention of arbitrary arrest translate to feeding poor widows?

- **State Obligations**

Generally, States have a tripartite typology obligation to respect, protect, and fulfil all human rights and freedoms, including ESC rights. The obligation to respect means States must refrain from interfering in the enjoyment of rights. For instance, a State should not forcefully evict people from their homes; neither should they cut off electricity or water supply. The obligation to protect requires States to reasonably prevent others, that is: non-state actors or third parties, from infringing on or interfering with enjoyment of rights. For instance, States can enact laws that regulate the activities of private business entities so as to ensure they do not violate people’s ESC rights. The obligation to fulfil mandates States to actively take steps towards creating the conditions necessary for the full enjoyment and realization of rights by adopting appropriate legislative, administrative, and other measures; and when an individual or group is unable to give effect to a right, States are to provide the means by which to enjoy that right. For instance, a State can adopt a law that abolishes employment discrimination directed at persons living with disabilities.



Furthermore, the obligations imposed on States for CP rights differ from that of ESC rights. CP rights give rise to “negative obligations” which, essentially, mean that States are to refrain or not act in ways that will hinder rights enjoyment (e.g., not to torture, not to kill, not to deny fair hearing, etc.). However, in fulfilling these negative obligations, a State may sometimes need to implement positive actions such as adopting laws and policies. ESC rights impose “positive obligations” to act, do something, or take steps towards realizing ESC rights (e.g., provide adequate housing, build

hospitals, improve educational facilities, etc.). In addition, ESC rights are “progressively realized” over a period of unspecified time based on resource availability, even though they bear some immediate obligations such as non-discrimination; CP rights are “immediately enforced,” although they also have some rights which require progressive realization. It should be mentioned, however, that while States have the obligation to progressively realize ESC rights, there is prohibition of retrogression – that is, any measure that may undermine or impact negatively on existing ESC rights enjoyment.

- **Resource Dependency**

Realizing ESC rights can be costly. Hence, States are expected to use their “maximum available resources” in progressively realizing ESC rights. Even if a State clearly has inadequate resources at its disposal, it should still introduce low-cost and targeted programs to assist those most in need. By so doing, limited resources are used efficiently and effectively towards realizing ESC rights for the historically marginalized, those most at risk, and persons who are often disproportionately affected by the lack of or limited access to ESC-related services. ESC rights are within the remit of States to allocate and utilize their resources as they deem fit; thus, any attempt by the international community to advise States on how it should allocate its resources towards achieving and promoting ESC rights will contradict a cardinal principle of international law, as no sovereign State wants to be told how it should spend its resources. This, nonetheless, does not preclude States from acting responsibly in advancing ESC rights.

- **The Justiciability Factor**

When a right is justiciable, it means right-holders can approach a court of law for trial and justice when such right is violated. Hence, by justiciability, a court may or may not be prevented from exercising judicial authority to hear or decide on a case. Generally, cases relating to the violation of CP rights are justiciable. For instance, when a person’s freedom of movement is infringed, such a right-holder can approach a court and seek redress. It is not that straightforward for, say, violation of a right to water which is an ESC right. This is because ESC rights are inherently incapable of judicial enforcement, unless through other means. The criticism that ESC rights lack capacity for legal enforcement is not far-fetched from the view that ESC rights are gratuitous.



Source: www.leadership.ng

The inherent non-justiciability of ESC rights can first be gleaned from the respective International Covenants that enshrines CP rights and ESC rights. While Article 2(3) of the ICCPR provides for remedy when CP rights are violated; there is no equivalent provision in the ICESCR. The ICCPR, from its onset in 1976, immediately had an Optional Protocol^[10] that permits and sets out the conditions for individual complaints and inquiry mechanism when CP rights are violated. A corresponding Optional Protocol for the ICESCR^[11] was only adopted in 2008 and came into force in 2013 – that is, 37 years after the ICESCR became effective. As of September 2021, while 117 States are parties to the Optional Protocol to the ICCPR;^[12] the Optional Protocol to the ICESCR has only 26 States parties.^[13] So far, only seven decisions have been made based on the OP-ICESCR – five against Spain, and one each against Italy and Ecuador.^[14] There have been 22 inadmissibility decisions,^[15] which may be because of the recency of the OP-ICESCR causing people not to have familiarized themselves with the document enough to know the Committee’s rules regarding admissibility and other expectations. It is worth mentioning that the Committee’s interpretation of the ICESCR and the decisions flowing therefrom have been adjudged to be of good quality, and crucial in the realization and advancement of ESC rights.

Importantly, the non-justiciability of ESC rights is often analysed through the prism of the nature of liberal constitutional democracies, where it is considered inappropriate for one arm of government (the judiciary) to meddle in socio-economic matters which are deemed to be within the exclusive domain of the executive and the legislature. This brings to the fore the potential violation of the doctrine of separation of powers. It also raises the “political question doctrine” whereby federal courts often (or are expected to) refuse to hear or determine a case if the court finds that the case presents a political question. Adapting this doctrine, ESC rights-related cases are often so politically charged that federal courts, which are expected to maintain their apolitical nature, should not hear, or attempt to determine, such cases. For instance, a case where a State is sued in a domestic court for insufficient budgetary allocation to education would amount to the court exercising functions over a political matter relating to resource allocation that is within the primary mandate of the executive.

In addition, there are also issues relating to judicial capacity to hear and determine ESC rights cases. While ESC rights are human rights, it is often not considered the role of courts or a UN body to interfere with governments’ decisions on how to allocate its resources in promoting such rights. This is because there are concerns about the competence and institutional capacity (expertise, qualification, or experience) of courts to deal with violations of ESC rights. Concerns have also been raised as to whether it is the role of courts to deal with ESC rights cases, as doing so would be an inappropriate use of judicial powers. Other judiciary-related criticisms relate to courts lacking the necessary tools and remedies to deal effectively with ESC rights; the possible inherent biases of the court judges who are often elites, thus lacking the ability to fully appreciate the realities of those who suffer violations of ESC rights; that courts lack information relating to allocation of State resources; and the perceived incapability of courts to successfully handle the polycentric tasks of adjudicating ESC rights cases, where polycentricity is when one decision creates a wide and multi-layered web of other issues, such that results in huge and wide-ranging implications in terms of policies, programs, and decision making.

Moving Forward

Despite the many concerns and criticisms of ESC rights, there are approaches that can be considered in ensuring that ESC rights are advanced with the same level of will and commitment to CP rights. Here, I propose five approaches:

- **The Strategic Realization Approach**

One approach to ensure ESC rights are not left behind is to rethink the obligations on States to “progressively realize” ESC rights. The notion of “progressive realization” means that while ESC rights require progress in ensuring actual enjoyment of rights, it does not mean this realization should be pushed into the future. Instead of a slow-paced approach, which is how most States interpret “progressive realization,” a strategic approach is proposed. By this, States are to demonstrate strategic, deliberate, and steady movement towards the full realization of ESC rights. This involves expanding economic and social access for a large population of people. For instance, rather than build one school for 1,000 schoolchildren per budgeting cycle, why not allocate sufficient funds to build 10 schools for 10,000 school children in the same period? Another factor that States can consider in progressive realization is to prioritize historically marginalized and disproportionately affected social groups – persons living with disabilities, the elderly, indigents, rural dwellers, etc – in providing ESC rights-related services. This way, a wider range of social groups, especially those primarily affected, will enjoy ESC rights at the same time, while shortening the length of time it would require for such rights to be realized.



- **The Holistic Resource Approach**

Undeniably, ESC rights require huge resources; however, these resources need not be only financial. States are expected to use their “maximum available resources” in ensuring enjoyment and achievement of ESC rights. While it is expected for States to deploy financial resources gathered

through quality budget allocations, taxes, and internally-generated revenues; non-financial “real” resources – human, technical, material, natural resources, etc – that a State has or can have access to, should also be utilized. Such resource utilization must be sufficient or adequate vis-à-vis the ESC rights that is being promoted. In addition, resources should not only be expended for the exact ESC rights-related purpose, it should also be done efficiently by prioritizing those who primarily need specific ESC rights-related services. It is imperative for States to ensure funding is allocated towards the smooth administration and management of allocated resources, such as spending on training and capacity building for those saddled with the responsibility of managing the State resources so as to aid better decision making, promote efficiency, and avoid corruption.

- **The Jurisprudential Approach**

Through a jurisprudential interpretation approach, ESC rights cases decided positively by domestic, regional, and international courts serve as case study and reference in clarifying and resolving points of views regarding the realization of ESC rights. Hence, at the international level, it is important to take advantage of the OP-ICESCR by approaching the Committee on Economic, Social, and Cultural Rights (CESCR) when ESC rights have been violated in a State that is a party to the ICESCR, provided the admissibility requirements stated in Article 3 of the OP-ICESCR[16] are met. It is noteworthy that complaints about ESC rights violations can be submitted by or on behalf of an individual or group whose ESC right have been violated. Another jurisprudential approach is the invocation of and reliance on international and regional instruments that a State is party to, such that guarantees the justiciability of ESC rights.

For instance, Nigeria, having ratified and domesticated the African Charter on Human and Peoples’ Rights (ACHPRs),[17] is under obligation to respect, protect, and fulfil all the rights contained therein, which includes ESC rights. An effect of this is seen in the *SERAP v. Nigeria* case,[18] where the ECOWAS Court relied on the right to education in Article 17 of the ACHPR[19] to pronounce on the obligation of Nigeria to ensure the full realization and enjoyment of the right to education in Nigeria. In addition to relying on relevant international and regional treaties, as well as legislating the justiciability of ESC rights, other jurisprudential approaches to resolving the ESC rights justiciability concern are, for instance, conducting training programs for court officials and judges on effectively adjudicating ESC rights as a way of building their competence while aiming to have judges who specialize in ESC rights-related cases; and, where courts lack information necessary for effectively deciding on an ESC rights case, there should be mechanisms for helping with information gathering, for instance, through third parties or amicus curiae.

- **The Legislation Approach**

States can develop, adopt, or review their legislations to ensure realization of ESC rights. South Africa exemplifies this approach in its apex law. Section 7(2) of South Africa’s Constitution[20] mandates the State to “...respect, protect, promote and fulfil the rights in the Bill of Rights.” This provision made no distinction between CP rights and ESC rights; hence, all rights give rise to the same State obligations. For instance, regarding the right to land, which is an ESC right, section 25(5) of South Africa’s Constitution obligates the State to “take reasonable legislative and other measures,

within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

South Africa guarantees other ESC rights in its Constitution, such as the right to adequate housing; [21] right to healthcare services, reproductive healthcare, sufficient food and water, and social security and social assistance;[22] and the right to basic education, including adult basic education.”[23] To ensure effective implementation of ESC rights, South Africa’s Constitution requires the South African Human Rights Commission to ensure relevant organs of State provide, yearly, information on measures taken towards realizing the rights to housing, health care, food, water, social security, education, and the environment.[24]

- **The Positive Precedents Approach**

Through positive judicial decisions on ESC rights, States not only signal their intolerance for rights violations, but they also demonstrate willingness and commitment to realizing and achieving ESC rights. These favourable decisions are aided when States recognize that despite the separation of powers doctrine, the judiciary plays crucial collaborative roles alongside the legislature and executive in promoting the inherent dignity of the persons within their territories and those subject to their jurisdictions. As mentioned above, the perceived non-justiciability of the right to education was resolved in the *SERAP v. Nigeria*. [25] In this case, the ECOWAS Court held that children have a justiciable right to education as guaranteed by Article 17 of the ACHPR. [26] This regional judicial approach was taken considering the non-justiciable nature of the Chapter II rights in Nigeria’s Constitution, wherein the right to education is enshrined in its section 18. [27] The plaintiff (SERAP) prayed the court to pronounce favourably on the right to basic education which should not be hindered by financial misappropriation, mismanagement of public resources, or the corruption of government officials or third parties to the extent of depleting the resources needed to provide basic education. While positive decisions like these are few, enjoying ESC rights in Nigeria, as with other democratic States, have been through the energy-sapping route of the human rights protest approach, including judicial activism, in demanding the protection of human rights, generally, and ESC rights, more specifically.



Source: www.studiozunarelli.com

The constitutionalization of ESC rights in South Africa has produced jurisprudence that emphasizes the State's commitment to promoting ESC rights. South Africa's judiciary have upheld the right to social security, especially to persons living with disability;^[28] and the right to medical treatment even in the face of its under-resourced health care system.^[29] The rights to food and education in the face of a global pandemic was recently upheld in *Equal Education v. Department of Basic Education*,^[30] where the High Court defended children's right to food and education during the COVID-19 pandemic. The Gauteng Division of the High Court of South Africa ruled on the inextricable and interlinked nature of the rights to basic education and basic nutrition for South African children, while emphasizing the importance of avoiding retrogression in the enjoyment of ESC rights.

Another example in South Africa is the *Treatment Action Campaign* case,^[31] where some non-governmental organizations, led by the Treatment Action Campaign (TAC) sued the South African government for its failure to provide anti-retroviral drug (Nevirapine) to HIV positive pregnant women so as to prevent mother-to-child (MTV) transmission. This violated the ESC rights of both the children and mothers to healthcare services guaranteed in sections 27(1) and 28(1)(c)^[32] of the South African Constitution. The case started from the Transvaal Provincial High Court, where Judge Chris Botha ruled in favour of the TAC ordering the South African government to make Nevirapine available to its birthing population who are HIV positive. Upon appeal of the lower court's decision by the South African government, the Constitutional Court of South Africa refused the appeal, finding that restricting Nevirapine to few pilot sites excludes HIV positive women in other sites who should, reasonably, be covered by the program. In its decision, the court ordered the South African government to not only extend the availability of Nevirapine to all its birthing population, but to also ensure testing and counselling to all public birthing health facilities across the country.

Another laudable positive case from South Africa is the *Grootboom* case,^[33] which is a landmark judgment that upheld the right to housing in South Africa. In this case, Mrs. Irene Grootboom and others, who were said to be illegal occupants of a private land earmarked for low-cost housing, were evicted from the land with their possessions bulldozed and burnt alongside the shacks and shelters that they had erected on the land. Prior to moving to the private land earmarked for low-cost housing, Mrs. Grootboom was among 390 adults and 510 children who were living in an informal squatter settlement where they had no water, sewage, or refuse removal services, and from where they had requested for temporary accommodation pending when permanent housing is provided.^[34] Relying on sections 26 and 28 of South Africa's Constitution^[35] on their right to housing, Mrs. Grootboom and others approached the Cape Good Hope High Court, praying the court to ask the government to provide them with adequate housing. The High Court held in their favour. The South African government appealed the decision. In its decision on the appeal, the South African Constitutional Court aligned with the High Court. However, despite this favourable revolutionary decision, the South African government refused to implement the courts' decisions, leaving Mrs. Irene Grootboom to die homeless,^[36] eight years after.

Conclusion

Concerns about the relegation of ESC rights have been based on four general assumptions or propositions: first, that ESC rights are inherently different from CP rights; second, that ESC rights are resource demanding; third, that due to the heavy resources requirement to realize ESC rights, States are to “progressively” (read “slowly”) advance these rights; and, fourth, that it is inappropriate for courts to intrude into the sphere of socio-economic policies. Recognizably, categorization of rights as civil and political, and as economic, social, and cultural is useful in having an analytical frame to assess and critique State actions. Besides, different situations of rights violations require different levels, kinds, and intersecting obligations. Nevertheless, ESC rights are equally central to achieving the core purpose for which human rights were established in the first place, which is to promote equality and the inherent dignity of all persons.

CP rights and ESC rights are interconnected and mutually reinforcing, such that the advancement of one set of rights at the expense of another is a recipe for creating societies where individuals and groups enjoy half-baked rights. The interdependence and indivisibility of ESC rights and CP rights mean that excluding some rights or certain types of governmental obligations from the courts’ authority only results in serious inequalities or hierarchies in the practical application of rights, especially in relation to fundamental human rights, which may then become enforceable for some groups and rendered largely illusory for others.

In a nutshell, economic, social, and cultural rights must not be left behind!



ENDNOTES

- [1] International Covenant on Civil and Political Rights. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>
- [2] International Covenant on Economic, Social and Cultural Rights. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>
- [3] Constitution of the Federal Republic of Nigeria, 1999 (As Amended)
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