

# Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities

Stanley Ibe\*

Associate Legal Officer, Africa Programme, Open Society Justice Initiative, Abuja, Nigeria; Solicitor and Advocate of the Supreme Court of Nigeria

## Summary

*The article explores ways of overcoming challenges in the effective implementation of economic, social and cultural rights in Nigeria. It begins with a brief review of the legal architecture of economic, social and cultural rights. It examines challenges to implementing these rights, such as locus standi, justiciability and the doctrine of dualism. Finally, it identifies the opportunities provided by Nigeria's current constitutional review process; the debate on access to information legislation; legislative action; and citizens' education, empowerment and mobilisation.*

## 1 Introduction

Scholars are often quick to claim that economic, social and cultural rights are *programmatically*<sup>1</sup> and therefore incapable of immediate reali-

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\* LLB (Lagos State), LLM (Globalisation and Human Rights) (Maastricht); stanibe@yahoo.com. This article is based on a paper presented at the Seminar on International Law in Domestic Courts organised by the International Law in Domestic Courts (ILDC) project of the Centre for Human Rights, University of Pretoria, and Nigerian Bar Association, Yenogoa Branch in Yenogoa, Bayelsa State, Nigeria, on 18 September 2009. I would like to thank the two anonymous reviewers appointed by this journal for their painstaking review of the draft and useful suggestions. The views expressed here are personal to the author and do not necessarily represent the opinions or policies of the Open Society Institute (OSI) or any of its associated foundations and programmes. 1

<sup>1</sup> In the sense of having to be 'realised gradually', being of a 'more political nature' and 'not capable of judicial enforcement'. See A Eide 'Economic, social and cultural rights as human rights' in A Eide & A Rosas (eds) *Economic, social and cultural rights: A textbook* (2001) 3. See also D Bilchitz 'Towards a reasonable approach to the minimum core obligation: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

sation.<sup>2</sup> This claim is reinforced by the language of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which gives considerable discretion to states in the standard and timing of recognised rights.<sup>3</sup>

The wide gap<sup>4</sup> between the reception and enforcement of economic, social and cultural rights, on the one hand, and civil and political rights, on the other, ensures that the former are treated less seriously than the latter. However, economic, social and cultural rights have far-reaching implications for the lives and livelihood of millions of poor and powerless Africans.

In Nigeria, economic, social and cultural rights are recognised under chapter II of the 1999 Constitution as Fundamental Objectives and Directive Principles of State Policy (DPSP). However, section 6(6)(c) seems to prohibit the courts from entertaining matters arising out of violations of chapter II. If one assumes that this is fatal to litigation on economic, social and cultural rights,<sup>5</sup> one needs to look for other opportunities to realise these rights.

The article explores such opportunities with a view to eliciting a discussion on the need to realise the *rights of the poor*. It reviews the legal architecture of economic, social and cultural rights as well as challenges to implementing this specie of rights, such as *locus standi*, justiciability and the doctrine of dualism. Finally, it explores the opportunities provided by Nigeria's current constitutional review process; the debate on access to information legislation; legislative action; and citizens' education, empowerment and mobilisation.

## 2 Legal architecture of economic, social and cultural rights

Economic, social and cultural rights exist on three different but interconnected levels — international, regional and national. At the international level, the Universal Declaration on Human Rights (Universal Declara-

<sup>2</sup> Indeed, art 2 of ICESCR urges states to 'progressively realise' these rights.

<sup>3</sup> Exceptions are the right to free and compulsory primary education and the principle of non-discrimination. See J Cottrell & Y Ghai 'The role of the courts in implementing economic, social and cultural rights' in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice – The role of judges in implementing economic, social and cultural rights* (2004) 61.

<sup>4</sup> For background on the factors responsible for the existing gap, see S Ibe 'Beyond the rhetoric: Transcending justiciability in the enforcement of socio-economic rights in Nigeria' unpublished LLM dissertation, Maastricht University, Netherlands, 2006 (on file with author); RKM Smith *Textbook on international human rights* (2003); Eide (n 1 above); HJ Steiner & P Alston *International human rights in context* (2000); MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995).

<sup>5</sup> It is not. I provide the basis for this conclusion in sec 2 of the article.

tion) recognises a few economic, social and cultural rights.<sup>6</sup> ICESCR<sup>7</sup> is the framework for realising these rights. Until recently, ICESCR did not provide access to remedies at the international level for victims of violations of economic, social and cultural rights.<sup>8</sup> Therefore, such victims had to resort to domestic or regional systems.

Described as representing 'a significantly new and challenging normative framework for the implementation of economic, social and cultural rights',<sup>9</sup> the African Charter on Human and Peoples' Rights (African Charter) presents economic, social and cultural rights free of claw-back clauses.<sup>10</sup>

Unlike the case with ICESCR,<sup>11</sup> state parties to the African Charter assume obligations that have immediate effect. State parties must respect, protect and fulfil all the rights in the Charter, including economic, social and cultural rights.<sup>12</sup> The obligation to respect, like that arising under ICESCR, means that states must 'refrain from actions or conduct that contravene or are capable of impeding the enjoyment of economic, social and cultural rights'.<sup>13</sup> This obligation is neither

<sup>6</sup> Examples include the right to an adequate standard of living (art 25); the right to property (art 17); the right to work (art 23); and the right to social security (arts 22 & 25).

<sup>7</sup> By Resolution 543 (VI) of 5 February 1952, the Commission on Human Rights divided the rights contained in the Universal Declaration into what would become two separate covenants, ICESCR and the International Covenant on Civil and Political Rights (ICCPR), in part because economic, social and cultural rights were perceived as general principles for governments in the management of public affairs while civil and political rights were considered enforceable. See Ibe (n 4 above) 6.

<sup>8</sup> The Optional Protocol to ICESCR, adopted on 10 December 2008, rectified this. Unlike ICESCR, ICCPR was adopted with an Optional Protocol establishing the procedure for individual complaints in 1966. See L Chenwi 'Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 *African Human Rights Law Journal* 23-51.

<sup>9</sup> CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights – The system in practice 1986-2000* (2002) 178-218 186.

<sup>10</sup> Civil and political rights are subject to claw-back clauses. See Ibe (n 4 above) 13.

<sup>11</sup> Art 2 of ICESCR enunciates the 'progressive realisation' principle, which the ESCR Committee has described as 'a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'. See General Comment 3 on the Nature of State Parties' Obligations under ICESCR, para 9.

<sup>12</sup> Unfortunately, the Charter does not mention such ICESCR rights as the right to social security, an adequate standard of living (art 11(1)), freedom from hunger (art 11(2)) or the right to strike (art 8(1)(d)). Although the African Charter specifically provides for economic, social and cultural rights and recognises them as justiciable rights, state parties to the Charter have yet to realise these rights, either within domestic legal systems or at the regional level.

<sup>13</sup> F Morka 'Economic, social and cultural rights and democracy: Establishing causality and mutuality' in HURILAWS *Enforcing economic, social and cultural rights in Nigeria – Rhetoric or reality?* (2005) 85 88.

contingent on 'availability of resources', nor subject to the notion of 'progressive realisation'. The obligation to protect involves a duty to encourage third parties (including non-state parties) to respect these rights or refrain from violating them. The obligation to fulfil creates a duty that 'requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights'.<sup>14</sup> Significantly, article 45 of the African Charter makes all rights justiciable before the African Commission on Human and Peoples' Rights (African Commission).<sup>15</sup> Nigeria has ratified and domesticated the African Charter.<sup>16</sup>

In a recent decision,<sup>17</sup> the Economic Community of West African States (ECOWAS) Court of Justice confirmed that the 'rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court'.<sup>18</sup>

Nigeria's 1999 Constitution recognises economic, social and cultural rights in chapter II consisting of DPSP provisions.<sup>19</sup> Chapter II was devised to fulfil the promises made in the Preamble to the Constitution, *inter alia* to

provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice and for the purpose of consolidating the unity of our people.

The Preamble and provisions of chapter II reflect the high ideals of a liberal democratic polity and thus serves as guidelines to action on major policy goals.<sup>20</sup> The rationale for the inclusion of chapter II in the 1999 Constitution, as in the 1979 Constitution, is that governments

<sup>14</sup> See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) 15 *Netherlands Quarterly of Human Rights* 244.

<sup>15</sup> See S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225-228.

<sup>16</sup> See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act ch A9, Laws of the Federation of Nigeria, 2004 which domesticates the Charter in accordance with sec 12 of the 1999 Constitution. Sec 1 of the Act provides that '[t]he provisions of the Charter shall have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'. See also the decision in *Fawehinmi v Abacha* (2000) 6 NWLR Part 660, 228 confirming that the Charter is part of Nigerian law.

<sup>17</sup> *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*, Suit ECW/CCJ/APP/08/08, ruling of 27 October 2009 (on file with author).

<sup>18</sup> n 17 above, para 19.

<sup>19</sup> The term was first used in the 1979 Constitution. Justice Mamman Nasir described fundamental objectives as identifying 'the ultimate objectives of the nation' and the Directive Principles as laying down the 'policies which are expected to be pursued in the efforts of the nation to realise the national ideals' (see *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350).

<sup>20</sup> O Agbakoba & U Emelonye *Test of progressive realisation of economic, social and cultural rights in Nigeria (1990-1999 Budget Analysis)* (2001) 1-2.

in developing countries have tended to be pre-occupied with power and its material perquisites and have scant regard for political ideals as to how society can be organised and ruled to the best advantage of all.<sup>21</sup> The resultant effect of this pre-occupation is that existing social divisions in Nigeria's heterogeneous population are perpetuated.

The first section under chapter II recognises the duty and responsibility of 'all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this Constitution'.<sup>22</sup> Similarly, section 224 provides that the programmes and objectives of a political party must conform to the provisions of chapter II. Finally, item 60 of the Exclusive Legislative List gives the National Assembly the power to make laws with respect to the establishment and regulation of authorities to promote and enforce the observance of the DPSP contained in chapter II. However, section 6(6)(c) of the same Constitution seems to prohibit the courts from entertaining cases arising under or as a result of chapter II.<sup>23</sup> Although it seems that by virtue of section 6(6)(c) economic, social and cultural rights are non-justiciable, I argue that this is not necessarily true.

In *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*,<sup>24</sup> Nigeria's Appeal Court was able to examine this interesting subject. By a circular dated 26 March 1980, the Lagos State government purported to abolish private primary education in the state. The plaintiffs challenged the circular as unconstitutional. Under the relevant provisions of the 1979 Constitution, the plaintiffs applied to refer the following question to the Court of Appeal:

Whether or not the provision of educational services by a private citizen or organisation comes under the classes of economic activities outside the major sectors of the economy in which every citizen of Nigeria is entitled to engage in and whose right so to do the state is enjoined to protect within the meaning of section 16(1)(c) of the Constitution.

In his decision on the merits of the case, Mamman Nasir J held that no court has 'jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles'. He also clarified the role of the judiciary as 'limited to interpreting the general provisions

<sup>21</sup> J Akande *Introduction to the Constitution of Nigeria* (2000) 52.

<sup>22</sup> Sec 13.

<sup>23</sup> Consequently, some have argued that economic, social and cultural rights are not justiciable. See E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' paper presented at the Conference on International Law and Human Rights Litigation in Africa organised by the Centre for Human Rights, University of Pretoria, South Africa, and the Amsterdam Centre for International Law, University of Amsterdam, Netherlands, 14-15 August 2009, University of Lagos, Nigeria 11-12; F Falana *Fundamental rights enforcement* (2004) 9.

<sup>24</sup> (1981) 2 NCLR 350. The facts and key pronouncements are excerpted from Ibe (n 15 above) 241-242.

of the Constitution or any other statute in such a way that the provisions of the chapter are observed'. I disagree with the popular idea that this decision<sup>25</sup> and others like it<sup>26</sup> make economic, social and cultural rights non-justiciable. If nothing else, the fact that the court pronounced on this matter demonstrates that judicial action is possible on matters arising out of chapter II violations. Furthermore, the court correctly observed that its role should be to interpret the provisions of the Constitution in a way that ensures that the provisions of chapter II are observed. I would therefore argue that, although section 6(6)(c) provides the basis for arguing against the justiciability of economic, social and cultural rights, it does make an important exception, namely, 'except as otherwise provided by this Constitution'.<sup>27</sup> This means that a provision of the Constitution, such as item 60 of the Exclusive Legislative List, changes the equation to the extent that the legislature enacts any specific legislation seeking to implement chapter II.

The legislature has in fact done so in the case of Nigeria's anti-corruption crusade. In *Attorney-General of Ondo State v Attorney-General of the Federation*,<sup>28</sup> Uwaifo J made clear the relationship between item 60(a) and section 15(5)<sup>29</sup> of the Constitution in these words:<sup>30</sup>

It is quite tenable, in my view to consider item 60(a) in regard to section 15(5) of the Constitution as having placed directly as a subject in the exclusive legislative list, the abolition of all corrupt practices and abuse of office, in the terms that the item is stated. Under the circumstance, the National Assembly may, in the exercise of the substantive powers given by section 4 of the Constitution in relation to item 60(a), make all laws which are directed to the end of those powers and which are reasonably incidental to their absolute and entire fulfilment.

<sup>25</sup> Indeed, the decision liberalises access to primary education by providing the platform for establishing privately-owned primary schools in Lagos State.

<sup>26</sup> See also *Uzoukwu v Ezeonu II* (1991) 6 NWLR Part 200.

<sup>27</sup> In *Federal Republic of Nigeria v Alhaji Mika Anache & Others* (2004) 14 WRN 1-90 61, Justice Niki Tobi explained 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 or sections of Chapter II justiciable, it will be so interpreted by the courts.'

<sup>28</sup> (2002) 27 WRN 1-231.

<sup>29</sup> Sec 15(5) provides: 'The state shall abolish all corrupt practices and abuse of power.' It is embedded in ch II of the 1999 Constitution.

<sup>30</sup> n 28 above, 160 paras 40-48. In the *Anache* case (n 27 above), Tobi J emphasised that '... item 60(a) is one of the items that the National Assembly is vested with legislative power ... by item 60(a), the National Assembly is empowered to establish and regulate authorities to "promote and enforce the observance of the provisions of chapter 2 of the Constitution"' (63).

Further, Nigeria's chapter II owes its origin to India.<sup>31</sup> The Indian judiciary has set a precedent regarding DPSP, in an expansive model of interpretation for economic, social and cultural rights. The model identifies an undeniable link between justiciable civil and political rights and supposedly non-justiciable economic, social and cultural rights. In a plethora of cases, beginning with *Maneka Gandhi*,<sup>32</sup> the court expanded civil and political rights to include economic, social and cultural rights. Indeed, we can argue that this happens in a rather subtle form in Nigeria.

There are several cases in which the judiciary has granted bail to a criminal suspect on account of ill-health.<sup>33</sup> Clearly, the subject matter is a civil and political right, namely, the right to bail as an integral part of the right to personal liberty. However, a socio-economic right (the right to health) is relied upon for the purpose of claiming a civil and political right. This is a model firmly rooted in Indian jurisprudence, but also interesting for its positive contribution to improving rights. It is therefore important to consciously apply this principle in the dispensation of justice.

Strengthening institutions such as the Independent National Electoral Commission (INEC), the National Human Rights Commission (NHRC), the Economic and Financial Crimes Commission and the Independent Corrupt Practices and Other Related Offences Commission (ICPC) will ensure that citizens determine that their leaders and independent institutions guarantee responsible and accountable governance at all levels.

### 3 Challenges to implementing economic, social and cultural rights in Nigeria

In this section, I consider the challenges of *locus standi*, justiciability and dualism which impede the implementation of economic, social and cultural rights in Nigeria.

<sup>31</sup> It is crucial to observe that India's adoption of the DPSP was defined by its historical and social context as well as international developments at the time of its drafting, which predated the general trend towards decolonisation. Things have since changed. Eg, the Vienna Declaration of 1993 expressly affirms the current trend towards universality, indivisibility, interdependence and interrelatedness of all rights.

<sup>32</sup> See also *Francis Coralie Mullin v Union Territory of Delhi* (1981) 1 SCC 608, where the Supreme Court held that the right to life guaranteed under art 21 of the Indian Constitution includes the right to live with human dignity and all that goes along with it.

<sup>33</sup> Courts are enjoined to grant bail in special circumstances, including cases where refusal of the application will put the applicant's health in serious jeopardy. See eg the case of *Fawehinmi v The State* (1990) 1 NWLR Part 127 486. In *Mohammed Abacha v State* (2002) 5 NWLR Part 761 638 653 para E, Ayoola J confirmed that '[w]hatever the stage at which bail is sought by an accused person, ill-health of the accused is a consideration weighty enough to be reckoned as special circumstance'.

### 3.1 The challenge of *locus standi*

The challenge of *locus standi* or standing to sue is relevant within the context of justiciable economic, social and cultural rights. This is because only in this context would it be necessary to approach the courts as individuals or a collective for the purpose of seeking judicial interpretation or a resolution of problems arising from or attributable to violations of economic, social and cultural rights.

Onnoghen J has described *locus standi* as 'the legal capacity to institute proceedings in a court of law or tribunal'.<sup>34</sup> In the alternative, it is 'the right of a party to appear and be heard on the question for determination before the court or tribunal'.<sup>35</sup> To establish *locus standi*, a litigant must show sufficient interest in the suit or matter.

There are two criteria for showing sufficient interest. The first relates to the question whether the party could have been joined as a party to the suit. The second is whether the party seeking redress will suffer some injury or hardship arising from the litigation.<sup>36</sup> Consequently, only a party in imminent danger of any conduct of the adverse party has *locus standi* to commence an action.<sup>37</sup> In view of the strict requirements for establishing standing to sue, and the confusing decision in *Abraham Adesanya v President of the Federal Republic of Nigeria*,<sup>38</sup> it is often difficult or impossible for non-governmental organisations (NGOs) or other interested persons to sue on behalf of victims of rights violations. Regarded as the *locus classicus* on the subject in Nigeria, the *Adesanya* case sought a determination by the Supreme Court on three key issues, the most important of which concerns the correct interpretation of the provisions of section 6(6)(b). Section 6(6)(b) of the 1979/99 Constitutions provides as follows:

The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

<sup>34</sup> See *Berende v Usman* (2005) 14 NWLR Part 944 1 16 paras D-E, quoting the decision in *Alhaji Gombe v PW (Nigeria) Ltd* (1995) 6 NWLR Part 402 402. In *Thomas & Others v Olufosoye* (1986) 1 NWLR Part 18 669, Ademola JCA, referring to the *locus classicus* on the issue of *locus standi* in Nigeria, *Senator Abraham Adesanya v The President of Nigeria* (2002) WRN Vol 44 80, said: '[I]t is also the law ... that, to entitle a person to invoke judicial power, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself and which interest [*sic*] injury is over and above that of the general public.'

<sup>35</sup> As above. See also *Senator Abraham Adesanya v President of the Federal Republic of Nigeria* (n 34 above); *Fawehinmi v Col Akilu* (1987) 4 NWLR Part 67 797.

<sup>36</sup> Niki Tobi J in *Pam v Mohammed* (2008) 40 *Weekly Reports of Nigeria* 67 123.

<sup>37</sup> See *Olagunju v Yahaya* (1998) 3 NWLR Part 542 501.

<sup>38</sup> See n 34 above.

In a minority opinion often confused as the majority decision on the matter, Mohammed Bello J expressed the following sentiment:

It seems to me that upon the construction of the subsection, it is only when the civil rights and obligations of the person who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the court may be invoked. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.

A careful survey of the decision in *Adesanya's* case reveals that the Supreme Court was not unanimous on the real purport of section 6(6)(b) in relation to *locus standi* in Nigeria. While Nnamani and Idigbe JJ subscribed to Bello J's idea that section 6(6)(b) laid down a test for *locus standi*, Sowemimo and Obaseki JJ took the view expressed by Fatayi Williams CJ (then Chief Justice of Nigeria) to the contrary. Unfortunately, Uwais J, who had the casting vote, took a completely different view to the effect that the interpretation of section 6(6)(b) depended on the facts and circumstances of each case. This *lacuna* led to such confusion that a few subsequent cases<sup>39</sup> were decided on the basis that Bello J's opinion was the majority decision of the Supreme Court. The Court, however, clarified its position on the *Adesanya* case in *Owodunni v Registered Trustees of the Celestial Church and Others*.<sup>40</sup> In its lead judgment, Ogundare J confirmed that 'there was not a majority of the court in favour of Bello JSC's interpretation of section 6(6)(b) of the Constitution'. Instead, he pointed to the decision of Ayoola J of the Court of Appeal as correctly establishing the province of the section.

In the case referred to above, Ayoola J offered some illumination in the following words:

In most written Constitutions, there is a delimitation of the power of the three independent organs of government namely: the executive, the legislature and the judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the states in the courts and defines the nature and extent of such judicial powers does not directly deal with the right of access of the individual to the court. The main objective of section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of powers between the judiciary on the one hand and the other organs of government on the other, in order to obviate any claim of the other organs of government, or even attempt by them to share judicial powers with the courts. Section 6(6)(b) of the Constitution is primarily and basically designed to describe the nature and extent of judicial powers vested in the courts. It is not intended to be a catch-all, all-purpose provision to be pressed into service for determination of questions ranging from *locus standi* to the most uncontroversial questions of jurisdiction.

I think that Ayoola J's judgment correctly establishes the province of *locus standi* to the extent that it holds that section 6(6)(b) is not its

<sup>39</sup> See *Fawehinmi v President, Federal Republic of Nigeria* (2007) 14 NWLR Part 1054 275 and *Okechukwu v Etukokwu* (1998) 8 NWLR Part 562 513.

<sup>40</sup> (2000) 10 NWLR Part 675 315.

legal basis. However, to the extent that it does not carefully establish its legal basis, it is necessary to devise a more inclusive definition of *locus standi* in a way that ensures that litigants need not demonstrate personal interest 'over and above'<sup>41</sup> those of the general public.<sup>42</sup> For this purpose, I propose a revision of the law<sup>43</sup> to allow for the *actio popularis*<sup>44</sup> or public interest litigation, where a person or organisation may institute a case on behalf of a third person or persons with commonality of grievance.<sup>45</sup> Shortly after this article was submitted, the Chief Justice of Nigeria made new rules of court<sup>46</sup> to dispense with the strict requirements of *locus standi*.<sup>47</sup> According to section 3(e) of the Rules, no human rights case may be dismissed or struck out for want of *locus standi*.

### 3.2 The challenge of justiciability

Much has been written and said about the justiciability of economic, social and cultural rights.<sup>48</sup> In this article, I have referred to the opinion of some writers on the subject. For all the reasons advanced for the non-justiciability of economic, social and cultural rights – the implications for revenue allocation and separation of powers, the unavailability

<sup>41</sup> The Court of Appeal in *Fawehinmi v President, Federal Republic of Nigeria* (n 39 above) and Supreme Court in *Owodunni v Registered Trustees of the Celestial Church & Others* (n 40 above) applied the 'over and above' principle.

<sup>42</sup> See *Olufosoye* (n 34 above).

<sup>43</sup> Essentially the Rules of Court.

<sup>44</sup> Interestingly, the ECOWAS Court relied on this in the *SERAP* case to hold that 'in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable.' See the *SERAP* case (n 17 above) 16.

<sup>45</sup> Explaining the goal of public interest litigation, the Indian Supreme Court in *Peoples' Union for Democratic Rights (PUDR) v Union of India* (1983) 1 SCR 456 <http://www.scribd.com/doc/17037501/PUDR> (accessed 2 October 2009) held that it was to 'promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed'.

<sup>46</sup> Fundamental Rights (Enforcement Procedure) Rules 2009 (on file with author), which took effect on 1 December 2009.

<sup>47</sup> Sec 3(e) lists the following as possible applicants in a human rights case: (i) anyone acting in his own interest; (ii) anyone acting on behalf of another person; (iii) anyone acting as a member of, or in the interest of, a group or a class of persons; (iv) anyone acting in the public interest; (v) associations acting in the interest of its members or other individual groups.

<sup>48</sup> Eg, Lester and An-Na'im restate the core arguments in the justiciability debate in Ghai & Cottrell (n 3 above). Lester believes that 'for reasons of democratic legitimacy, crucial resource allocation decisions are better left in the hands of the legislature and the executive, rather than being determined by an unelected judiciary' and that judicial intervention should take place only 'where there exists a clear and comprehensive dereliction of duty on the part of the two "democratic" branches of government'. For his part, An-Na'im thinks that 'if human rights are to be universal in a genu-

or inadequacy of resources and implementation difficulties – the one point which continues to resonate is that regarding the financial implications of judicial decisions on economic, social and cultural rights. Proponents argue that economic, social and cultural rights involve considerable financial investments over which the judiciary is ill-equipped to adjudicate. This is untenable considering the financial implications of ordering fresh elections in Nigeria over the last two years since the last general elections in April 2007. The fact that every fresh election conducted depletes the commonwealth does not invalidate the legal competence of courts to adjudicate over election petitions. By the same token, the prospect of a huge financial outlay to meet the basic needs of citizens should not deter any judge from hearing economic, social and cultural rights cases on their merits.<sup>49</sup>

Whilst one would not argue for exclusive and/or first-hand recourse to litigation in cases involving violations of economic, social and cultural rights, it is imperative that one resorts to the judiciary in a country like Nigeria where there exists a sufficiently gross failure to uphold basic economic, social and cultural rights. Where the other two branches have failed to fulfil their responsibilities, the judiciary has a duty to intervene. The independent bar and NGOs must start this process. The judiciary will need to articulate a minimum core obligation below which the state cannot fall. This is essential in view of the penchant for states to rely on the idea of the progressive realisation to evade obligations freely assumed under ICESCR. Although the progressive realisation benchmark assumes that valid expectations and concomitant obligations of state parties under ICESCR are neither uniform nor universal, but relative to levels of development and available resources,<sup>50</sup> the Committee on Economic, Social and Cultural Rights (ESCR Committee) has clarified that it imposes an obligation to ‘move as expeditiously and effectively as possible’ towards achieving a set goal, namely, the full realisation of economic, social and cultural rights.<sup>51</sup> Furthermore, the ESCR Committee establishes a minimum core obligation on the basis of which every state party owes an obligation to ‘ensure the satisfaction of minimum essential levels of each of the rights’.<sup>52</sup> State parties seeking

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in a more inclusive sense, they must include ESCR and that cannot be without judicial supervision of the performance of normal political and administrative process in this regard’. See L Lester of Herne Hill QC & C O’Cinneide ‘The effective protection of socio-economic rights’ in Ghai & Cottrell (n 3 above) 17-22 and AA An-Na’im ‘To affirm the full human rights standing of economic, social and cultural rights’ in Ghai & Cottrell (n 3 above) 7-16.

<sup>49</sup> See An-Na’im (n 48 above).

<sup>50</sup> A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 5.

<sup>51</sup> Para 9, General Comment 3 on ‘The Nature of States Parties’ Obligations’ (5th session, 1990). See [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (accessed 31 March 2010).

<sup>52</sup> General Comment 3 (n 51 above) para 10.

to rely on the unavailability of resources to escape the minimum core obligation must demonstrate that 'every effort has been made to use all resources that are at its (their) disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>53</sup> However, the South African Constitutional Court has rejected the 'minimum core' requirement on the ground that states may only be held to the standard of reasonability in the steps they take to guarantee economic, social and cultural rights. In a frequently-cited decision,<sup>54</sup> the Court declared:<sup>55</sup>

It is impossible to give everyone access even to a 'core service' immediately. All that is possible and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights ... on a progressive basis.

### 3.3 The challenge of dualism

Dualism is described as legislative *ad hoc* incorporation of international rules. Under dualist systems, international law becomes applicable within the state's legal system only if and when the legislature passes specific implementing legislation.<sup>56</sup>

Nigeria has a dualist system regarding international law. Specifically, section 12 of the 1999 Constitution provides that: '[n]o 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'. Interpreting this provision against Nigeria's obligations under the Convention of the International Labour Organisation, the Supreme Court insisted that section 12(1) was a condition precedent to applying international treaties ratified by her.<sup>57</sup> Specifically, the Court confirmed that '[i]n so far as the ILO Convention has not been enacted into law by the National Assembly, it has no force of

<sup>53</sup> As above.

<sup>54</sup> *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 SA 721 (CC) (TAC case). See [http://www.law-lib.utoronto.ca/Diana/TAC\\_case\\_study/MinisterofhealthvTACconst.court.pdf](http://www.law-lib.utoronto.ca/Diana/TAC_case_study/MinisterofhealthvTACconst.court.pdf) (accessed 2 April 2010).

<sup>55</sup> TAC case (n 54 above) 24.

<sup>56</sup> See M Dixon & R McCorquodale *Cases and materials on international law* (2003) 109, quoting A Cassese *International law* (2001) 168-171 180. See also ME Adjami 'African courts, international law and comparative case law: Chimera or emerging human rights jurisprudence?' (2002) 24 *Michigan Journal of International Law* 103. For Brownlie, dualism 'points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject matter'. See I Brownlie *Principles of public international law* (1998) 31-32.

<sup>57</sup> See *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v Medical and Health Workers Union of Nigeria* (2008) 37 WRN 1.

law in Nigeria and cannot possibly apply'.<sup>58</sup> Although this decision violates 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',<sup>59</sup> it nonetheless represents the true position of the law with respect to unincorporated treaties in Nigeria. For incorporated treaties, the position is different. In *Abacha v Fawehinmi*,<sup>60</sup> a full panel of Nigeria's Supreme Court examined the legal effect of incorporated treaties, specifically the African Charter. The Court declared that such treaties become 'binding and our courts must give effect to it like all other laws falling within the judicial power of the courts'.<sup>61</sup> However, the Court was careful to clarify that such treaties with international flavour did not, by virtue of incorporation into domestic law, assume a status higher than the Constitution. Interestingly, the Court unwittingly liberalised access to courts for violations of economic, social and cultural rights by agreeing that once incorporated into domestic law, an international treaty without specific procedural provisions could be enforced by recourse to the Fundamental Rights Enforcement Procedure Rules made pursuant to chapter IV of the 1999 Constitution.<sup>62</sup>

## 4 Opportunities for realising economic, social and cultural rights

In this section, we explore opportunities for realising economic, social and cultural rights in Nigeria. In this regard, we shall consider the current constitutional review process; the clamour for a freedom of information law; legislative action; and citizens' education, empowerment and mobilisation.

### 4.1 The constitutional review process

Nigeria's bi-cameral legislature, comprising the Senate and House of Representatives, has a constitutional mandate to amend the Constitu-

<sup>58</sup> Sylvester Onu J 53 lines 30-35. He also referred to the decision of Ogundare J in *Abacha v Fawehinmi* SC 45/1997 <http://www.nigeria-law.org/General%20Sanni%20Abacha%20&%20Ors%20%20V%20%20Chief%20Gani%20Fawehinmi.htm> (accessed 22 October 2009), wherein he echoed the provisions of sec 12 that 'an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly'.

<sup>59</sup> See art 27 of the Vienna Convention on the Law of Treaties, 1969, referring to justification for failure to perform a treaty.

<sup>60</sup> n 58 above.

<sup>61</sup> n 58 above, 4.

<sup>62</sup> See judgment of O Achike J in *Abacha v Fawehinmi* (n 58 above) 20. See also *Oshevire v British Caledonian Airways* (1990) 7 NWLR Part 163 489 and *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR Part 498 124.

tion.<sup>63</sup> In furtherance of this mandate, both houses have attempted a review of the military-imposed Constitution of 1999 many times. Unfortunately, every attempt has failed. Its current attempt presents an opportunity for legislative proposals to place economic, social and cultural rights on a firm footing. To ensure equality of all categories of rights under the Constitution, it might be necessary to merge all rights under a single chapter in the Bill of Rights and to vest jurisdiction over a violation or threatened violation of these rights in the courts. This way the challenge of justiciability will be laid to rest. Concomitant to providing access to courts for violations of economic, social and cultural rights is gaining access to information necessary to evaluate government's performance in this critical area.

#### 4.2 The debate on access to information

The journey to an access to information regime in Nigeria began ten years ago with the submission of a bill on the subject to the National Assembly. Unfortunately, Nigerians are yet to enjoy freedom of information. Although this significantly violates the promises of past and current governments, it presents an opportunity to litigate existing legislation guaranteeing access to information, such as the Environmental Impact Assessment Act,<sup>64</sup> with a view to forcing the relevant institutions to open up the public debate. Specifically, it provides a latitude for citizens to interrogate government income and expenditure with a view to ensuring that needs are met in timely fashion.

#### 4.3 Legislative action

Item 60 of the Second Schedule to the Constitution empowers the National Assembly to establish and regulate authorities of the federation or any state 'to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'. This presents an interesting opportunity for the legislature to hold the executive accountable for steps taken to progressively realise economic, social and cultural rights. The Bar Association should engage

<sup>63</sup> Sec 9 of the 1999 Constitution invests the National Assembly with this mandate.

<sup>64</sup> Cap E12, Laws of the Federation 2004. The Act sets out general principles, procedure and methods to enable the prior consideration of environmental impact assessment on certain public or private projects. Sec 2(1) provides: 'The public or private sector of the economy shall not undertake or embark on or authorise projects or activities without prior consideration, at an early stage, of their environmental effects.' The Act enjoins the relevant agency responsible for the environment to 'give an opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity' before it gives a decision on any activity to which an EIA has been produced (sec 7). Furthermore, the Act mandates the agency to publish its decision in a manner that members of the public can be notified (sec 9(3)). These sections provide a veritable opportunity to challenge a denial of access to government-held information and should be explored to broaden existing interventions.

in legislative advocacy to ensure that the National Assembly takes the necessary steps, failing which it should invite the courts to compel the assembly to perform its lawful duties as a public institution.

#### 4.4 Education, empowerment and mobilisation of citizens

NGOs and the Bar Association owe a sacred duty to Nigerians, namely, the duty to educate, empower and mobilise them in order to take positive action towards realising their full potential. At the heart of the pervasive poverty and almost absolute disregard for the economic, social and cultural rights of citizens are ignorance and powerlessness. Public advocacy events directed at equipping the rural and urban poor with the requisite skills to interface with government and, more importantly, demand good governance, are crucial to sustaining Nigeria's fledgling democracy. To ensure success and sustainability, it is necessary to equip the lawyers themselves. Consequently, the teaching of human rights law should be made a compulsory course in the third or fourth year programme of law faculties across the country. For lawyers, the continuing legal education programme of the Nigerian Bar Association should aim to provide a minimum of four hours of human rights training per year.

### 5 Conclusion

Even the most advanced economies fail to place a high premium on economic, social and cultural rights for reasons previously discussed. Whilst this may be acceptable, to a very limited extent, in those countries because of their robust social welfare programmes,<sup>65</sup> it is absolutely unacceptable to accord economic, social and cultural rights less than equal status with civil and political rights in countries such as Nigeria. In this article, I have identified the challenges as well as opportunities for realising this specie of rights. However, it is important to note that only through the collaborative efforts of the three arms of government – executive, legislative and judicial – as well as civil society, including the Bar Association and other interest groups, will economic, social and cultural rights be realised and sustained. In the words of Bhagwati J:<sup>66</sup>

The task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multidimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective.

<sup>65</sup> See SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177.

<sup>66</sup> *Peoples' Union v Union of India* (n 45 above).