

INHIBITIONS TO THE ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS IN  
THE UK AND NIGERIA: A STUDY OF TWO WORLDS.

By

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## **Abstract**

This research analyses the socio-legal approaches taken to realising socio-economic rights (SER) in Nigeria in comparison to the UK, within the sphere of international human rights jurisprudence. The implementation of SER is a much-debated issue in human rights practice by academics from various disciplines, and there is a plethora of objections to SER being described as rights in the first place, not to mention their being justiciable. This aptly captures the situation in Nigeria and the UK. This position is informed by the history of SER as some states regard SER as nothing but pious declarations, and any sort of judicial ‘interference’ in the enforcement of SER is criticised as tying the hands of governments with unrealistic commitments by those (courts) who lack the democratic legitimacy and institutional capacity to make such decisions. However, I argue that the involvement of the courts can help shape social and public policy in order to realise SER. And how would the judiciary go about doing this, without ‘encroaching’ on an area that is widely thought to be the exclusive preserve of parliament and the executive? I examine this, drawing on perspectives from Nigeria and the UK.

Because of the expansive scope of the subject of SER, the focus of this research is limited to the rights to work, housing and healthcare in Nigeria in comparison to the UK. I have chosen these rights because it can be argued that these three set of rights necessarily encompass the other aspects of SER and bear vital linkages to them. The framework and standard of measurement for these rights are set in Articles 6 (work), 11 (housing) and 12 (healthcare) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) being the primary source of this research.

To aid my analysis of these rights, I draw on the provisions of regional human rights legislation such as the African Charter, and the European Convention on Human Rights. These together with the literature on these rights are then integrated with related country-specific legislation on the above rights. Through this process, I have been able to generate and analyse common themes by seeking the factors that are responsible for the various approaches to the realisation of SER in both jurisdictions.

Although the UK and Nigeria have ratified the ICESCR, they are yet to incorporate ICESCR rights into their national laws. Despite this similarity, their approach to the realisation of SER from an international perspective does take on different pathways. This research does not seek to ask why these differences in approaches occur but aims to identify and analyse common

themes present in SER' theory and practice in both jurisdictions with the aim of providing an original academic contribution to the ongoing discourse of SER enforcement in both jurisdictions, given the increase in rights-based approaches to social policy.

Finally, adopting Henry Shue's idea of basic rights, I argue for the streamlining of the rights in the ICESCR through the process of a minimum core for SER which I believe will be more effective in the realisation and enforcement of SER in the UK and Nigeria.

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## **LIST OF ABBREVIATIONS**

ACHPR	African Charter on Humans and Peoples' Rights
AU	African Union
CDC	Constitutional Drafting Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Courts of Human Rights
ESC	European Social Council
EU	European Council
HRA	Human Rights Act
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
NIC	National Industrial Court
SER	Social and Economic Rights
TEU	Treaty on the European Union
UDHR	Universal Declaration on Human Rights
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
WHO	World Health Organisation.

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## Chapter one

### 1.1. Introduction

#### 1.1.1 Research Context

This research work is a comparative critical analysis of the conceptual themes and theories relevant to the protection of social and economic rights (SER) and how these themes and theories affect SER practice in Nigeria and the UK.<sup>1</sup> The protection of SER is a much-debated issue that has attracted attention over the years from a myriad of disciplines.<sup>2</sup> The use of the word ‘protection’ here is not restricted to court given decisions only, as there is no illusion about the practical difficulties involved in the use of this method alone. However, on a much broader scale, the enforcement of SER continues to be a much-debated issue in human rights jurisprudence and practice. This stems from the nature, scope and concept of SER especially as it affects a country's human rights norms and practices within a domestic context. The debate raises the question as to whether SER are valid and claimable rights, and what impact their enforcement could have on the legitimate roles and duties of a state? The relevant arguments and counter-arguments regarding the validity of SER as claimable rights are covered in chapter three of this research.<sup>3</sup> A thorough examination of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is the world’s first formalised document on SER, and (for obvious reasons –the take-off point of this research) reveals the subjective nature of its provisions. For instance, article 2(1) provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measure.<sup>4</sup>

The above provision opens itself to a range of conflicting interpretations and derogations because of the panoramic language in which it is couched, a situation that has made it convenient for member states such as Nigeria and the UK to decide the extent to which they

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<sup>1</sup> Reference to the UK in this thesis is, unless stated otherwise, a reference to the law as it applies in England and Wales.

<sup>2</sup> James Griffin *On Human Rights* (OUP 2008) 14-15.

<sup>3</sup> See section 3.4. pg. 46.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, 3.

are willing to protect the rights provided in the ICESCR within their jurisdictions, and this can create the problem of having SER that are weak in national legal systems. Sen captures this problem quite graphically when he says 'the legitimacy of including these rights within the general class of human rights has been challenged through two specific lines of reproach, which I shall call respectively the institutionalisation critique and the feasibility critique'.<sup>5</sup> The above descriptors in Sen's illuminating exposition, ("institutionalisation" and "feasibility" critiques) are central themes that feature in the analysis of the rights discussed in this research, therefore, nothing further need be said about them at this stage, apart from mentioning that these descriptors encapsulate a vast range of issues in the enforcement of SER discourse not only at the international scene but also in the two countries of interest, because the issues contained in this research bear elements of international human rights law and hence the comparative approach adopted in carrying out this research.<sup>6</sup>

In terms of the protection of SER, the UK and Nigeria provide what one might describe as being on either extreme of a pole. Whilst the UK relies mainly on judicial interpretation and reviews of the acts of public authorities, Nigeria on the other hand, has a robust protection and enforcement mechanism in that not only does it rely on the judicial review of the acts of public bodies, but also has about two chapters of its constitution devoted to human rights ostensibly to highlight the importance of human rights in the national legal system. This is characteristic of constitutions of many developing nations, more often than not as a mere display of what could be called false nationalism; whereas in jurisdictions such as Denmark and Sweden, such things as judicial review or constitutionalisation of rights are not popular,<sup>7</sup> and yet the people of these countries have witnessed a higher standard of living with access to more than basic standards of living which are not found in countries with a robust framework for the enforcement of SER such as South Africa and Nigeria.<sup>8</sup> This underscores the point that courts alone cannot achieve the enforcement or realisation of SER. Furthermore, as exemplified by the experience of Nigeria, the assumption that SER is purely a matter for the courts to decide has created unrealistic expectations of judges and perhaps unfortunately drawn the attention away from the need for the executive and legislature to make stronger efforts to realise SER.

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<sup>5</sup> Amartya Sen 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy & Public Affairs* 315, 346.

<sup>6</sup> Henning Hahn 'Justifying Feasibility Constraints on Human Rights' (2012) 15 *Ethic Theory Moral Practice* 143.

<sup>7</sup> See Ran Hirschl and Evan Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities' in Campbell T and others (Eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011) 213-214.

<sup>8</sup> See generally Mike Tushnet, *Weak Courts, strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2007) 211-212.

### **1.1.2. Research Aim**

The overarching aim of this research is to compare how well Nigeria and the UK protect the key SER of work, housing and healthcare both in comparison to one another and as against relevant regional and international human rights standards especially the ICESCR.

### **1.1.3. Research Questions**

- a. Can a case be made for the recognition, implementation and enforcement of SER and, if so, to what extent should they be recognised and protected in both jurisdictions?
- b. What, if any, are the domestic socio-legal frameworks for protecting the key ICESCR rights of work (article 6), housing (article 11) and health care (article 12) in both jurisdictions? And are these sufficient to implement and enforce SER in both jurisdictions?
- c. Can it be argued that SER are universally applicable to humans everywhere, and if this is true, how should the UK and Nigerian courts apply universal SER principles to local situations?

### **1.1.4 Research Focus**

SER theory and practice as an aspect of academic endeavour is quite wide and multidisciplinary and would require more than the remit of a singular PhD thesis to fully examine, more so when the issues to be examined are of a comparative nature. As a result, the focus of this research is specifically on the rights to health in chapter four, adequate housing in chapter five and work in chapter six in the UK and Nigeria, especially as it could be argued that these rights necessarily encompass the other aspects of SER especially as provided in the ICESCR. Furthermore, it can be contended that these rights constitute exemplars of SER and bear vital linkages to other SER. The focus on these rights will not have any negative impact on the scope of this research or its outcome, as an examination of these rights especially as contained in the ICESCR and Human Rights instruments in both countries will show that the provisions of articles 6, 11 and 12 of the ICESCR are interlinked.

In line with the research focus, the pertinent sections of the ICESCR will be discussed and analysed as they apply the UK and Nigeria throughout this research. Also, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) will be considered in order to explain their connection to the rights in the ICESCR. Consideration of these legislation particularly the ICESCR, however, does not in any

way presuppose that human rights did not exist in some form before 1948 when the UDHR was adopted. Indeed, Bill of Rights already existed as far back as 1789 in the US and 1791 in France, and even the English Magna Carta dates from the 13th C.

With regards to the UK, the relevant regional and state human rights legislation have been analysed alongside the ICESCR to see how well they interrelate and more importantly to see if they meet the standards envisaged under the ICESCR. I have also discussed the relevant articles of the European Convention on Human Rights (ECHR), the European Social Charter (ESC) and the Charter of Fundamental Rights of the European Union (CFREU) Other relevant legislation includes the Human Rights Act 1998, the Housing Act, the NHS Act 2006, the National Health and Social Care Act 2012, the Employment Rights Act 1996 and the Equality Act 2010. These are analysed in more detail in chapters four to six of this research.

From the Nigerian perspective, the Nigerian constitution 1999 (as amended), the National Health Act 2014, the Labour Act 2004, the National Housing Fund Act, the African Charter (Ratification and Enforcement) Act and the Land Use Act 1981, the Land Use Act 1979 are also critically examined in chapters 4-6 of this research. Additionally, the relevant articles of the African Charter on Human and Peoples Rights (African Charter) which is the main regional human rights instrument have been examined in relation to SER practice in Nigeria. Special focus is placed on articles 15, 16, 20, 22, 24 of the African Charter because these articles among other things bear direct relevance to the rights to health, adequate housing and work. Another useful source of doctrinal and comparative analysis is the 2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa, which seeks to further strengthen the provisions of the African Charter and provide guidance for African states in enforcing SER. Consideration of these international, regional and state legislation will be buttressed with decided cases that are relevant to this research.

This research also examines the role of state institutions such as the courts, justice systems and the international safeguards provided for the realisation and protection of SER in the UK and Nigeria. Aside from the foregoing, the research also critically evaluates how the legal obstacles with regards to the implementation of SER might be overcome. The process of examining the above legal sources will greatly help in identifying and streamlining the issues involved in this research. This will then be integrated to enable a comparative discourse of the protection of SER in the UK and Nigeria.

### **1.1.5. Structure of the Thesis**

As already mentioned, this research aims to undertake a comparative analysis of how well Nigeria and the UK protect the key SER of health care, housing and work both in relation to one another and against relevant regional and international human rights standards set in the ICESCR. To achieve this, this research is written in seven chapters. Chapter one deals with the introductory aspects of the research. Chapters two and three are on the themes and theories relevant to the debate on the implementation of SER, whilst chapters four to seven form the main part of the research.

In this chapter, the context of the study is set with a focus on the aim of the research as well as its methodology. Chapter two opens with a preliminary consideration of the relevant themes such as universalism and relativism in SER debate which have continued to impact on the actual practice of SER in the UK and Nigeria. The focus is on issues which are considered particularly germane in considering the role of the court and human rights policy in the two systems. In chapter three, the focus shifts to the discussion of the justificatory theories of rights. Specifically, the will and the interest theories of rights are considered within the Holdfeldian analytical framework of rights and duties. These chapters are written to enable an understanding of the philosophical and foundational basis for SER and the theories that underpin them.

Chapter four begins the main part of the research. The chapter provides a detailed exploration of the right to health care under article 12 of the ICESCR and how well the parameters or standards set by article 12 of the ICESCR are being met by the UK and Nigeria. These parameters are the obligations to respect, to protect and to fulfil SER. These obligations require a state to make the right to health care services available, accessible (including affordability), acceptable and of good quality. From the analysis of these parameters in the ICESCR and the reality on ground in terms of accessing the right to health care, the question is asked whether any state such as the UK or Nigeria can actually guarantee a right to health, hence this research's preference for the right to 'health care' in place of the right to 'health' which is contained in article 12 of the ICESCR. The chapter concludes with a comparative analysis of the right as practised in both Nigeria and the UK and then goes on to consider existing relevant national and international efforts aimed at promoting the right.

Chapter five contains a detailed analysis of the right to adequate housing under article 11 of the ICESCR, which is an all-encompassing article because it contains a cluster of other SER.

However, the chapter focuses on the right to adequate housing and how the anticipated standards set in the ICESCR are being met by the UK and Nigeria. Again, this is achieved by means of a comparative analysis of the right as practised in the UK and Nigeria in the light of government policies and some decided legal cases that may have implications for the right to housing. The role of culture in meeting housing rights and how this plays out in practice are also examined. More importantly, a critical analysis of the current housing rights legislation in both jurisdictions is examined under the theme of security of tenure which the author finds to be one of the most crucial elements in housing rights jurisprudence in both countries. As a general rule, there is no enforceable right to housing in the UK and Nigeria, but the work of regional courts such as the European Court of Human Rights (ECtHR), African Commission and the African Court on Human and Peoples' Rights in trying to extend the scope and application of the right to housing in both countries is extensively examined.

In chapter six, the research considers the right to work in the light of article 6 of the ICESCR. It begins by distinguishing between the 'right to work' and 'rights in work' to ensure that the province of the right to work is not conflated with that of 'rights in work' even though it must be admitted that the distinction is often a difficult one to draw. This is because the right to work is one of the most instrumental rights considered in the ICESCR. From there, it moves on to discuss the implications of article 6 in both jurisdictions. Different employment models such as zero-hours contract, discriminatory employment practices and regulations in both jurisdictions are analysed as well as compared against each other to see what benefits they could bring to both jurisdictions, or how they could be better implemented. Because of the ever-changing nature of work, especially in the face of growing technological advances in automation and communication, the chapter also experimented with the idea of an unconditional right to basic income and whether this could be the direction of travel in future with regards to the right to work especially in the face of automation and rising unemployment.

A theme that runs through my discussion of the rights contained in chapters 4-6 of this research, is the idea of the implementation of a minimum core content of SER which would in turn give rise to state obligations in respect of the rights considered in this research. I argue that regardless of national wealth, states must be able to meet their obligations of the minimum core of these SER. Furthermore, I argue that universal minimum core obligations in respect of each SER can only be achieved through a streamlined application of the provisions of the ICESCR. I elaborate on the idea of the minimum core in chapter seven by creating a model for the application of the minimum core principle in SER jurisprudence. The chapter also contains a

summary of the research undertaken and the details of the main themes and insights that have emerged from the study. Apart from these, the chapter also contains the original contribution this research has made to knowledge.

## **1.2. Research Methodology**

### **1.2.1. Doctrinal Legal Research**

This research employs the doctrinal legal research methodology for reasons explained at 1.2.2. It is primarily library based, and no fieldwork has been carried out as part of it. The research places heavy reliance on UN, EU, Council of Europe (CoE), AU and country (the UK and Nigeria) specific legislation, and decisions of the relevant international, regional and state courts as sources of primary data. Also, books, historical data, journal articles, case law analysis on the subject matter of the research are reviewed as secondary data.

The research uses the comparative approach method to aid the primary research methodology in order to highlight and analyse emergent themes from the research. This approach affords the author the freedom and flexibility to critically examine and analyse the application and workings of the topical issues involved in this research. Eberle<sup>9</sup> has identified four stages of comparative research method, which it is submitted provides a useful guide for carrying out this research. The four stages and how this research has achieved them are briefly described below:

- a. 'to determine the legal issues clearly, objectively and neutrally.' (the protection of SER in Nigeria in comparison to the UK as envisaged under international law such as the ICESCR).
- b. 'analyse the law as it is expressed physically and realistically, in words, action, or orality.' (in the case of the UK, analyse relevant Acts of Parliament such as the Housing Act 1985, the Employment Rights Act 1996, the Human Rights Act 1998, the NHS Act 2006 and the National Health and Social Care Act 2012 amongst others. For Nigeria, the following legislation have been analysed; the Land Use Act 1979, the African Charter (Ratification and Enforcement) Act 1983, the National Housing Fund Act 1992, the Nigerian constitution 1999, the Labour Act 2004 and the National Health Act 2014, amongst others).

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<sup>9</sup> Edward Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) Washington University Global Studies Law Review 445.

c. 'examine how the law actually operates within a given culture' and in this case, UK and Nigeria. (this is sourced from decided cases and major statements of the law in both jurisdictions on the rights adumbrated above).

d. assemble identified issues and conclude with comparative observations that can provide the relevant insights into the legal systems of the UK and Nigeria, with reference to SER under international law.

Judging from the foregoing, one could argue that the essence of comparative law is not solely to compare the law of one country against that of another, rather it is to consider the similarities and differences between such legal systems and then using these comparisons to understand the content and range of the legal concept under observation. Using this method to complement the doctrinal research methodology enables this research to grasp the workings of SER in Nigeria and the UK, their content, meaning, and application. Here, the attention will be on the relevant law as written, stated or otherwise applied.<sup>10</sup>

### **1.2.2. Justification of Research Methodology**

The research raises an important methodological question as to the choice of the methodology used – whether it is appropriate and adequate. Below, I analyse the suitability and adequacy of the research methodology, providing in the process a justificatory basis for choosing the doctrinal research methodology.

In contemporary legal research, there seems to be an ever-increasing debate on the appropriate use or adequacy of applying doctrinal research method as the dominant method of doing legal research. According to McConville and Wing,<sup>11</sup> legal research methods are mainly divided into doctrinal and non-doctrinal research. Other scholars like Kissam<sup>12</sup> and Palmer<sup>13</sup> have described these methods as the classical/traditional and empirical methods respectively. Non-doctrinal research can be qualitative or quantitative whilst doctrinal is qualitative since it does not involve statistical analysis of data. There is a third type of legal research methodology known as the empirical legal research methodology. Because of the need for the law to connect with

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<sup>10</sup> Ibid 460.

<sup>11</sup> Mike McConville and Hong Wing, 'Introduction and Overview' in McConville M and Chui WH (eds) *Research Methods for Law* (Edinburgh University Press 2007) 1.

<sup>12</sup> Philip Kissam, 'The Evaluation of Legal Scholarship' (1988) 63 *Washington Law Review* 221.

<sup>13</sup> Vernon Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 *American Journal of Comparative Law* 276.

social and economic institutions both at the state and international levels, there has been the increasing use of empirical legal research method which involves working with disciplines such as economics, sociology, medicine just to mention a few. This approach has been described as interdisciplinary or multidisciplinary because it relies more on the interpretative effects of the law, unlike doctrinal methodology which Coomans and others<sup>14</sup> argue has a risk of being disconnected from reality because it makes implicit assumptions about the law without going further to determine their reality on the ground. I do not entirely agree with their assessment of doctrinal legal research because it gives the impression that doctrinal legal research methodology lacks the material connection between law and practice, something that could detract from the reliability of doctrinal legal research methodology. However, there is indeed some validity in their assertion, especially if it is the case that some researchers already know the conclusions they are likely to reach in their research, and therefore would not want to use a research methodology that could have a negative impact on such conclusions. There is, therefore, the need for a sound methodology that can be ‘applied carefully, neutrally, and vigorously so that ... law can fulfil its mission as a critical legal science’<sup>15</sup>, and doctrinal legal research methodology continues to be a veritable and time-tested tool for legal scholarship. One of the obvious characteristics of this method of legal scholarship is that it helps the legal researcher to preserve the legalistic flavour of their research and to lay the theoretical foundations for it. Nowhere is this seen more than in the area of interdisciplinary or comparative law research which would often involve a combination of different research methodologies. Such complementarity will help in no small measure in increasing the validity and credibility of the research conclusions.

### **1.3. Comparing the UK and Nigeria - Contribution to knowledge**

#### **1.3.1. Reasons and Relevance of comparing different legal systems**

This section explains the uniqueness of this research work, especially as it could be argued that the UK and Nigeria do not belong to the same legal family, and that comparing two things presumes a reasonable degree of a sameness, thus giving the impression that in comparative

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<sup>14</sup> Coomans Fons and others, 'Methods of Human Rights Research: A Primer' (2010) 32(1) Human Rights Quarterly 179.

<sup>15</sup> (n9) 475.

law studies, one cannot compare 'incomparable', because to compare a thing to another, presumes some degree of sameness.

The above reflects a point of disagreement in the field of comparative law studies as comparative law practitioners and academics<sup>16</sup> are often broadly divided as to what purpose a comparative law research endeavour could serve. The views on this subject matter are as one would expect, divergent and profuse. However, it will be enough for the moment to say that these views are largely coloured by one's standpoint on whether the aims of comparative law research should be to produce a universal or global legal order or one that is relative to culture and place of origin of such law. According to Orucu,<sup>17</sup> the field of comparative law is not just about discovering resemblances between similar phenomenon, for it is not similarities, but differences that help to facilitate and enhance the quality of comparative research. Legrand<sup>18</sup> argues in favour of this position. He asserts that sameness across different laws excludes, albeit artificially, epistemological dimensions from the analytical framework of comparative law. He further argues that sameness can end up making comparative law a pseudo-scientific exercise, existing only in a vacuum and has no connection with the country or place of origin the law being compared. The position taken by Orucu and Legrand addresses the argument often put forward amongst some experts of comparative law,<sup>19</sup> who say that comparative law research can only be carried out between jurisdictions of similar cultures, political and legal systems, geographically proximate and at the same level of development. Even though the author does not support the position that for legal systems to be compared they must be similar, there is, in fact, a sizeable degree of sameness between the legal system of the UK and that of Nigeria. A lot of the laws in the Nigerian legal system were transplanted from the UK's legal system to Nigeria during the colonial era so that despite the fact that Nigeria and the UK are on different continents with a largely different legal and political systems, there has been and continues to be a lot of English law influence on the Nigerian legal system. Currently, English law is one of the sources of Nigerian law. Section 32 of the Nigerian Interpretation Act<sup>20</sup> is instructive on the above. It provides:

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<sup>16</sup> Peter Legrand, 'Comparative Legal Studies and the Matter of Authenticity' (2006) 1(2) *Journal of Comparative Law* 366.

<sup>17</sup> Esin Orucu, *The Enigma of Comparative Law* (Brill Academic Publishers 2004) 34.

<sup>18</sup> Peter Legrand, 'Comparative Legal Studies and the Matter of Authenticity' (2006) 1(2) *Journal of Comparative Law* 366.

<sup>19</sup> Clifford Geertz, *Local Knowledge* (Fontana Press 1983) 218.

<sup>20</sup> Cap 123 *Laws of the Federation of Nigeria* (2004).

(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.

(2) Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal law.

(3) For the purpose of facilitating the application of the said Imperial laws, they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

As can be seen, judges in the Nigerian legal system can apply English laws specifically the English common law, English doctrine of equity and the statutes of general application in force in England as at January 1<sup>st</sup>, 1900 to fill in gaps in Nigerian law. This underlies the long-standing relationship between English and Nigerian law, so much so that a comparison of the protection of SER in the legal systems of both countries, such as this research seeks to do, is not only timely but appropriate, especially in a world where technology has nearly rendered geographical boundaries irrelevant, thus making it easier for legal transplantation of laws and principles from one jurisdiction to another

It should be noted from the onset that this research work does not in any way concede the superiority of one jurisdiction's law over the other, but to establish the link between both legal systems for the advancement of SER in both jurisdictions. The Nigerian legal system is to a large extent modelled after the English legal system, and as has been shown above, English law continues to be one of the major sources of Nigerian law. Indeed, a lot of the laws still existing in Nigeria today were either made during the colonial period or subsequently transplanted to Nigeria from the UK, so that in terms of comparative law relationship, Nigeria has benefited from such legal transplants, not only from England but the entire Commonwealth and other common law jurisdictions.

In view of the foregoing, this section considers the relevance of doing a comparative legal research between the UK and Nigeria. When it comes to comparative law and the issue of protecting SER, it cannot be said that one size fits all; ethnographic, economic and political

variables such as culture, the level of available resources, the needs of the citizens, the political willingness to redistribute wealth, the readiness of other actors in the political sphere of such country to obey the rule of law especially court judgements as opposed to legislative and executive action, all contribute to protecting SER and these variables have a role to play when comparing SERs in different jurisdictions. Comparative law is, therefore, a veritable tool for the development of various legal systems. Whilst one does not advocate universalism of legal system, however, an understanding of how the law works in different jurisdictions is certainly a desideratum for the development of the various legal systems of the world, and comparative law remains one of the vehicles for driving such development. In its broadest sense, comparative law as a discipline helps to understand the foreign law and the legal culture underlying such system. When this is applied, appropriately and contextually, it might help to understand one's own legal culture better, and one of the ways this can take place is through the process of comparing one legal system to another. Zweigert and Kotz<sup>21</sup> have argued that the uses of comparative law are for knowledge and understanding of the various techniques of interpreting and discovering models for preventing and solving problems. They assert that comparative law 'dissolves unconsidered national prejudices and helps us to fathom the different societies and cultures of the world and to further international understanding.'<sup>22</sup>

Furthermore, it should be noted that SER by their nature are central to the well-being of humanity, as they affect people everywhere. The same can be said for the theoretical and principal foundations of these rights and in these days of globalisation and international cooperation; a study of this nature concerning the issues involved in the protection and enforcement of SER in both jurisdictions is timely. According to Gutteridge as quoted by Orucu:<sup>23</sup>

the isolation of legal thought in national watertight compartments has always seemed to me to be one of the factors which is most prolific in producing that frame of mind which leads to a spirit of national egotism. We have too much to learn from one another in a legal as well as other departments of human activities, and it is, in a sense, a reproach to the lawyers of all nations that they

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<sup>21</sup> Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (2nd edn Oxford University Press 1992) 14.

<sup>22</sup> *ibid* 15.

<sup>23</sup> Orucu (n 17) 35.

have been unable, up to the present, to arrive at the free interchange of knowledge and ideas which has been attained in other branches of learning.<sup>24</sup>

From the perspective of the ICESCR, (which itself is an agglomeration of the internal laws, norms and cultures of the various member states who are signatories to it) SER are by their nature universal, non-relational, held by all persons, and place duties on institutions. Culture more than any other real factor plays a role in adapting these rights to local realities. But in spite of this, the relationship between the state and individual arising out of the well-known social contract theory<sup>25</sup> is common to humans everywhere, whether in the UK or Nigeria; and in this day of increasing legal and cross-cultural discourse among different jurisdictions bolstered by advancement of the computer and internet, there is an emerging methodological pattern of courts using knowledge gathered from a foreign jurisdiction to provide insights which can be applied to their legal culture and local realities, thus helping to provide a different or even similar perspective that might yield a deeper grasp of their local legal principles. Therefore, this research through the instrumentality of comparative law will provide insights on both the Nigerian and UK law on the protection of SER and whether the approaches of the courts in both jurisdictions are similar, different or even adequate. For example, one of the areas that have been identified for further exploration in this research is that in the UK, the Human Rights Act 1998<sup>26</sup> (HRA) does not apply to disputes between individuals, a principle that is known as horizontality. According to this principle received into the HRA, whilst an individual might be able to bring a case against a public authority; they may not be able to do so against a private individual as a general rule. This position is clearly different from what obtains in Nigeria, where an individual according to the Fundamental Rights Enforcement Procedure Rules<sup>27</sup> can bring human rights violation cases against a public authority and or an individual. This approach or a similar one might be a worthy product for legal transplantation in the UK.

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<sup>24</sup> Harold Gutteridge, 'The Comparative aspects of Legal Terminology' (1938) 12 Tulane Law Review 410.

<sup>25</sup> The social contract is a theory that became prominent during the Age of Enlightenment. The theory explains the basis and legitimacy of state authority over the individual. Individual members of the community have consented to surrender some of their freedoms in exchange for protection of their remaining rights. The theory is relevant towards explaining certain aspects of claims and duties in SER practice. The term takes its name from a book written by the French political philosopher Jean-Jacques Rousseau in 1762 where the concept of social contract was also discussed.

<sup>26</sup> Art 6.

<sup>27</sup> Section 46 (3) of the Nigerian constitution empowers the Chief Justice of Nigeria to make rules for the practice and procedure for the High Court towards the enforcement of the fundamental rights in chapter 2 of the constitution which are wholly political rights. The current rules came in to effect on 11th November 2009.

### **1.3.2. Expected values and outcomes**

Article 2 of the ICESR prescribes the standard parameters to which all parties to the ICECSR are enjoined to pursue progressively. These standards could be referred to as the minimum threshold for the protection of SER at the international level which the UNCESCR and other regional bodies expect state parties to meet. These parameters constitute necessary standards or case studies for conducting this research on the protection of SER in Nigeria and the UK. There is no doubt that the different cultures, the level of development, and access to the justice systems in both jurisdictions will have their own impact on these parameters, but these differences where they exist have been highlighted and explored in such a way that will be beneficial to the subject of this research.

There is only a small amount of literature on Nigerian human rights law compared to UK law, especially in SER jurisprudence. There appears to be a more realistic and practicable framework both at the national, regional and international levels in the UK, compared to Nigeria's for the protection SER. This research, therefore, provides that missing link on this very important aspect of comparative analysis which will serve as a reference and a guide to policymakers, administrators and academics, especially as both countries are at different levels of socio-economic development. Furthermore, it proves to be an invaluable resource in the relatively uncharted area of comparative discourse on the UK and Nigerian human rights law; it fosters the much-needed partnership between the UK and Nigerian law not only on SER but human rights in general. As far as the author is aware, no previous academic research work of this nature has been done comparing the socio-legal inhibitions to the enforcement of SER in the UK and Nigeria. This research work will, therefore, provide an original academic contribution to the ongoing discourse of SER enforcement.

Considering the foregoing, the process of this research and the conclusions will help in understanding and developing alternative models and processes to protect SER in both jurisdictions. This might sound a little bit ambitious given the limitations of a research of this nature; however, this will be done by providing a template for augmenting known traditional approaches to enforcing these rights, not only through the courts but also by other acceptable social means and reviewing the work of other actors in the area of enforcing SER in UK and Nigeria.

## **Chapter two**

### **2.1 Relevant contemporary themes in SER debate**

#### **2.1.1. Introduction**

This chapter is aimed at identifying, the issues and themes currently dominating the debate on the protection of SER considered in this research. A discussion of these themes is particularly relevant because such discussions help to uncover the various factors that affect the nature of SER, which in turn have an impact on the approach taken by states to the realisation of the SER discussed in this research. These issues or themes will feature in the analysis of the SER discussed in this research with regards to the UK and Nigeria.

#### **2.1.2. Universalism versus relativism of Human Rights**

The first of these themes is the universalism versus relativism debate. According to Donnelly,<sup>1</sup> the question of whether human rights and by implication SER are universal or relative is the most discussed issue in human rights theory. The question is a recurring theoretical point of debate in contemporary human rights discourse. The reason for this appears to be the effect which international treaties do often have on a country's sovereignty with far-reaching implications for the conduct of national governments and their respective state institutions. A deliberate examination of the theoretical and scholarly works of leading theorists and experts in human rights on this issue reveals an eclectic mix of, at times, conflicting and overlapping opinions underpinned by various cultural, political, socio-economic and ideological considerations. Apart from these factors, there is also the role of moral philosophy in the debate, which is often used as a tool for launching various opinions depending on the theory one espouses. However, with reference to this research work, and given the width and diversity of opinions on the universalism versus relativism debate, it is instructive to streamline the salient issues in the debate which are relevant and applicable to human rights jurisprudence in Nigeria and the UK.

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<sup>1</sup> Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 281.

### 2.1.3. Universalism

Broadly speaking, some proponents<sup>2</sup> of what can be described as the universalist school of human rights argue that human rights are indivisible, self-evident and inalienable so that all human beings irrespective of where they are in the world are born free and equal in dignity and rights as envisaged in the UDHR, the International Convention on Civil and Political Rights (ICCPR) and the ICESCR, as well as other international human rights instruments.<sup>3</sup> As a result, they assert that a violation of universal human rights anywhere would be a point of genuine and legitimate concern for the world, since such violations run counter to the minimum standards of human rights set by nations in the various international human rights agreements, especially the UDHR, ICCPR and the ICESCR. Although, this perspective of human rights has been strongly criticised for being a Western construct of human rights, the idea is nonetheless a good one as it provides a practical foundation for the protection of human rights especially the SER discussed in this work which in themselves if properly implemented can enhance the dignity of the individual which is central to universal human rights. According to Ghai, ‘this centrality of the human being elevates the autonomy of the individual to the highest value; rights become essentially a means of realizing that autonomy. Each individual is, in a certain sense, absolute. He or she is irreducible to another and separated in his or her autonomy’.<sup>4</sup> By way of commentary, it should be mentioned that the autonomy which Ghai refers to is a much broader conception of human worth, which I think must be considered carefully because what amounts to human worth for one, might not be for the other, however, one could argue from a human rights perspective that what amounts to human worth must be something that adds value, and protects the dignity of the human person. In my opinion, dignity is an irreplaceable component of the universalism of human rights, it encompasses human worth and autonomy, and is an ever-present feature especially in SER practice. This position explains why the UDHR describes dignity as inherent in the human person. For example, a person who is suffering from mental illness could have their capacity to make rational decisions impaired by such illness and thus diminishes the level of their autonomy, however, they should still be treated with dignity regardless of their mental state and diminished level of autonomy. The concept of dignity is,

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<sup>2</sup> Flávia Kroetz, ‘Between global consensus and local deviation: a critical approach on the universality of human rights, regional human rights systems and cultural diversity’ (2016) 3(1) *Revista de Investigações Constitucionais*, Curitiba, 43.

<sup>3</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn Cornell University Press 2003) 10.

<sup>4</sup> Yash Ghai, ‘Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims’ (2000) 21 *Cardozo L. Rev.* 1095 - 1096.

therefore, one that cuts across different societies and has a unique contribution to the universal appeal of human rights.

Although some theorists<sup>5</sup> have argued that universalism of human rights is a Western construct of human rights that stemmed from the liberal political philosophy of natural rights theorists such as Locke,<sup>6</sup> I think that its prominence and widespread acceptance is more as a result of the atrocities committed by some nations during the second world war, notably Germany and Japan. Furthermore, the need to avoid such human right abuses in any future conflict situation, as well as setting forth a new universal standard of achievement for all nations of the world when it comes to human rights issues was also a factor in the rise of universalism. Therefore, I would argue that the underlying theme of universalism is the uniqueness of the human person anywhere in the world, and their right to be respected as an individual in the form of certain basic inalienable freedoms such as freedom from unlawful interference by the state, the right to private life, to own property, to contract among others.

According to Goodhart<sup>7</sup> universalists believe that there are some moral judgements that are universally valid, he further argues that the rights provided for in the UDHR and other international human rights agreements are universally valid and would apply to individuals anywhere irrespective of culture and laws of the place where they live. I agree to a considerable extent with Goodhart's view on the universal nature of human rights especially in the sphere of morality, which in my opinion, plays a key role in human rights jurisprudence of both the UK and Nigeria. For example, to deprive someone of the right to their just earnings would incur the same opprobrium in Nigeria as it would in the UK, not only because it is morally and legally wrong, but also because of the impact such deprivation would potentially have on the dignity of that person, as deprivation might affect their health and their ability to pay for their basic necessities such housing and food. And so, in that sense, it could be argued that the rights to housing and health care are of a universal nature. Donnelly defends what he refers to as the moral universality of human rights. He makes the following arguments:

If human rights are the rights one has simply because one is a human being, as they are usually thought to be, then they are held “universally,” by all

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<sup>5</sup> See generally Jack Donnelly, 'Human Rights: Both Universal and Relative (A Reply to Michael Goodhart)' *Human Rights Quarterly*, (2008) 30 (1) 194; Michael Goodhart, 'Neither Relative nor Universal: A Response to Donnelly' *Human Rights Quarterly* (2008) 30 (1) 183.

<sup>6</sup> Lewis Hinchman, 'The Origins of Human Rights: A Hegelian Perspective' (1984) 37 (1) *The Western Political Quarterly* 7.

<sup>7</sup> Michael Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' [2003] 25 *Human Rights Quarterly* 935, 940.

human beings. They also hold “universally” against all other persons and institutions. As the highest moral rights, they regulate the fundamental structures and practices of political life, and in ordinary circumstances, they take priority over other moral, legal, and political claims. These distinctions encompass what I call the moral universality of human rights<sup>8</sup>

One of the obvious implications of Donnelly's position above, is that states should not be able to hide under the cover of sovereignty, or use their laws to perpetrate human rights abuses, without attracting the concern of the international community, especially where the rights being violated are those protected under the UDHR and other international human rights laws. There are many instances where the international community has criticised nations for gross human rights violations such as we have seen in Myanmar.<sup>9</sup> The universalism theory of human rights, therefore, places the individual first before the community. The reason Pollis<sup>10</sup> gives for this attribute of universalism is that individuals have the ability to reason, and are motivated by their selfish interest and the desire for self-preservation. In view of this, national government and the relevant state institutions must act as a tempering force to ensure that individual conflicts that might arise are managed efficiently in a way that serves the common good of the state, and universalism is sufficiently able to self-regulate these potential conflicts through the normative application of universal human rights.<sup>11</sup> I find the foregoing argument made above by Donnelly, a more compelling basis for the universalism of human rights because of the factual differences in their perspectives. Whilst Pollis argues that universalism is based on selfish interest and individual self-preservation, Donnelly's is of the opinion that universalism is motivated by respect for the human person which aligns with the fundamental basis of protecting human rights i.e human dignity. This more than any other factor supports the relevance of universalism of human rights.

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<sup>8</sup> Ibid.

<sup>9</sup> Michael Safi, 'UN chief urges Myanmar to end violence as 120,000 Rohingya flee' (5 September 2017 The Guardian) < <https://www.theguardian.com/world/2017/sep/05/more-than-120000-rohingya-flee-myanmar-violence-un-says> > accessed 30 January 2018.

<sup>10</sup> Adamantia Pollis 'A New Universalism' in Pollis A and Schwab P (eds), *Human Rights: New Perspectives, New Realities* (Lynne Rienner Publishers 2000) 9.

<sup>11</sup> Luca Baccelli, 'The Logical Foundation of Fundamental Rights and their Universality' (2011) *Res Publica* (2011) 17:369, 372.

#### 2.1.4. Relativism

As with most theories of human rights, the universalist assumption of human rights has a counter side to it. This is what is known as cultural relativism of human rights. As was already mentioned in 2.1.3, the relativist school of thought, just like universalism, has within it different shades of views on human rights. The following discusses the aspects of the theory relevant to this research work.

To the cultural relativist, human rights are constructed and best understood within a cultural context. Therefore, as moral values differ significantly from one cultural location to the other, it is impossible to reach a consensus on universally recognised ideals of human rights.<sup>12</sup> Furthermore, arguments in support of cultural relativism hold that universal human rights are essentially a Western imposition on the Third World, which does not take cognisance of the various cultural, political and economic realities of non-Western societies. Whilst this sort of relativist perspective may seem a respectful position on the surface, it could, however, potentially become an avenue to justify and legitimise oppressive and discriminatory traditions all in the name of accepting human rights within a cultural concept. For example, in some cultures in Nigeria, female children do not have the right to inherit or benefit from the estate of their deceased parents. Whilst the cultural relativist would justify this as the way the people have chosen to regulate their human rights relations within the context of their culture, the universalist would think that the rules of inheritance should be the same for all human beings and should have nothing to do with some one's sex.<sup>13</sup>

The authors Scwab and Pollis<sup>14</sup> have made an insightful contribution to the debate on this theory and have also edited the works of other writers about human rights, especially as they relate to universalism and relativism. In one of their authored works,<sup>15</sup> they argue that the UDHR and the UN charter are based on a Western political philosophy which provides a particular interpretation of human rights which might not be applicable or meaningful in non-Western societies due to ideological and cultural differences. They further argue that the West dominated the San Francisco Conference where the UN was formed in 1945. According to them, the UDHR was adopted at a time when most Third World countries were still under colonial rule and on the strength of these grounds, they declared that the UDHR reflects 'a

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<sup>12</sup> Kroetz (n 2) 43.

<sup>13</sup> *Mojekwu v Ejikeme* (2000) 5 NWLR 402.

<sup>14</sup> Adamantia Polliss and Peter Schwab 'Human Rights: a Western Construct with Limited Applicability' in Pollis A and Schwab P (eds) *Human Rights: Cultural and Ideological Perspectives* (Praeger Publishers 1980) 1.

<sup>15</sup> *ibid.*

moral chauvinism and ethnocentric bias.<sup>16</sup> With respect, I do not agree with the position that international treaties and declarations such as the UDHR and the ICESCR are chauvinistic simply because the process of making them was dominated by the West without necessarily identifying any fundamental flaws. The pertinent issue from the perspective of this research is to discuss ways of effectively incorporating these ideas into local cultures to challenge oppressive or discriminatory practices that are embedded in a country's culture and I must add that oppressive and discriminatory practices occur in every society regardless of whether it is Western or not. In my opinion, it is unacceptable to deny the universalism of human rights simply on the grounds that human rights as they are known today are essentially a Western concept, even though the idea of human rights being Western is debatable.<sup>17</sup> Furthermore, it is my position that when it comes to the justification for having rights, no single philosophical or cultural interpretation can serve as the only one and underlying foundation of human dignity. According to Rawls,<sup>18</sup> it is important for people to develop an 'overlapping consensus' amongst the different interpretations of their ideas of human dignity.

Yash Ghai<sup>19</sup> opines that there are some certain aspects of the UDHR that the relativist would not argue with, for instance the relativist admits that there are indeed some rights which are inherent in human nature, but contends that such rights cannot be considered as abstractions on their own but bear vital linkages to the culture of the society, and thus the individual cannot sever such linkages or seek to subordinate the interests of the society to theirs by asserting their individuality at the expense of the group. In a similar vein, Panikkar<sup>20</sup> argues that nothing in the world can be universal, rights and values are determined from one society to another by the values and cultural perceptions of such society, and therefore the idea of universal human rights would only be possible if there exists a universal culture.<sup>21</sup> The preceding opinions sound very much like a nuanced type of universalism because to say there is no such thing as universalism appears to be a contradiction in terms since the statement that there are no absolutes is itself a form of an absolute statement. From the perspective of this research, those who argue against the universal nature of human rights overlook the impact human rights as a universal concept can have on human dignity. Universalism provides the sort of standard template to consider

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<sup>16</sup> *ibid* 14.

<sup>17</sup> Huber Wolfgang 'Human rights and globalisation – Are human rights a “Western” concept or a universalistic principle?' (2014) 55 (1) NGTT DEEL 117.

<sup>18</sup> John Rawls, *Political Liberalism*. (New York: Columbia University Press 1986) 133-172.

<sup>19</sup> Yash Ghai (n4) 1097-1098; See also Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed) *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25.

<sup>20</sup> Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?* [1982] 120 *Diogenes* 75.

<sup>21</sup> *ibid* 102.

human rights across all cultures so that assessing human rights compliance in the UK, for example, would be no different in Nigeria. So, universalism in human rights creates a common process of minimum standards for human rights practice and monitoring. Secondly, arguments against universalism by implication suggest that there could be an alternative to universalism such as cultural relativism. A close examination of cultural relativism reveals what could be described as a nuanced universalism. For example, cultural relativism assumes that in all cultures, there are some certain overlapping values that can be used to form a common foundation for human rights. The position of this research is that the end product of such a process leads back to universalism. The argument against human rights being universal runs in a vicious circle ending with propositions that bear some universal characteristics of human rights which by implication applies to SER.

Finally, on the universalism versus cultural relativism debate, it is important to note that the notions of universalism and cultural relativism do not need to be considered as mutually exclusive in practice. It is not like saying that one has to choose the side they belong once and for all, 'rather than seeing universalism and cultural relativism as alternatives to which one must choose, once and for all, one should see the tension between the positions as part of the continuous process of negotiating ever-changing and interrelated global and local norms'.<sup>22</sup> As has already been mentioned above in section 2.1.4, I would like to emphasise that attention should be focused on having a universalistic approach to international human rights whilst at the same time strengthening and focusing on the overlapping consensus between these rights instead of whether their origin is Western or not.<sup>23</sup>

### **2.1.5. Hybrid Ideas**

Apart, from these two dominant positions on the issue of a conceptual human rights theme, there are other strands of opinions which could be described as containing some elements of universalism and relativism. However, it should be pointed out this classification is quite fluid as some of the opinions expressed by these human rights theorists do not fit into any of the two views above. For instance, Donnelly<sup>24</sup> argues that there are no such thing as universal human rights. He posits that the universalism and relativism debates arose as a result of the conflation

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<sup>22</sup> Cowan Jane 'Introduction' in Jane Cowan, Marie-Benedicte Dembour and Richard Wilson (eds) *Culture and rights: anthropological perspectives* (Cambridge University Press, 2001) 6.

<sup>23</sup> Donnelly (n 5) 89.

<sup>24</sup> Jack Donnelly 'Human Rights and Asian Values: A Defense of Western universalism' in Joanne Bauer & Daniel Bell (eds) *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 60.

of human dignity with human rights. For him, human rights are historically a Western concept, but human dignity is a universal value which had existed in other societies apart from the West. He further asserts that what existed in non-Western societies was not human rights being properly so called, because these rights were not innate, but only earned or granted as members of a group.<sup>25</sup> It is submitted that this position by Donnelly is quite confusing because it goes no further than creating a superficial difference between human rights and human dignity. Secondly, Donnelly in his theory of inalienable and innate human rights test does not provide us with any useful or objective parameters for measuring or determining what amounts to human rights or not. It seems that the only test here is geographical, i.e. the so-called point of origin of such rights, which does not satisfy the requirement for arriving at such conclusion. Goodhart<sup>26</sup> is of the opinion that Donnelly's conception of human rights is narrow and problematic and to say that human rights are distinctively liberal is a misreading of the Lockean concept of natural rights which is that the highest priority be given to individual self-preservation and whatever is necessary to achieve the preservation of the individual, without also mentioning that Locke also advocated for the freedom and equality of all individuals, a position that undermined justifications for social hierarchies and natural authority.<sup>27</sup> He (Goodhart) goes further to offer an entirely different but interesting viewpoint to the discourse on this aspect of human rights. According to him, human rights are neither universal or relative; but that their universal acceptance is a character of their appeal which derives from their legitimacy as an effective response to domination.

As scholars, we have worried too much that human rights might be relative and strained too hard to prove them universal. Leaving behind universalism and relativism improves the precision of our analysis and advances our theoretical understanding of human rights, emphasizing their global appeal makes clearer the bases of their legitimacy and insulates them from critiques of their misuses while simultaneously making those critiques the impetus for an ongoing reformulation of rights that adds to their

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<sup>25</sup> See Josiah Cobbah 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) Human Rights Quarterly 314, for what he calls the African perspective to this debate; and for a contrary opinion, see Oritsegbubemi Oyowe 'An African Conception of Human Rights? Comments on the Challenges of Relativism' (2014) 15 Hum Rights Rev 329.

<sup>26</sup> Michael Goodhart 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 (4) Human Rights Quarterly 944.

<sup>27</sup> John Locke *The Second Treatise of Civil Government*  
<<https://www.marxists.org/reference/subject/politics/locke/ch08.htm>> accessed 30 January 2019.

inclusiveness and generality. This is a virtuous circle: as human rights become more appealing, they become more effective and vice versa.<sup>28</sup>

The above quote from Goodhart brings us back to what was said earlier under the section on cultural relativism on the need to focus on what could be achieved through the building of healthy global norms around universal human rights. It further emphasises the need to focus on building consensus and making rights effective by enhancing their appeal. One of the ways this could be achieved without prejudice to universalism is cultural pluralism.<sup>29</sup> As a paradigm, it assumes that in all cultures there are some certain overlapping values that can be used to form a common foundation for human rights. It is claimed by the proponents<sup>30</sup> of this theory that cultures have valuable insights and by seeking intercultural understanding of how each culture views rights would lead to a new form of universalism. This idea on the face of it seems attractive and seeks to build a consensus of cultures, which will lead to a new form of universalism according to the exponents of this view. However, the danger in this proposition is that it may lead to friction between cultures and promote mutual distrust, especially in today's world where there is increased mobility of people from diverse cultures as well as the impact of globalisation.<sup>31</sup>

### **2.1.6. The relevance of the universalism versus cultural debate**

It is instructive to highlight the relevance of the universalism versus cultural relativism debate to this research and human rights practice generally. The analysis of the various opinions point to the central theme of the role of government in any country for the realisation of human rights and in the case of this research the protection and enforcement of SER in Nigeria and the UK, particularly those emanating from the ICESCR. From the nature of the debate, one of the obvious implications of the application of international human rights in countries is the impact they have on the sovereignty of any nation because the nature of human rights as discussed in this research work is necessarily one of an international character. Human rights as practised

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<sup>28</sup> Goodhart (n 7) 193.

<sup>29</sup> See generally Charles Taylor, 'Conditions of an Unenforced Consensus on Human Rights' in Joanne Bauer & Daniel Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press 1999 ) 124.

<sup>30</sup> Federico Lenzerini *The Culturalization of Human Rights Law* (OUP 2014) 246; Felipe Gómez Isa, Cultural Diversity, Legal Pluralism, and Human Rights from an Indigenous Perspective: The Approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights (2014) 36 *Human Rights Quarterly*, 722.

<sup>31</sup> Helen Quane 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?' (2013) 13(4) *Oxford Journal of Legal Studies*, 675.

in nations of the world are shaped by the normative character of culture based on international usage, and countries are often too wary to cede an aspect of their sovereignty on the altar of international human rights. Goodhart and Taninchev<sup>32</sup> examine this development in the normative character of international human rights legislation and identifies a new bloc of opposition to the idea which they describe as sovereigntist. The sovereigntists' opposition is hinged on the argument that the application of international law in nations erodes the idea of popular sovereignty and is undemocratic because such laws are made by entities outside the constitutional framework, which are not directly accountable to the peoples of such nation. Again, this line of thought amounts to oversimplifying the process by which international laws are made in relation to states. There are many ways under international law by which member states could vary or exclude the legal effect of a treaty they have ratified<sup>33</sup> and although not very common with human rights treaties, to say the implementation of international human rights law is undemocratic in a ratifying state party is an error of analysis. The status and enforcement of such treaties in each national jurisdiction will depend on a country's legal system, in particular, its mode of reception of international law treaties whether it be dualism or monism. This may, at first sight, seem insignificant, but with most of the sources of SER having their origins in international and regional human rights treaties, this often becomes an issue, and at times nations may want to exploit this lacuna in their laws to shirk their obligations under international law. The Nigerian case of *Abacha v Fawehinmi*<sup>34</sup> provides a classic example of this. Finally, it should be stated that for international human rights including SER to be effective at the state level, obligations of the states under such international human rights treaties must also be reflected in the contents of the municipal law. The point is now well made in international law that countries should not rely on their local laws to avoid their obligations under international law,<sup>35</sup> thus underlying the universal nature of the SER. The universalism versus cultural relativism debate carries on in chapters 4, 5 and 6 of this research where I analyse the specific application of the universalist versus relative debate in considering the nature of the rights to work, adequate housing and work. I have also examined how these arguments can affect the application of the minimum core approach taken by the UNCESCR to the progressive realisation of SER.

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<sup>32</sup> Michael Goodhart and Stacy Taninchev 'The New Sovereigntist Challenge for Global Governance: Democracy without Sovereignty' [2011] 55 International Studies Quarterly 1047, 1049.

<sup>33</sup> Article 2 of the Vienna Law of Treaty.

<sup>34</sup> (2001) AHRLR 172; see also UN Committee on Economic, Social and Cultural Rights (UNCESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24.

<sup>35</sup> Arts 26 and 27 Vienna Convention on the Law of Treaties.

## 2.2 Judicial Enforceability of SER

According to Scheppele there exist a plethora of objections to SER being described as rights in the first place not to mention the element of enforceability,<sup>36</sup> including that SER are not the subject of precise definition or universal agreement. Other scholars<sup>37</sup> who agree have gone further to say that judicial ‘interference’ in the enforcement of SER does no more than to tie the hands of the government with expensive and unrealistic commitments whilst hindering it from balancing the needs of other citizens with equal regards. The issues of whether SER are human rights per se, and what the role of the court should be in enforcing them are extensively dealt with in chapters four to seven of this research. One of the main lines of my argument in those chapters is that opinions against the court’s involvement in SER practice are becoming increasingly unsustainable and unhelpful to human rights practice in general because there is evidence<sup>38</sup> to suggest that at least on the practical plane, countries continue to embrace the broad underlying normative principles and philosophical basis such as the universal and legitimate basis for the enforcement of SER. The continued adoption by countries of SER instruments such as the ICESCR and other related regional human rights instruments such as the African Charter, the European Social Charter, and the European Convention on Human Rights are all signs that bid well for the enforcement of SER in those jurisdictions starting at least on the theoretical plane of signing up to actual implementation.

Closely related to the issue of enforceability of SER is the issue of justiciability because for SER to be enforced, at least from the perspective of the judiciary, then they must be justiciable. Though in the case of Nigeria and the UK, SER are not directly enforceable in courts because SER are not justiciable in both jurisdictions from the perspective of ICESCR. Justiciability enables the courts to assume jurisdiction over SER cases. It is the first stage towards judicial enforcement of SER. From a judicial point of view, justiciability of SER brings it within the competence of the court. I would argue that justiciability and enforcement are different stages of the same process because, if one were to proceed on the basis that the SER can only be achieved by a court of law, then the issue of justiciability of such rights which enables the court to assume jurisdiction and determine such rights is vital because it is an elementary principle

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<sup>36</sup> Kim Scheppele, ‘Realpolitik Defense of Social Rights [2004] 28 Texas Law Journal 1921.

<sup>37</sup> Stanley Ibe, ‘Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities’ [2010] 10 African Human Rights Law Journal 197; see also Lord Lester and Colm O’Cinneide, ‘The effective protection of Socio-economic Rights’ in Yash Ghai & Jill Cottrell (eds), *Economic, Social and Cultural Rights in Practice. The role of Judges in implementing Economic, Social and Cultural Rights* (Interights 2004) 17.

<sup>38</sup> Varun Gauri and Daniel Brinks ‘Introduction’ in Varun Gauri and Daniel Brinks (eds) *Courting Social Justice: Judicial Enforcement of Socio-economic Rights in a Developing World* (Cambridge University Press 2008) 1.

of law that a court can only act within the remit of its powers otherwise such decisions would be null and void.<sup>39</sup>

### **2.3 The attitude of domestic courts and the principle of interdependence of rights**

Another theme that has dominated contemporary SER debates is what the attitude of domestic courts should be when faced with SER enforcement issues. This question is one that features prominently in the whole of this research work and is particularly discussed in chapter seven of this work in relation to Nigeria and the UK. The answer as to what the attitude of the court should be is not as simple as it first seems, as there are varying arguments in respect of this theme. The usual focus of these arguments is as Sen puts it, the ‘institutionalisation critique and the feasibility critique’<sup>40</sup> which has to do with the competence, capacity and legitimacy of the courts to adjudicate on matters that have economic and fiscal implications, even though as the author will argue later, the courts have made decisions on civil and political rights that have fiscal and economic implications. Beyond the two lines of criticism which Sen has identified above, the research also discusses whether considerations such as ‘institutional comity’ between the executive and the judiciary plays any role in shaping the attitude of courts with reference to the UK and Nigeria, in view of the analysis of some South African SER cases.

Connected to the foregoing are issues surrounding the actual status of SER compared to civil and political rights as the two sets of human rights appear to be categorised differently in the UK and Nigeria, with civil and political rights enjoying more acceptance compared to SER. According to Steiner and others,<sup>41</sup> the UDHR did not separate or give priority to political and civil rights over SER. Indeed, since resolution 543 (VI) of 1952, by which the decision was taken to have two separate human rights covenants,<sup>42</sup> the idea of the indivisibility of human rights has been referred to time and again and the debate appears to be far from settled. However, the author agrees with Steiner that there is sufficient evidence to support the position that the rights in the ICCPR are not in any way superior to the rights provided for under the ICESCR. The interdependence and indivisibility of rights as described above is not a position that enjoys much acceptance in the UK and Nigeria’ human rights practice. One of the reasons

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<sup>39</sup> *Nigericare Dev. Co. Ltd. v. Adamawa S.W.B.* (2008) WRN (Vol. 20) 166.

<sup>40</sup> Amartya Sen 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy & Public Affairs* 315, 346.

<sup>41</sup> Henry Steiner and others, *International Human Rights in Context: Law Politics Morals.* (Oxford University Press 2007) 275.

<sup>42</sup> [The ICCPR and ICESCR.](#)

for this as it appears is that acceptance of the above principle will inevitably confer a new legal status on SER with far-reaching implications in the area of enforcement.

## **2.4 Conclusion**

In this chapter, I have identified and discussed some of the relevant themes that underline the practice of SER in countries of the world with reference to Nigeria and the UK. One of such themes was the universalism versus relativism debates and how the perceived historical origin of the theme has impacted the practice of SER in both countries of interest. Even though it has been widely argued that the origin and universalism of human rights is Western and therefore a chauvinistic attempt to foist Western cultural values on the rest of the world, I take the view that human rights, especially SER are intrinsic and universally held by all humans irrespective of their cultures and ideological persuasions. I argue that if this position of mine is true - as it indeed should be - then it is imperative for both countries, especially Nigeria to reassess the basis for the implementation of SER because such a process of reassessment will go a long way in helping to promote the realisation of SER. It could act as a catalyst in changing the attitude of public institutions such as the courts to the justiciability and implementation of SER in both jurisdictions.

## Chapter Three

### Legal and moral philosophy of SER

#### 3.1. Introduction

This chapter is aimed at examining the legal and moral constituents of human rights, with reference to SER practice. This and chapter two have been written to form a sound jurisprudential basis to enable the in-depth examination of some elements

<sup>1</sup> of SER protection in the UK and Nigeria within the framework of the ICESCR. Whilst chapter two is aimed primarily at identifying themes featuring in SER debates with particular reference to the UK and Nigeria, this chapter seeks to locate the relevant underlying justificatory theories in SER jurisprudence. However, the process of seeking an explanatory and justificatory theory of rights is itself fraught with conceptual and theoretical difficulties. Theories of rights are like a ‘runaway gun’.<sup>2</sup> They suffer from the fundamental criticism of lacking a clear connection with human rights practice.<sup>3</sup> Despite this criticism, it is submitted that theories of rights are critical to our understanding and workings of SER.<sup>4</sup> Theories of rights are like the building blocks of the rights edifice. The presence of these theories in human rights jurisprudence helps us to critique and justify the existence of SER especially at the institutional level where they could be most effective. Although these theories are largely construed in abstract terms,<sup>5</sup> they no doubt equip us with the foundational and conceptual basis for the existence of SER.<sup>6</sup>

According to the author Griffins:<sup>7</sup>

The term “human right” is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly—and not just among politicians, but among philosophers, political

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<sup>1</sup> This research focuses specifically on the right to health care, housing and work in Nigeria, in comparison to the UK. The framework and standard of measurement for these rights are set in articles 6 (work), 11 (housing) and 12 (health care) of the ICESCR being the primary source of this research.

<sup>2</sup> Existing literature on the concept and analysis of human rights is replete with various definitions of this concept. These definitions are largely coloured by the different theoretical perspectives of the authors. See generally Allen Buchanan, *Justice, Legitimacy and Self-Determination* (OUP 2004); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford UP, 2007) Tom Lowenthal, ‘The Role of Dignity in Human Rights Theory: Constituent or Teleological?’ (2015) 18 *Trinity College Law Review* 56.

<sup>3</sup> Bas De Gaay Fortman, *Political Economy of Human Rights* (Routledge. 2011) 3.

<sup>4</sup> Brown opines that the criticism against ‘fretting about the human rights project and its theoretical underpinnings’ misses the point and can eventually see a counter-productive refusal to acknowledge important difficulties faced by human rights activists. See Chris Brown, ‘Universal Human Rights: A critique’ in Tim Dunne & Nicholas Wheeler (eds) *Human Rights in Global Politics*. (Cambridge University Press 1999) 104.

<sup>5</sup> *Ibid.*

<sup>6</sup> William Edmundson, *An Introduction to Rights* (2nd edn, Cambridge University Press 2012) chap 7.

<sup>7</sup> James Griffin, *On Human Rights* (OUP 2008) 14-15.

theories, and jurists as well. The language of human rights has, in this way, become debased.<sup>8</sup>

Brown<sup>9</sup> similarly asserts that:

Virtually everything encompassed by the notion of “human rights” is the subject of controversy... the idea that individuals have, or should have, “rights” is by itself contentious, and the idea that rights could be attached to individuals by virtue solely of their common humanity is particularly subject to penetrating criticism<sup>10</sup>

Bearing the preceding statements in mind, the critical issue is whether we have rights a priori by virtue of being human.<sup>11</sup> This issue is one that is hard to justify in itself because of the themes that underlie the practice of SER in various places and cultures as was discussed in chapter two under the universalism versus relativism debate. Crucially, the missing link is some kind of theory as to why humans are of such importance that they must be afforded a certain kind of respect, e.g. by refraining from doing certain things to them altogether (torture, assault, murder), and only do certain other things within limited legal parameters (civil and political rights) and even ensure they have access to certain other things (SER). With the foregoing in mind, this chapter is written with a view to locating a theory or theories, within which the relevance of the SER discussed in this work could be explained and justified. In the search for such a justificatory theory, we must set the parameters around the importance of SER and what they could potentially achieve for society. To achieve this task, the logic behind a theory of rights must be contextualised; we must understand the form (internal structure and composition) and functions (what they actually do for us) of such theories of rights.<sup>12</sup> With respect to the relevance of a theory of human rights, I argue that to understand the internal structures of rights and their justificatory basis in any legal system, such theoretical arguments must be founded upon a rights architecture that supports and enables rights to flourish. Before delving into these in some considerable detail, it is best to set out the structure and thematic sequence of this part of the research.

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<sup>8</sup> Ibid.

<sup>9</sup> Chris Brown ‘Universal Human Rights: A critique’ in Tim Dunne & Nicholas Wheeler (eds), *Human Rights in Global Politics*. (Cambridge University Press 1999) 103.

<sup>10</sup> Ibid.

<sup>11</sup> Richard Rorty, ‘Human Rights, Rationality and Sentimentality’ (1998) 318 *Headline Series* 116.

<sup>12</sup> Mark Franke, ‘A Critique of the Universalisability of Critical Human Rights Theory: The Displacement of Immanuel Kant’ (2013) 14 *Human Rights Review* 367.

The chapter is divided into three sections. The first section (3.2), explores the outlines of the dominant and contemporary theories of rights which have helped to shape the nature of human rights discourse as they have become known today. Because of the multiplicity of rights theories and their associated concepts which can overlap and at times even conflict, it has been decided to streamline and choose the ones that are most relevant to this work. These are the Will theory and Benefit theory of rights. Although this assertion is debatable, both theories could be referred to as providing the framework for the contemporary application of rights and their impact in a legal system.<sup>13</sup> Although these theories have been known to apply to other areas of law such as contract and property law, their examination in this research is distinctively on human rights, considered from a legal and moral prism with particular reference to SER practice in the UK and Nigeria.

The second section (3.3) sees the evolution and application of the thematic outcomes from the analysis of the two dominant theories referred to above. This approach allows the examination of the principal theoretical constructs and approaches taken in SER discourse. This is done under the theme of rights and duties, using the Hohfeldian incidence of rights as an analytic framework in steering the course of the discussion of the various concepts in human rights theory. And finally, in the third section (3.4), the research provides a critical analysis of whether or not there exists a basis for SER to be claimable or not in the light of the Hohfeldian rights' architecture which is considered alongside other views. So why choose Hohfeld's exegesis on rights? Hohfeld's account is preferred because of its conceptual clarity and utility in helping to elucidate the concept of rights and duties from a human rights perspective.<sup>14</sup> His tables of legal relations help to explain the different ways in which human rights are used in law such as 'liberty' 'claim' 'power' and 'immunity'.<sup>15</sup> Even though, not initially intended by Hohfeld,<sup>16</sup> the impact of his account on the evolution of human rights in different legal systems (including the UK and Nigeria) has been well acknowledged.<sup>17</sup> It should be remarked that Hohfeld's account is not applied exclusively. The works of leading theorists<sup>18</sup> in legal and moral philosophy are analysed as well, in order to produce a synthesis as well as a contrast in the jurisprudence of rights and duties. The emerging concepts of this approach are then applied to

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<sup>13</sup> Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 (2) *Ethics* 202.

<sup>14</sup> Although Hohfeld's work was concerned solely with the analysis of legal rights, the leading opinion in human rights literature is that his work (Hohfeld's) reveals most of the fundamental and logical connections between moral and legal rights. See Edmundson, (n 6) 94-95.

<sup>15</sup> Hohfeld's work on the nature of rights are examined in further details in section 3.3, pg. 40.

<sup>16</sup> (n 6) 94-95.

<sup>17</sup> Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) 5-6.

<sup>18</sup> See section 3.4, pg. 46.

underline their relevance to the discussion of the SER that form the crux of this research as they apply to Nigeria and the UK. Therefore, the objective of this chapter is not to justify SER from the standpoint of moral and political philosophy, but rather to deepen the understanding of the nature of the relevant theories of rights and their philosophical underpinnings in order to aid the subsequent discussion of the SER considered in this research and how they apply to the UK and Nigeria.

### **3.2. Theories of rights analysis – SER and the search for a foundational theory of human rights**

From the account rendered so far in this chapter, it is evident that there is a myriad of theories of rights. However, there are two dominant theories which can be said to be relevant in the search for a foundational theory of rights as well as in the field of legal theory.<sup>19</sup> This assertion is in itself a contentious one because of the often-overlapping concepts of legal theory, and moral and political philosophy<sup>20</sup> and so a choice would have to be made between the relevant theories. Choosing a theory would necessarily involve the consideration of a range of factors. These factors will include the jurisprudential relevance of the theories to the objects of this research and their usefulness in helping to examine the issues that could arise from this choice. And in making this choice, one has to be as objective as practically possible in order to preserve the pattern of the examination of rights and the relevant concepts arising from such a process. Bearing the preceding in mind, it has been decided to examine two of the dominant and relevant theories to this research, because as far as SER are concerned, these theories are largely the two general perspectives of the matter.<sup>21</sup> As already stated above, these are the Will (Choice) theory and the Interest (Benefits) theory of rights. In the part that follows, I explore these theories providing a broad overview in the process, in order to establish how these theories, affect the debate on human rights and their implications for SER practice in the UK and Nigeria.

It should be emphasised that both theories have been dominated by attempts to establish that one theory is better than the other in helping to formulate a classificatory analysis of human rights. However, the superiority of one theory over the other is not a case of how well the

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<sup>19</sup> (n 17) 6.

<sup>20</sup> The role of morality in human rights law is an idea many authors with a positivist leaning do not accept. (n 6) 94-95.

<sup>21</sup> (n 17) 6.

proponents of the different theories are prepared to defend their positions, but rather one of utility and fitness for purpose. And to be fit for purpose, a theory of rights must be able to situate the conceptual and justificatory perspectives from which rights are viewed. Such theory should be able to answer what rights are – tending to the conceptual and what the reason for their existence is, which focuses on the justificatory aspect,<sup>22</sup> but again, even these criteria are difficult to defend in a practical sense, because what amounts to the distinction between the conceptual and the justificatory is not clear-cut and often the two aspects overlap and can lead to a further confusion on what a theory of right should entail. However, this distinction or lack of it is not fatal, because both concept and justification of rights are conterminous. Again, both theories are problematic in that they attempt to capture the four Hohfeldian incidences of rights into a single analytic framework without recognising that the structure of each of the Hohfeldian form is different from the others. The practical difficulty in the application of these theories confirms the argument on the need for a theory of rights to be fit and useful for the desired purpose. However, as already alluded to above, the process of determining ‘fitness for purpose’ of a theory of rights can in itself be problematic, because of the mass of differing opinions<sup>23</sup> on the standards of a theory that fully capture all the essential manifestation of rights in the society.<sup>24</sup> For example, the theory behind the reason why there is the right to free universal basic education in Nigeria, might not be the same in the UK. However, the application of both theories would appear to be geared towards a similar aim, i.e., the right to free universal basic education in both countries. If a further analysis were to be carried out on the underlying theories of this right, a whole lot of significant factors would emerge warranting further detailed consideration. Such is the difficulty of analysing relevant justificatory theories of human rights.

### **3.2.1 Will Theory (Choice Theory)**

Kant<sup>25</sup> was a very influential proponent of the will theory. His idea about rights was largely influenced by moral law and the fundamental facts about human society. He saw rights as powers of control that an individual has over another individual’s conduct. According to him; ‘my possession of another’s choice, in the sense of my capacity to determine it by my own choice to a certain deed in accordance with laws of freedom ... is a right (of which I can have

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<sup>22</sup> Ibid.

<sup>23</sup> [Section 3.2 pg. 31.](#)

<sup>24</sup> Marie-Benedicte Dembour, ‘What are Human Rights? Four Schools of Thought’ (2010) 32 Human Rights Quarterly 1, 6-7.

<sup>25</sup> Immanuel Kant, *Practical Philosophy*, (Mary Gregor ed, Cambridge University Press 1996) 6, 271.

several against the same person or against others)'<sup>26</sup> From this quotation, it is evident that a special feature of the will theory is the control or choice one has over the conduct of another, which could be justified according to Kant's social contract doctrine. On the justificatory plane, autonomy and freedom of choice are central to the character of the will theory of rights. Hart<sup>27</sup> was another foremost proponent of the will theory. In his opinion, the will theory as a legal and political construct seeks to explain the nature and functions of rights in jurisprudence, i.e. the art of legal philosophy. According to this theory, having a right involves being in the position to control the performance of a duty,<sup>28</sup> so that for any person to lay claim to a right, they must have the control over the performance of such duty in respect of the right and be able to exercise an inherent choice to waive such performance and thus lose their immunity in respect of such right. This also has the effect of releasing the duty bearer from the duty they owe the right holder. The waiver by the right holder then confers immunity on the duty bearer in respect of the right holder. Will Theory, therefore, posits that the holder of a right correlative to a duty is vested with paired powers to either waive or enforce such right. Another way of explaining the above principle is: X holds a legal right only if X holds a legal claim to a legal power to enforce the duty correlative to the claim and a legal power to waive that duty and liberties to exercise those powers.<sup>29</sup>

Hart further explains:<sup>30</sup>

The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: I, the right holder may waive or extinguish the duty or leave it in existence; ii after breach or threatened breach of a duty he may leave it "un-enforced" or may "enforce" it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and iii he may waive or extinguish the obligation to pay compensation to which the breach gives rise.... These legal powers for

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<sup>26</sup> Ibid.

<sup>27</sup> Herbert Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press 1982) 162, 188.

<sup>28</sup> Ibid 168.

<sup>29</sup> This example is taken from Matthew Kramer's 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 (2) *Ethics* 245.

<sup>30</sup> (n 27) 183-184.

such they are over a correlative obligation are of great importance ...and there are I think many signs of the centrality of those powers to the conception of a legal right. Thus, it is hard to think of rights, except as capable of exercise and this conception of rights correlative to obligations as containing legal powers accommodates this feature.<sup>31</sup>

The above passage from Hart represents in literature, a dominant version of the will theory of rights and it is one from which other versions of the theory are known to have benefited.<sup>32</sup> For Hart, the control factor which is the operative element in this theory, has three implications and these are: the power of the rights holder to waive the performance of the duty owed, the freedom to claim or refuse to claim and finally the power to waive implications that might arise from the claiming of such rights, such as the payment compensation as a result of the duty owed. As an example, let's consider the following to illustrate the workings of this theory: A buys a television from one of the big retail outlets which comes with a 12-month warranty as part of the sale. Following this example, A has a claim against the retail outlet and the retail outlet, in turn, bears a duty to A in respect of the television. Two months into the warranty period, the television suffers an electrical fault. Instead of A seeking to activate their rights and claim as necessary under the agreement of sale, A can decide not to follow this course, thus exercising his choice and power under the contract and releases the retail outlet from their duty under the warranty. Because A has by implication waived the retail outlet's duty, the retail outlet becomes immune in line with the above thesis of the will theory.<sup>33</sup> Relative to human rights and SER, in particular, the theory raises significant concerns about the inalienability of certain human rights because of their fundamental nature. Although the example that has been used above relates to contractual rights, it is also relevant in helping to explain the application of this theory and its implications for the nature and functions of SER within a legal system.

Griffin's<sup>34</sup> account of 'personhood'<sup>35</sup> as being the basis for a conceptual foundation of human rights theory fits in with this theory. He argues that humans alone, unlike other forms of life, are entitled to human rights, because humans can form a conception of a worthwhile life.

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<sup>31</sup> Ibid.

<sup>32</sup> See generally Hillel Steiner, *An Essay on Rights* (Blackwell Publishers 1994) 1; see also Siegfried Van Duffel 'In Defence of the Will Theory of Rights' (2012) 18 Res Publica 321.

<sup>33</sup> Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988) 95.

<sup>34</sup> (n 7) 33.

<sup>35</sup> Griffin is one of the many examples authors who have written about personhood. For a more recent discussion of this; see Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2017) Chapters 1 and 2.

According to him, personhood is determined by the agency, and one of the criteria he identifies as the basis for agency is autonomy – the ability to choose one’s path in life, free from the control and domination of others. This is a central theme in his theory. However, by way of criticism<sup>36</sup>, Griffin’s theory does contain some fundamental conceptual deficiencies in this regard. One of the often-cited criticisms against the Will Theory applies here. The question is asked: if autonomy and agency are the basis for rights, does it mean that infants and those who are mentally incapable have no rights and by extension also everyone whilst they are asleep? This is a point in his theory which raises serious normative issues that is simply not agreeable to international human rights law.<sup>37</sup> Crucially, Griffin’s account misses the material difference between the existence of a right and justification for such a right. This distinction is critical because even though the rights of some classes of people, e.g. children could be justifiably restricted, such restriction does not amount to non-existence of such rights, simply because such classes of people have no agency and as a result are unable to exercise autonomy.<sup>38</sup> Such a theory of rights as already shown would be contrary to the principles of international human rights espoused in this research. This probably explains the reason why most legal regimes have turned their backs on the sort of right theories that endorse the lesser treatment of some humans in comparison to others. A recent example of this rejection is the UK case of *P v Surrey County Council*<sup>39</sup> (this case concerned the deprivation of liberty of mentally disabled persons, who did not have the mental capacity to give a valid consent for their care) The most fundamental question in the case, was whether the right to liberty protected by article 5 of HRA is the same for everyone, regardless of whether or not they are mentally or physically incapacitated. The UK Supreme Court in answering this question rejected an argument of what would have been a subtle endorsement of Griffin’s theory. Speaking through Lady Hale, the court held thus:

In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights founded

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<sup>36</sup>See for instance Marcus Arvan, ‘A Better, Dual Theory of Human Rights’ (2014) 45 *The Philosophical Forum* 21.

<sup>37</sup> *S v Williams* (1995) ZACC 6. 1; see also *Campbell v United Kingdom* (1993) 15 EHRR 137.

<sup>38</sup> For example, Griffin’s theory would render nearly all rights contained in the Convention on the Rights of the Child nugatory.

<sup>39</sup> [2014] UKSC 19.

on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.<sup>40</sup>

Kramer<sup>41</sup> who is widely known as one of the proponents of the Interest Theory has criticised the will theory on some grounds, but the recurrent criticism in human rights literature is that the theory is illogical and incoherent. For example, it is now well settled, at least from an international human rights perspective, that human rights confer entitlements on the right holder. But to the will theorist, the right holder should have discretion on whether to accept the benefits which the enforcement of the rights would confer. The puzzling question is, therefore, why would someone refuse to accept or even reject a right that confers some good on them? The theory does not capture the whole conceptual expression of socio-economic rights in contemporary times. Secondly, in the search for a theory that encompasses all the incidents of rights in a legal system, it is to be expected that such a theory should account for most, if not all instances in which people are taken to have rights. Unfortunately, the theory does not meet this criterion because the theory, from its propositions, seems to deny rights to children and the mentally infirm because they cannot exercise choice to claim or waive their rights,<sup>42</sup> which therefore means that the duties in respect of these do not arise out of rights, a position this research finds implausible.

In reply to the foregoing criticisms of the will theory, Steiner<sup>43</sup> claims that the state itself can hold these rights on behalf of the mentally disabled and children, and can exercise control over the duties owed to those incapable of exercising their rights. However, a further examination of this argument meets with another problem: if the state is the human right-holder on behalf of children and the mentally disabled, this implies that the state can also waive these rights or worse still violate them without fear of being challenged, so that the measure of protection which human rights are supposed to afford the individual is then lost.

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<sup>40</sup> Ibid para 45.

<sup>41</sup> For a full exposition of these criticisms, see Matthew Kramer's 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 (2) Ethics 245.

<sup>42</sup> The above position of the will theory is heavily defended in Siegfried Van Duffel's 'In Defence of the Will Theory of Rights' (2012) 18 Res Publica 321, where he describes children and the mentally infirm as unempowerables especially as they cannot exercise any claims and therefore cannot be said to be owed any duties. He argues that their rights if any, are in respect of duties regarding them, not duties owed to them.

<sup>43</sup> Hillel Steiner, *An Essay on Rights* (Blackwell Publishers 1994) 285.

From the standpoint of this research and based on the analysis so far, a theory of SER practice founded on the principles of the will theory might essentially prove difficult to support in view of its obvious limitations to the foundations and normative framework of SER. The recognition of rights and associated duties should bear in them the concept of inalienability, this feature, it is contended, is what distinguishes rights from ‘grants’. The notion of waiving rights is a concept that cannot be supported in socio-economic rights practice because SER are at their most needed when individuals are at their most vulnerable and that is really undercut by will theory because a lot of the vulnerability contexts that can arise are contexts in which will is nascent or has not been developed or has been lost.<sup>44</sup>

### **3.2.2. Interest (Benefit) Theory**

Just like the will theory, there are a number of different versions of the interest theory providing the literature on the theory of rights, with the analytic framework and different dimensions to examine the existence and functions of rights. However, the most notable variants are those propounded by Raz<sup>45</sup> and Bentham<sup>46</sup> which are in the realm of moral and legal rights.<sup>47</sup>

According to this theory, the central function of right in any system is to protect the interest of the right holder. A characteristic difference between this theory and the will theory is that rights under this theory are necessarily not waivable by the right holder. For instance, everyone has a right to be free and cannot waive such right by having themselves sold into slavery. Similarly, we speak of a right to life and the correlative duty of the state to protect the lives of its citizens by taking certain measures to ensure there is access to health care facilities. If the state then fails in this duty, it does not necessarily mean that the right to life has been waived by such a citizen. Indeed it is a ‘natural property’ of the individual which the government ought to recognise. For example, the SER considered in this research, do not yet enjoy institutional protection in the UK and Nigeria up to the recommended level in the ICESCR, however, the absence of such institutional safeguards does not mean that those rights have been waived by

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<sup>44</sup> Aniceto Masferrer & Emilio Garcia-Sanchez E, (eds), *Human Dignity of the Vulnerable in the Age of Rights – Interdisciplinary Perspectives* (Springer 2016) 2-8.

<sup>45</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 165.

<sup>46</sup> Bentham’s view on the theory is referred to as Benefit theory.

<sup>47</sup> Note, Bentham does not agree with the place of morality in legal rights. His idea of natural moral rights was conceptual nonsense. (nonsense upon stilts) See Jeremy Bentham, ‘Anarchical Fallacies’ (1998) 318 *Headline Series*, 59.

the right holders, rather they have become grounds to demand the enforcement of such rights.<sup>48</sup> Furthermore, the right holder's claims are not seen as covering a 'small-scale sphere', but rather of universal nature such as the human right to health care under international law. Therefore, for the interest theorist, the essence of a right consists in its tendency to safeguard some aspect of the well-being of its holder and adding to their dignity and security. To put it in perspective, the following part of an article by Kramer<sup>49</sup> is particularly instructive as it captures the functions of this theory at least in a jurisprudential sense:

What the Interest Theory does is to articulate the basis for the directionality of any legal duty. In other words, it recounts the general considerations that determine to whom any legal duty is owed. If someone is the person to whom a legal duty is owed, he is the person who holds the legal right that is correlative to that duty. Hence, at a level of high generality, the Interest Theory enables us to identify the holders of any legal rights. If we know the content of a legal duty, and if we know the sundry evaluative and non- normative facts that pertain to the fulfillment of that duty, we can employ the Interest Theory to ascertain who holds the correlative legal right.<sup>50</sup>

The above quotation explains the functions of what a rights theory should entail in helping to identify the contents of a right and the rights holder. The theory seeks to build a sufficient universal criterion for the determination of what amounts to rights and the corresponding duties, even though the idea of having a universal criterion for human rights has been criticised by Brown<sup>51</sup> as weakening the credibility of human rights, however, Brown fails to explain the basis for such assessment.

It is important to note that not every theorist who espouses the interest theory of rights that supports the amalgam of law and morality in discussing the concept of the theory and its implications for rights. Of those theorists<sup>52</sup> who espouse the interest theory, Bentham's<sup>53</sup> position is notable, because, he did not rely on any extra-legal or moral principles in discussing his version of this theory. His account of this theory is a purely legal one in that he sees rights

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<sup>48</sup> *Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General* FHC/ABJ/CS/640/2010.

<sup>49</sup> (n 29) 123.

<sup>50</sup> *Ibid* 245.

<sup>51</sup> (n 9) 103.

<sup>52</sup> See for instance, Charles Blattberg, *Patriotic Elaborations: Essays in Practical Philosophy*, (McGill-Queen's University Press 2009) 43–59.

<sup>53</sup> (n 45) 59.

as creatures of the imposition of duties by the sovereign<sup>54</sup>. However, there is a major snag in his view, because the imposition of duties that create rights by the sovereign does not suffice to explain the full range of legal rights. Furthermore, it is right to argue that the Hohfeldian power in right, does not always arise from the imposition of duties, rather they arise from claims. For example, the idea behind the provision of social welfare support such as the payment of benefits to people who are out of work is not motivated at first by any legal reason, but rather a moral one to assist members of the society who for one reason or another are out of work.<sup>55</sup> Even the process of determining who gets paid and what they get paid is not entirely based on legal factors, but on a host of other factors such as need, disability, the size of family, among others. Therefore, the process of determining potential legal rights holders in this respect is not entirely devoid of extra-legal considerations.

This theory as would be expected suffers from a couple of pitfalls that have led to it being criticised on many fronts. One of such critics is Hart, who argues that the interest theory of rights often conflates the concept of duties with that of rights in the description of law which can at times be misleading.<sup>56</sup> Another criticism is that it could become over-expansive in its attempt to identify right holders and the duties they are owed. This could lead to an overlap and bring about confusion in an attempt by this theory to cover every conceivable scenario of rights and duties that might arise especially against ‘third party beneficiaries’,<sup>57</sup> where for instance someone could have interest in X without having a right to X. However the interest theory of rights, provides a more solid conceptual and justificatory basis upon which the idea of SER could be founded and supported, because, the theory helps to provide useful insights for the functioning of SER, especially when considered from an international rights perspective. That is not to say that the will theory serves no purpose at all, rather, there is one critical point of agreement between both theories which the research explores in the next section. It is the agreement of the existence of rights and duties in both theories, even though they function differently under both theories. Right and duties are central constructs within the consideration of a veritable theory of rights because they provide the framework that helps to give shape and meaning to SER practice. These (rights and duties) are analysed in the next

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<sup>54</sup> Ibid.

<sup>55</sup> Paul Spicker, *Social Policy: Theory and Practice* (Policy Press 2014) Chapters 1-4.

<sup>56</sup> (n 27) 181-183.

<sup>57</sup> For a full discussion of this criticism, see Matthew Kramer, ‘Getting Rights Right’ in Matthew Kramer (ed), *Rights, Wrongs, and Responsibilities*, (Basingstoke: Palgrave Macmillan 2001) 29.

section and to achieve this, Hohfeld's<sup>58</sup> seminal contribution to the examination of rights and duties is deployed, because it provides a fundamental basis for considering the concept and nature of rights and duties, in relationship to the SER discussed in this research.

### **3.3. Rights and duties in SER theory**

#### **3.3.1. The form and functions of rights under the Hohfeldian analytical system**

Commencing the analysis in this section with Hohfeld is not without its challenges. This is because, Hohfeld like Bentham, was a legal theorist and because of his (Hohfeld's) positivist inclination, did not see human rights as capable of existing outside the bounds of the law. Human rights in his view, are a creation of the legal system in which they operate and can only derive their nature and application as defined by such a system.<sup>59</sup> Hohfeld was not concerned with synthesizing the concept of rights through any rights theory, rather, he was interested in analysing the various forms in which rights manifested and their implications for the various relationships they applied to in a legal system. It was in the process of this analysis that Hohfeld provides us with a concept of diversity of rights, which gives the templates for a conceptual analysis of the workings and nature of human rights with reference to the subject of this research. These Hohfeldian incidents of rights as explained below, are inextricably bound together, thus helping to provide the apparatus to reconstruct human rights into a system that may have different approaches but all leading to a core concept of human rights.<sup>60</sup>

According to Hohfeld:<sup>61</sup>

As more fully shown in the former article, the word "right" is used generically and indiscriminately to denote any legal advantage, whether claim, privilege, power, or immunity. In its narrowest sense, however, the term is used as the correlative of duty; and, to convey this meaning, the synonym "claim" seems the best. In what follows, therefore, the term "right" will be used solely in that very limited sense according to which it is the correlative of duty<sup>62</sup>.

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<sup>58</sup> Wesley Hohfeld Fundamental Legal Conceptions as Applied in Judicial Reasoning (1917) 26 Yale Law Journal 710.

<sup>59</sup> As already alluded to, Hohfeld's theory is relevant to the analysis of moral and legal rights, and that's the position this research espouses. See (n 6) 94-95.

<sup>60</sup> Marie-Benedicte Dembour, 'What are Human Rights? Four Schools of Thought' (2010) 32 Human Rights Quarterly 1, 6-7.

<sup>61</sup> Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) Yale Law Journal 710, 717.

<sup>62</sup> Ibid.

Hohfeld uses various examples to illustrate what could be described as the different manifestations of rights in the four forms which can be identified in the above quote, which for the ease of discussion and clarity will be classified as right as a 'claim' right as a 'privilege' right as a 'power' and right as an 'immunity'. Hohfeld does not attempt to define these concepts of right, however, what he does is to describe and discuss them with the aid of examples and legal authorities.<sup>63</sup> In furtherance of the amplification of his thesis on rights,<sup>64</sup> he sets up a framework which has become eponymous with his name - a schema of jural relations and opposites, a sort of an analytic framework built to analyse legal relations and to disambiguate the concept of rights, especially in the area of legal practice and the application of basic legal ideas through human rights jurisprudence. The benefit of this approach, as it appears, is that these concepts will continue to preserve their adaptability and relevancy through time and across different legal cultures. Hohfeld opens his discussion of what he calls 'fundamental jural relations contrasted with one another' with a quote from the American case of *Lake Shore & M. S. R. Co. v Kurtz*<sup>65</sup> 'a duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated.'<sup>66</sup> The following paragraphs will be devoted to a brief discussion of the four kinds of legal interpretations that could be given to the nature of rights in any legal relations as per Hohfeld's thesis.

Following the theme of rights and duties, let's consider the example: 'H has a right to X'. According to Hohfeld, this scenario could be given four distinctive set of connotations, and these will be critically analysed below:

The first connotation in this sense could mean *privileges*, which is the opposite of, or absence of duty. A sort of freedom from the right or claim of another person. Using the phrase above, if H has a right to X, then H has a special right (a privilege) to X. For example, a car owner has the privilege of the enjoyment of the use of their car to the exclusion of others, except in so far as they decide otherwise. According to Waldron,<sup>67</sup> this kind of privilege as used in this sense

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<sup>63</sup> This approach by Hohfeld is unique and intentional, one of the main characteristics that has preserved the currency and relevance of his work on rights through time. See Schlag, Pierre, 'How to do Things with Hohfeld' (2015) 78(1-2) *Law and Contemporary Problems* 185.

<sup>64</sup> Hohfeld's efforts on the rights discourse are indeed remarkable. The way he distinguished the various incidence of 'a right' has remained a useful resource for the analysis of rights. He identified four jural correlatives and regarded the one in which rights are correlative with duties as being 'a right' in the strictest sense. For a further analysis of Hohfeld, see Andrew Halpin 'Hohfeld's Conceptions: From Eight to Two' (1985) 44 (3) *The Cambridge Law Journal* 435; Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 (2) *Ethics*, 202.

<sup>65</sup> (1894) 10 *Ind. App* 60.

<sup>66</sup> *Ibid.*

<sup>67</sup> Jeremy Waldron 'introduction' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 6.

could also mean a *bare liberty* since H has a privilege which others may not have in respect of a given right. This is only one example. There could be other examples where every person might have a privilege in the interest of justice or public safety, for example, a citizen's right to arrest in certain cases.

A second sense of the phrase "H has a right to X" may also indicate that H has a *power* to bring about changes in X. It denotes the ability of a person to alter existing legal relations or arrangement. Take the example of the car owner above, as the owner of the car; they have the legal right to dispose of the car as they decide. They may, for instance, have it sold or give it out as a gift in consonance with their *power* of ownership and by so doing they would have relinquished their *right* and *privilege* over the car and acquire the duties correlative to those rights which they enjoyed previously.

The third connotation of the phrase is *immunity*. It means that if H has a right to X, then H has an *immunity* which no one can alter because they will lack the ability within a set of rules to change H's situation in respect of X. For instance, some of the rights provided for in the UDHR and the two Covenants<sup>68</sup> carry in them an *immunity* which no legislation should be able to change.<sup>69</sup> Here, two common examples of parliamentary and witness *immunity* will be discussed albeit briefly in relation to *immunity*. The history of parliamentary *immunity* in the UK's *corpus juris* have been well documented right from the time of King Richard II in the 14<sup>th</sup> Century.<sup>70</sup> Therefore, it is now taken as settled law<sup>71</sup> that the UK's parliamentarians should be free from fear of interference and be able to exercise their freedom of speech during parliamentary proceedings, so that they are *immune* from legal actions been brought against them, on account of what they said in Parliament. So Hohfeld's interpretation of the phrase 'H has a right to X' implies that H has an *immunity* that Y or any other person for that matter is unable to change. Thus following the above example, MPs in the UK and Nigeria have a right to freedom of speech that protects them from legal liability for speeches given during

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<sup>68</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

<sup>69</sup> For instance, Section 33 of the Nigerian constitution provides for the right to life. See a similar provision in article 2 of the Human Rights Act 1998.

<sup>70</sup> Leon Yankwich, 'The Immunity of Congressional Speech -- Its Origin, Meaning and Scope', (1951) 99 University of Pennsylvania Law Review 960.

<sup>71</sup>Section 2 Parliamentary Privilege Act 1770, cf Art 9 of the Bill of Rights 1869 and *R v Chaytor & Ors* [2010] UKSC 52. For the Nigerian equivalent of this principle, see the following *Ojemen v Punch Nig Ltd (1996) 1 NWLR (pt 427) 701*, Section 39(1) of the Nigerian constitution and section 3 of Legislative Houses Power and Privileges Act (LHPPA) Cap L12 Laws of the Federal Republic of Nigeria, 2004.

‘proceedings in Parliament’ and this *immunity*, is another manifestation of a right which no one such as the police or the courts can change going by Hohfeld’s explication of rights.

### 3.3.2. The Hohfeldian claim right and SER theory

Following in Hohfeld’s discussion of the classification of rights, there is yet one more explanation of the phrase ‘H has a right to X’, which is the fourth and final instance of the Hohfeldian rights amalgam. This is known as the *claim-right*, and because of the relevance of this Hohfeldian incident (*claim-right*) to SER discussed in this research, the decision has been taken to discuss it in more detail than the other three Hohfeldian incidents of rights (privilege, power and immunity). According to Hohfeld, ‘the term “right” tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense; and this looseness of usage is occasionally recognized by the authorities.’<sup>72</sup> From this, it is evident that Hohfeld disagrees with the ‘loose’ use of rights, although some writers question whether there can ever be any realistic or practicable situation where the use of the word ‘right’ can be applied in a correct or generally agreed on sense or even to give it a definite meaning.<sup>73</sup> That notwithstanding, Hohfeld’s analysis does provide some insight and support for the SER considered in this research with reference to the UK and Nigeria.

The discussion of the concept and nature of human rights does help to locate the different uses of the word right in contemporary human rights literature thus warranting a further discussion of the same logical phrase, as in the previous example of ‘H has a right to X’. According to Waldron,<sup>74</sup> another sense in which this could be applied might well be the existence of claims and duties. Put succinctly, the phrase ‘H has a right to X’ could indicate the existence of a duty owed by X to H, which would give rise to a claim should X fail to perform the duty owed to H. The common description for this sort of relation, as already mentioned, is referred to as *claim-right*.<sup>75</sup> A *claim-right* could involve both negative and positive duties from the bearer of such duty to the claim-holder. Thus the duty bearer must either refrain from impeding the claim holder in a purely negative sense or perform a positive requirement to enable H as the claim

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<sup>72</sup> Wesley Hohfeld ‘Some fundamental legal conceptions as applied in Judicial reasoning’ (1913) 23 Yale Law Journal, 23.

<sup>73</sup> See Leonard Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987) ch 2.

<sup>74</sup> (n 67) *ibid*.

<sup>75</sup> Hohfeld does not specifically use the term *claim-right*, but he does appear to use both terms interchangeably; see (n 72) 24-25.

holder exercise their right to X as per the example used. Because of the relevance of this example to this research, it will be useful to set out further illustrations. Thus, where H has a right to free health care, the government or the relevant agency of government as the duty bearer will have to fulfil their duty to enable H to enjoy their right to free health care. Note here, that the operative word is 'enable' and this is in a positive sense. How about the use of *claim-right* in a negative sense? Thus, we say H has a *claim-right* to privacy. The duty bearers such as the government and of course others owe H a duty not to pry into H's affairs. So, it is important to remember that the duty may be owed by an individual, government or its agencies as in the above example, or the duty might generally reside with the society which the claim holder finds their self. *Claim-right* is the commonest sense in which human rights, and by extension SER are analysed and interpreted today in both theory and practice<sup>76</sup>, i.e. the coming together of society and the subsequent vesting of responsibility on a known and defined agency such as a government to provide for the community's needs whilst the members of such community in turn, become entitled to some claims, as a result of their willingness to work for the common good of such community. Thus, there is a correlative duty on others in relation to the rights claimed by 'H'. The nature of this setup creates its peculiar problems in relation to human rights practice because there is supposedly a relationship between two parties, the claim holder and the duty bearer. However, in reality, this relationship is not as clear-cut as it has come to be known in human rights literature, because if human rights are claim-rights with a corresponding duty on somebody or an institution to provide for the realisation or protection of such a claim, then a major problem arises in identifying who is responsible for safeguarding or ensuring that such right is guaranteed to the right holder.

A classic example of the foregoing is the plight of oil producing communities in the Niger Delta area of Nigeria. In 2011, at the instance of the Nigerian government, the United Nations Environmental Programme (UNEP) was commissioned to carry out a scientific study in order to provide an independent and scientific report<sup>77</sup> on the nature, extent and impact of oil contamination in Ogoni land which is part of the Niger Delta area in southern Nigeria. One of the key findings of the report, was the abysmal lack of inter-governmental cooperation and information sharing between the agencies of government responsible, and to make matters worse, Shell BP continues to deny responsibility and culpability, for the attendant effects of years of poor petroleum exploration practices on the health and well-being of the people and

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<sup>76</sup> Schlag, (n 63) 185.

<sup>77</sup> United Nations Environment Programme, *The Environmental Assessment of Ogoniland* (UNEP 2011) < [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf) > accessed 30 January 2018.

their environment. And despite years of debilitating human rights violations in Ogoni land<sup>78</sup>, no one has yet been able to hold Shell fully and the government of Nigeria to account for these human rights violations<sup>79</sup> and both culprits have refused to accept responsibility for the years of poor petroleum exploration practices and lack of institutional oversight. This highlights the difficulty of arriving at a consensual position in the jurisprudence of human rights, especially SER, which are often seen as positive rights that require some sort of deliberate and unequivocal action on the part of the duty bearer, to ensure that SER are guaranteed or afforded to the right holders in any given socio-political setting. The literature on this aspect of the concept of rights, viewed from the perspective of moral philosophy, is far from settled, especially in the area of determining who the duty bearers are and the nature and extent of their duties.<sup>80</sup> However, from a legal point of view, the codification of rights in legal documents has largely established whose duty it is, to provide for these rights as well as the nature and extent of such duties. Therefore, in a legal system, it is assumed that if an individual has been the victim of human rights violations, the duty falls on their government to address the situation through the instrumentality of established institutions which operate with an established set of guidelines.

Notwithstanding the foregoing, there may exist other instances where even if the duty bearer is identifiable as the government, it may be unable, or cannot be reasonably expected to provide for or guarantee these rights. Such instances may be during times of long-term emergencies like war or epidemic. A practical example is the Ebola Virus Disease (the disease) which recently ravaged some West African countries, especially Liberia and Sierra Leone, where the disease is estimated to have killed thousands. In Liberia for instance, the disease clearly overwhelmed scarce government resources, so that some members of the international community including the UK had to commit both human, technological and medical resources to check the scourge and devastation caused by the disease in the two countries. Evidently, the governments of both Liberia and Sierra Leone were not able to tackle the disease. Therefore,

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<sup>78</sup> Ogoni is an oil producing community in the Niger Delta region of Nigeria.

<sup>79</sup> Apart from the isolated cases in which Shell has been ordered to pay compensation which are tokenistic solutions at best and do not go far enough to address the institutional issues which are at the fountain head of the long years of abuse. See also Nigeria: No progress: An evaluation of the implementation of UNEP's environmental assessment of Amnesty International *Ogoniland, three years on*. (Amnesty International Aug 2014 AFR 44/013/2014) where it was reported that the recommendations of the UNEP report are yet to be implemented by Shell and the Nigerian government three years after the publication of the report.

<sup>80</sup> Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, (1996 Cambridge University Press) 134, posits that the focus should not be on rights and duties since it is easy to forget the demands they place on agents, rather she is of the opinion that focusing on obligations is more realistic. She opines that theory of rights might have rhetorical value, however 'they are a bitter mockery to the poor and needy'.

who was the duty holder in this case? Should we conclude that the duty has now shifted to the aid-providing countries? Can it be the case that one does not necessarily have to owe a duty before providing it?

The above underlies the transitional and complex nature of duties and the agents to whom the responsibility for performing such duties falls, so that it is difficult to specifically identify in a given situation, who the duty or obligation bearer is, as there may be more than one duty bearer or duty bearers who are unable to render the entitlements due to the right holder as in the example above. Practically speaking, this issue might not pose any challenge outside the realm of theory. However, it is one that can certainly affect the way SER are enforced in different legal systems. For instance, in the UK, article 6 of the ECHR, does not apply to disputes between individuals, a principle that is known as horizontality. The HRA only makes it unlawful for a public authority not to act in a manner that is incompatible with a Convention right, so that whilst an individual might be able to bring a case against a public authority, they might not be able to do so against private individuals.<sup>81</sup> Contrast this with the position under Nigerian law, where an individual according to the Fundamental Rights Enforcement Procedure Rules<sup>82</sup>, may bring cases of human right violation against a public authority and or an individual. Therefore, in most cases of human rights violations in the UK, the duty bearer would be the government, whereas, in Nigeria, it may not just be the government, even though the government has the overarching responsibility for rights enforcement.

### **3.4. Identifying the nature of rights and duties in SER theories**

With reference to identifying duty bearers and the nature of the rights that could give rise to a claim for the performance of a correlative duty within a SER' paradigm, there are many views on this, however, for the purpose of clarity and ease of analysis, these views can be broadly classified into two schools of thought: those who oppose the concept of SER giving rise to claimable and enforceable rights in human rights jurisprudence and those in support. At the

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<sup>81</sup> This issue has attracted a lot of debates in the UK and opinions on it are sharply divided. See *Campbell v Mirror Group Newspapers* (2004) UKHL 22, where the House of Lords held that the Human Rights Act 1998 cannot create new causes of action between individuals; see also, Alison Young, 'The Human Rights Act 1998, Horizontality and the Constitutionalisation of Private Law' in Katja Ziegler and Peter Huber (eds), *Current Problems in the Protection of Human Rights* (Hart Publishing 2013) 73.

<sup>82</sup> Section 46 (3) of the Nigerian constitution (1999), empowers the Chief Justice of Nigeria to make rules for the practice and procedure for the High Court towards the enforcement of the Rights in Chapter 2 of the constitution. The current rules came in to effect on 11th November 2009.

end of the analysis, the author provides an opinion on the above positions on should be the basis of duties in SER theories.

### 3.4.1 Arguments against SER as claimable rights

O'Neill<sup>83</sup> is one of the authors that do not accept that SER should give rise to claimable rights. She is sceptical about the nature of rights and duties with respect to SER and their normative status. Her scepticism has elicited comments from some human rights theorists.<sup>84</sup> According to her, 'rights not to be killed or speak freely are matched and require universal obligation not to kill or not to obstruct free speech; but a universal right to food cannot simply be matched by a universal obligation to provide an aliquot morsel of food,'<sup>85</sup> because as she points out, the realisation of SER depends on the existence of institutions that allocate the corresponding duties to make SER claimable. She claims that negative and positive human rights are asymmetrical. Negative rights have corresponding universal duties which are held and claimable by everyone, thus underlying a symmetrical relationship between rights holders and duty bearers. According to her, the same cannot be said for SER, because the duties owed are special, not universal and can only be performed by certain individuals following the allocation of a duty bearer dependent on institutions. Geuss<sup>86</sup> somewhat shares O'Neill's persuasion in this regard. In his view, to refer to rights as giving rise to duties, such rights must be claimable and enforceable against an identifiable duty holder. According to him, it is 'essential to the existence of a set of "rights" that there be some specifiable and more or less effective mechanism for enforcing them.'<sup>87</sup> To Geuss, talking about correlative duties with respect to SER is to confuse the idea of rights with mere political aspirations about an ideal state of affairs which should not give rise to duties of any kind, because such duties can only arise when through the agency of an institutional mechanism, duty holders are allocated, thus making the existence of duties prior to right.

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<sup>83</sup> Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427, 429-431.

<sup>84</sup> See generally John Tasioulas 'The Moral Reality of Human Rights' *Ethical and Human Rights Dimension of Poverty: Towards a New Paradigm in the Fight against Poverty* (UNESCO Poverty Project 2003) 1 <[http://portal.unesco.org/shs/en/files/4333/10892901941jonh\\_Tasioulas.pdf/jonh\\_Tasioulas.pdf](http://portal.unesco.org/shs/en/files/4333/10892901941jonh_Tasioulas.pdf/jonh_Tasioulas.pdf)> accessed on 30 August 17; see also, Elizabeth Ashford 'The Inadequacy of our Traditional Conception of the Duties Imposed by Human Rights' (2006) 19 *Canadian Journal of Law and Jurisprudence* 217; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2007) 72-74.

<sup>85</sup> (n 83) *ibid.*

<sup>86</sup> Raymond Geuss, *History and Illusion in Politics* (Cambridge University Press 2001) 144.

<sup>87</sup> *Ibid* 143.

The implication of O'Neill and Guess's view is that SER do not fully meet the standards or the requirements to be deemed as rights from which duties could arise, because in their view, SER are dependent on institutions which create or allocate duty bearers to the holders of such rights, in a way that defines the contents of such rights. However, this research finds this point in O'Neil's thesis disagreeable, because you need institutions to protect the right to health care, just as you would need institutions like the police and a functional criminal justice system to protect, say, for instance, the right to life. An attempt to discriminate against SER practice on that basis alone is rather misleading because such difference is untenable in view of actual SER practice in the UK and Nigeria. As identified previously, this research is concerned that some of the theories in O'Neill's thesis, apart from their high academic visibility and debate purpose, will have serious and unsavoury implications for human rights practice. For O'Neill, the test for rights is whether there are counterpart obligations or duty bearers against whom correlative claims could be made and in the absence of these, then such claims would fail. This view is misconceived as it takes a far too narrow view of rights and correlative duties.

Valentini's<sup>88</sup> thesis emphasises the duty of the state to define the operation and sphere of human rights within its boundaries, so that right holders are free from interference with their rights. Valentini argues that it is only the state that can guide against such threats to human rights. She cites unilateralism as an example, which according to her comes from the state of nature into the state. In her view, to solve the problem of unilateralism, states as bearers of human rights duties, will have to decide the sphere of rights, because they possess an omnilateral will with the power to fulfil human rights duties and because states are morally responsible for defining and ensuring the enforcement of rights. Although she highlights the utility and indispensability of states as duty bearers and rights allocator, there are certain aspects of the debate on rights and corresponding duties that she has evidently overlooked. If one were to agree entirely with her views, it would mean that human rights are 'gratuitous grants' by an omnilateral state to its citizens, therefore making human rights what the state say they are and since the state is responsible for fulfilling human rights duties, then it is only those human rights that the state is ready to assume responsibility for, that would count, a development that would not bid well for the practice and theory of SER. Heard<sup>89</sup> shares a similar opinion with Valentini's and goes

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<sup>88</sup> Valentini calls this theory the 'freedom centred view'. See Laura Valentini, 'Human Rights, Freedom, and Political Authority' (2012) 40 (5) *Political Theory* 587.

<sup>89</sup> Andrew Heard, 'Human Rights: Chimeras in Sheep's clothing?' (1997) <<http://www.sfu.ca/~aheard/intro.html>> accessed 30 January 2018.

further to argue that the reference to the government as the sole or central duty holder is often misconceived in human rights theory. According to him

If human rights set moral standards for the treatment of all humans, those standards should bind anyone who is capable of infringing those rights - be they corporations, governments, or other human beings. Thus, the correlative duties involved in human rights as claim-rights are duties that do not necessarily reside solely with an individual's government.<sup>90</sup>

However, it is submitted that Heard misunderstands the issue at stake. As already mentioned, the government of any state has an overarching responsibility to ensure that there are laws in place to which all individuals and groups must be held accountable – even if only indirectly. I admit that there will be instances where a state might be unable or unwilling to undertake the task of ensuring that rights are enforced, but this situation should not be used as a defence, rather, it should be grounds to reinforce the need, for rights enforcement and to make sure those particularly vulnerable are adequately protected which is the *raison d'être* for SER.

### **3.4.2 Arguments in support of SER as claimable rights**

As mentioned previously, the position taken by these authors in opposition to SER giving rise to duties, have understandably drawn criticism from various quarters and engendered doubts as to the realistic application of their views. One of such opinions is Griffin's. According to him:<sup>91</sup>

It is doubtful ... that claimability is anything as strong as an existence condition of a right, though the requirement treats it as such. If one knows the content of a right, one thereby knows the content of the correlative duties, even if one does not know against whom to make the claim. One has all that is needed to settle the existence of a human right without knowing the duty-bearers. One will also have all that one needs to determine the contents of a human rights.<sup>92</sup>

The above quotation from Griffin highlights the theoretical and practical difficulty in the position taken by O'Neill, especially in the area of the moral demandingness of SER. It is however very contentious to say, as O'Neill argues, to tie the existence and recognition of SER

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<sup>90</sup> *ibid.*

<sup>91</sup> (n 7) 108.

<sup>92</sup> *Ibid.*

to the presence of institutional duty bearers, a position that would give a whole different shape and meaning to SER, in relation to civil and political rights. Because of the preceding, the author agrees with Griffin when he asserts that ‘the content of a human right is also the content of the corresponding duty. What one party may demand as a human right, another party has some obligation to supply. We have only to know the content of human rights’<sup>93</sup>. Crucially, there is the need to understand that the existence of SER, just like the civil and political rights are no less of rights, simply because there is no duty bearer or the absence of institutional recognition. The existence of rights should not be dependent on institutional recognition. However, from a critical perspective, the debate about the content of rights and the corresponding duty is not as straightforward as Griffin would lead his readers to believe. He somewhat admits this handicap when he says that the only thing that needs to be recognised is the content of rights. It is not in doubt that there is a broad consensus on the need for an effective legal and moral regime of human rights, what is not generally agreed is what should these rights be, who should hold them and to whom should the duty of fulfilling them fall.<sup>94</sup>

Ashford <sup>95</sup> agrees with O’Neill’s views above to the extent that institutions are central to the demands for and realisation of SER, just as they are for civil and political rights. However, she does not agree that the existence of duty-bearers is a precondition for the existence of SER. She argues that the process of determining right bearers and institutional allocation of corresponding duties are in themselves social rights. She asserts that O’Neill’s classification of rights into negative and positive rights with corresponding negative and positive duties are not always as distinct as she (O’Neil) claims and that institutions are vital to the realisation of rights. She, therefore, advocates for a different theory of claimable SER. According to her, fulfilling SER are duties of justice based on the dignity of the human person and the absence of institutions to allocate duties should not be a reason to deny the existence of such rights. She advocates the need for a different and wider account of claimable SER so that claim holders can have access to the basic necessities of life. In support of Ashford’s thesis, Shue<sup>96</sup> questions the division of rights into positive and negative rights with corresponding positive and negative duties. He argues that all basic rights impose both positive and negative duties and that tying

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<sup>93</sup> *ibid* 97.

<sup>94</sup> Maria Granik, ‘The Human Rights Dialogue: Foundationalism Reconsidered’ (2013) 60 (135) *Theoria* 1. The alternative theories suggested are theories that have to do with foundationalism and minimalism of human rights. These are considered and criticised extensively by Granik.

<sup>95</sup> Ashford (n 84) 217.

<sup>96</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and US. Foreign Policy*, (2<sup>nd</sup> edn, Princeton University Press, 1996). 33.

the existence of rights, regardless of whether they are described as negative or positive, to the existence of a duty is mistaken. For example, if the right to the dignity of the human person is not to be violated or is to be reasonably guaranteed (negative right), then there must be the provision of security (positive) in the form of the police, courts and others who fulfil the positive duty of ensuring security, even though they are not responsible for these violations. So, you do not need to be the one violating, to be held as a duty bearer.

From the foregoing, it is evident that the authors in opposition, see rights and duties in a formal Hohfeldian sense.<sup>97</sup> However, the other theorists whose views have been used to provide a contrast here, do see rights and duties beyond the formal and strict sense as O'Neill and others do. They rather take a normative and moral approach in discussing the subject of rights and corresponding duties especially as they affect SER and duties. For if one takes the approach or agrees that human rights are what people possess because of their humanity and dignity, then there is no need to tie their existence or realisation to any conditions. Nagel's<sup>98</sup> opinion in this regard is instructive:

The existence of moral rights does not depend on their political recognition or enforcement but rather on the moral question whether there is a decisive justification for including these forms of inviolability in the status of every member of the moral community. The reality of moral rights is purely normative rather than institutional – though of course institutions may be designed to enforce them.<sup>99</sup>

Furthermore, the categorisation of rights into negative and positive rights, entailing negative and positive duties<sup>100</sup> somewhat clutters the debate on the importance of human rights and robs it of the seriousness and conceptual clarity with which it deserves to be treated. No one can question the depth that has been brought to human rights debate, as a result of the research by academics from various disciplines, especially moral and legal philosophy. However, there

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<sup>97</sup> Hohfeld was apparently more concerned with the analysis of the manifestation of rights in a legal system rather than seeking to synchronise these manifestations and exploring their interrelations with the morality and norms of where they (rights) exist.

<sup>98</sup> Thomas Nagel, *Concealment and Exposure & Other Essays* (Oxford University Press 2002) 33.

<sup>99</sup> *Ibid.*

<sup>100</sup> This term is used interchangeably in other literature with 'imperfect and perfect rights and duties' Griffin's equivalent of these are 'secondary' and 'primary' duties; see also Julio Montero 'Global Poverty, Human Rights and Correlative Duties' (2009) 79 (1) *Canadian Journal of Law and Jurisprudence* 79, 87 where the author explicates the nature of perfect a duty as bearing three characteristics.

have been occasions when distinct academic aloofness, has taken over the province of sound and practical analysis, of the SER narrative.<sup>101</sup>

Article 25 of the UDHR and articles 11 and 12 of the ICESCR are often the most contentious of the international regime of human rights provisions,<sup>102</sup> especially, when it comes to the debate of human rights and corresponding duties, with reference to SER.

Article 25 of the UDHR runs thus

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The above provision is particularly expanded upon by articles 9, 11 and 12 of the ICESCR. The argument in respect of the articles referred to above is that the rights provided for do not create any counterpart obligations or duty bearers against whom any of these rights could be claimed. Furthermore, the nature and contents of the rights provided for are largely indeterminate and cannot, therefore, sustain any claim. According to O'Neill, 'there cannot be a claim to rights that are rights against nobody, or nobody in particular: universal rights will be rights against all comers; special rights will be rights against specifiable others.'<sup>103</sup> However from what has become evident in the examination of literature on this part of the subject, there is little support for O'Neill's thesis. Montero<sup>104</sup> argues thus:

Nevertheless, she (O'Neill) is mistaken in thinking that there is no human right to X without the existence of a specific agent bearing a correlative duty to provide me with Xs. I take it that to have a human right implies having a moral justification for imposing obligations on other agents to undertake actions aimed at providing us with secure access to the object of our rights... However, when no agent capable of bearing such duties actually exists, our interest in having access to something may still constitute a moral justification for imposing duties on other agents to bring about, or work toward bringing about, an agent or

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<sup>101</sup> (n 3) 3.

<sup>102</sup> (n 84) 429.

<sup>103</sup> *ibid* 430.

<sup>104</sup> Montero (n 99) 79. <sup>104</sup> (n 84) 429.

<sup>104</sup> *ibid* 430.

agency capable of bearing the perfect correlative duty, either by modifying an already existing one, or by creating a new one.<sup>105</sup>

A central theme running through Montero's view is the normative value of human rights. A view that holds that everyone has irrespective of whether there are correlative duty bearers or institutions to allocate resources to satisfy these rights. For him, the most important factor in deciding the existence of rights is actually the existence of claim holders. Montero and Nagel's position, appears to be a compelling basis for the recognition and enforcement of SER in Nigeria and the UK, because the criterion (existence of claim holders as opposed to duty bearers), which they set for the recognition of SER is a more plausible platform to analyse the justificatory aspect of SER. To assert a claim of a right is one thing and to fulfil or not to fulfil such claim is another entirely. Be that as it may, the absence of the duty bearer or a counterpart obligator does not, as a matter of practical reality, extinguish the existence of such claim. This is one of the main aspects of disagreement with counterpart obligator thesis by O'Neill as it fails to highlight the deep complexities between negative and positive duties in any real political setting or legal system.

From the examination of the literature on this subject, the foregoing position seems to enjoy more support in human rights theory, when compared to O'Neill's position. It is also my preferred position in analysing the SER considered in this research with regards to the UK and Nigeria because the debate about the realisation of SER would come to nought if the approach were different when considering rights and corresponding duties. The language of the relevant international human rights legislation<sup>106</sup> might be slightly ambiguous or overly extended in order to cover a majority of the anticipated cases that might arise globally, however, their intention is clear. For instance, in article 11 of the ICESCR, the duty bearer and the right holder are clearly identified thus: 'the States Parties to the present Covenant recognize the right of everyone'<sup>107</sup> and the optional protocol to the ICESCR, has made it possible for individual communications to be brought before the UN Committee on Economic, Social and Cultural Rights.<sup>108</sup> There might be arguments about the semantics and nuances of the words in these international human rights legislation, such as the ICESCR, but, this should not be misinterpreted as depriving them of all meaningful intentions. Rather, the flexible language

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<sup>105</sup> *ibid* 91.

<sup>106</sup> Article 25 of the UDHR and articles 2,6,11 & 12 of the ICESCR

<sup>107</sup> Ronald Dworkin, *Justice for Hedgehogs*. (Harvard University Press 2013) 332-339; see also Ronald Dworkin 'Rights as Trumps' in Jeremy Waldron (ed) *Theories of Rights* (Oxford University Press 1984) 153.

<sup>108</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. UK and Nigeria are not signatories to this protocol which came into force in 2013.

adopted by the legislation is a reflection of the realities of the real world and the challenges involved for any country in ensuring the realisation of SER. The relevant articles of the legislation, should, therefore, be read in the light of the overall objective of ICESCR, which is to establish clear duties for countries in respect of SER and this intention has been made clear<sup>109</sup> and the duties created do not lie on just state parties alone as some would argue<sup>110</sup>, but also on individuals as well.<sup>111</sup>

### 3.5 Conclusion

In this chapter, I have examined the legal and moral constituents of human rights with a focus on SER. As with every concept, what I sought to do was to analyse the justificatory basis of SER. Analysing justificatory theories of human rights can at times be fraught with theoretical difficulties. Seeking a justificatory theory or theories does, however, help in critiquing and justifying the existence of SER because the process of seeking out these justificatory theories helps in finding a conceptual basis for SER practice and thereby broadening our understanding of the subject of SER. Therefore, the fundamental issue that has been analysed in this chapter is whether we have rights a priori by virtue of being humans and the basis of our entitlements to such rights, in the examination of this issue, I considered whether there was some kind of theoretical construct within which to demonstrate why humans must be afforded a level of importance and thus have their human rights protected. To achieve this, I discussed various theories of rights, such as the will, and benefit theories and their relevance in seeking a justificatory theory for SER practice. One of the major features that has emerged from the analysis of these theories is that they create duties that give rise to claimable rights. Having rights that can be claimed, or worthy of protection is the bedrock of SER practice and goes to the foundation of human dignity which is the hub around which all human rights whether SER or civil rights revolve.

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<sup>109</sup> CESCR *General Comment No. 3: The Nature of States Parties' Obligations* E/1991/23. [Para 14](#).

<sup>110</sup> Laura Laventini 'Human Rights, Freedom, and Political Authority' (2012) 40 (5) *Political Theory* 587-593.

<sup>111</sup> See the Preamble to the ICESCR 1976.

## Chapter Four

### The right to health care

#### 4.1. Introduction:

This chapter is anchored on article 12 of the ICESCR which contains the right to health care.<sup>1</sup> Article 12 of the ICESCR is discussed with reference to its application in Nigeria and the UK. To ease the conceptual analysis of this chapter and given the comparative approach of the research, I discuss the subject of the right to health care in both jurisdictions in two sections as follows.

In section 4.2 below, the relevant issues that feature in the examination of the right to health care from an international perspective such as the nature of the and minimum core contents of the right are identified and discussed within the clarification provided by the UNCESCR in General Comment 14<sup>2</sup> and other related SER documents. Because of the scope and varied manifestations of the subject in different contexts, it is hoped the process of identifying and discussing these issues will result in the building of a framework to analyse the right to health care in Nigeria and the UK within a comparative context.

Section 4.3 analyses the country-specific laws<sup>3</sup> on the right to health care. This section opens with a brief constitutional history of Nigeria with reference to the right to health care. Admittedly, there is a small amount of domestic jurisprudence on the subject in Nigeria<sup>4</sup> owing to the legal status of SER the Nigerian legal system. These factors are discussed in more detail below.<sup>5</sup> However, despite the paucity of relevant court cases in the Nigerian legal system, there

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<sup>1</sup> Although the 'right to health care' and 'right to health' are sometimes used interchangeably, the author prefers the use of the term 'right to health care' as opposed to 'right to health' because of the contextual ambiguities that can arise with the use of the latter. The right to health care as used in this context refers to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health. It is essentially about access, quality, availability and affordability. For an in-depth consideration of the foregoing points, see Timothy Goodman, 'Is there a Right to Health?' (2005) 30(6) *Journal of Medicine and Philosophy* 643; Kathleen Swendiman, 'Health Care: Constitutional Rights and Legislative Powers' Congressional Research Services 1; Alicia Yamin, 'The Right to Health: Where Do We Stand and How Far Have We Come?' (2013) 35 (2) *Human Rights Quarterly* 509.

<sup>2</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4 (General Comment 14 henceforth).

<sup>3</sup> Eg The NHS Act, The National Health Act 2014, Health and Social Care Act 2012, Nigerian constitution, among others.

<sup>4</sup> See generally, Chidi Odinkalu, 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights' in Varun Gauri and Daniel M. Brinks (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) 183.

<sup>5</sup> See subsection 4.3.1-4.3.2 pg. 72 -79.

are indeed health care policy and legal resources that will prove useful to this research.<sup>6</sup> This section critically examines the normative content and legal nature of this right in Nigeria, and in line with the aim of this research, the activities of the courts with respect to the right to health care in Nigeria will also be reviewed. A similar approach is adopted with regards to the consideration of the right in the UK in the light of article 12 of the ICESCR. Although some of the concepts referred to with regards to Nigeria may not be practically relevant to the UK, they will prove useful in the final analysis as a tool for the further comparative discourse of the subject of the right to health care in Nigeria. For instance, the components of the right to health care in Nigeria are slightly different from those in the UK. One of the ways of discovering this will be to look at the relevant laws and policies of both jurisdictions.

## **4.2. Preliminary Issues - A reflection on the nature and scope of the right to health care**

### **4.2.1. Is there a right to health or a right to health care?**

The above question is very important to the discussion of the right because its answer will provide the necessary framework for the analysis of certain aspects of the right with reference to Nigeria and the UK, because a court would be better placed to enforce or interpret the right to health care if it fully understands the legal and conceptual nature of the subject and its impact on society. I begin the analysis of the question from the perspective of international law<sup>7</sup> with the view of relating the identified concept to the various domestic and regional human rights legislation applicable in Nigeria and the UK in terms of the right to health care.

According to the constitution of the World Health Organisation (WHO), health is defined as a ‘state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’.<sup>8</sup> The constitution similarly defines the right to health thus ‘the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being

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<sup>6</sup> See for instance, the Revised National Health Care Policy and the relatively recent Health and Social Care Act signed into law in December 2014.

<sup>7</sup> Article 12 of the ICESCR does not define the right to health care, it only states the standards expected with regards to the right. Even though the UNCESCR in General Comment 14 para 11 describes the right to health care as ‘an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health’.

<sup>8</sup> Preamble to the WHO constitution.

without distinction of race, religion, political belief, economic or social condition'.<sup>9</sup> Similarly, Article 25(1) of the Universal Declaration of Human Rights provides thus:

[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>10</sup>

In the late 1940s when the two documents referred to above were adopted, it would have been understandable following the immediate aftermath of World War II that such far-reaching definition is given to human rights and the right to health care because of the impact of the war on the general wellbeing and health of the world. However, in contemporary times, I would argue that the wide definition of the right is difficult to defend or sustain at the level envisaged. This may explain why Griffin describes the right as a dubious right.<sup>11</sup> Although, the WHO constitution and the UDHR are not treaties,<sup>12</sup> their wide acceptance and authoritative value on human rights, warrants that their definition of the right is considered, especially as some of the norms set out in the UDHR form part of the customary international law. It is submitted that the definition set out in both documents is problematic and does not provide any practical basis for defining a coherent concept of the right to health care in such way that might lend it to some judicial enforceability. Although, I have advocated for universalism as the foundation of all the SER discussed in this research,<sup>13</sup> the extremely broad definition of the right to health care can lead to unmanageable expectations among the citizens of any country, as no government can be reasonably expected to meet the requirements of the right as defined in the WHO constitution and the UDHR.<sup>14</sup> Furthermore, it is impossible to realistically expect the government of any country to guarantee the right to 'health' to its citizens, because health in itself is an intrinsic human condition, which no government can grant. According to Goodman, the health status of an individual is at least partially a function of his or her voluntary behavioural and lifestyle decisions, which are not susceptible to government control.<sup>15</sup> To

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<sup>9</sup> Ibid.

<sup>10</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

<sup>11</sup> James Griffin *On Human Rights* (OUP 2008) 208.

<sup>12</sup> Geraldine Van Bueren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' (2000) Public Law 1.

<sup>13</sup> Pg 15.

<sup>14</sup> Goodman (n 1); Jonas Juškevičius and Janina Balsienė 'Human Rights in Health care: Some Remarks on the Limits of the Right to Health care' (2010) 4 (122) Jurisprudence 95.

<sup>15</sup> Goodman (n 1) 644.

illustrate this point, the dangers of smoking to one's health have been well documented by both the government and health care practitioners in the UK. Despite the various schemes and interventions by the government to stop, or at least discourage people from smoking, I do not believe there is much the government can do in terms of physically stopping individuals from smoking, for such would be a violation of the individual's rights. Therefore, for the government to be the ultimate guarantor of citizens' right to health, it will of necessity have to be empowered to proscribe unhealthy behaviours such as smoking, excessive use of alcohol, and to encourage healthy lifestyles such as regular exercises and the consumption of healthy foods. Therefore, when the proponents of the right to health demand that government be the guarantor of the right to health, they must be cautious because as Goldwin warned:

If great concentrations of power are placed in the hands of the government, enough effectively to guarantee every citizen housing, a job, education of every sort, and many other guarantees as well, nothing will be powerful enough to 'oblige' the government 'to control itself'—and that is the obligation about which we should be most concerned if we care about liberty.<sup>16</sup>

The preceding arguments probably explain the reason why the more recent international human rights documents seem to have adopted a narrower definition of the right to health care in a manner somewhat consistent with the position being proposed in this research. For instance, article 24(1) of the Convention on the Rights of the Child (CRC) provides thus:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her **right of access to such health care services**.<sup>17</sup>

Similarly, article 25 Convention on the Rights of Persons with Disabilities 2006, also states:

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure **access for persons with disabilities to health services** that are gender-sensitive, including health-related rehabilitation.<sup>18</sup>

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<sup>16</sup> Robert Goldwin *Why Blacks, Women and Jews Are Not Mentioned in the Constitution, and Other Unorthodox Views* (AEI Press Washington 1990) 71-72.

<sup>17</sup> emphasis mine.

<sup>18</sup> emphasis mine.

As is evident from the provisions of these later human rights documents, the emphasis of the operational phrases is towards the provision of access to the right to health care or health services and not a right to health as evidenced in the earlier documents.<sup>19</sup> It is submitted that the apparent shift in the language of these later documents could not have been an accident of semantics, but a deliberate development occasioned by the realisation that the definitions of the right to health in the earlier human rights documents were far too wide, incoherent and unmanageable, so that no court sitting in the UK<sup>20</sup> or Nigeria<sup>21</sup> would be expected to enforce or adjudicate on them in the manner they are set out in the earlier human rights instruments, hence the need to have a more workable and realistic definition of the right.

The author acknowledges that a multi-sectoral<sup>22</sup> approach to enforcing or realising the right to health care is needed, for this indeed is the aim of the principle of interdependence of rights, however, I do not think that the building of a framework around the right that embodies in it, other human rights in a way that gives the impression that they can only be achieved through the enforcement or realisation of the right to health care is sustainable in the long run. Tobin<sup>23</sup> has rightly emphasised the need to draw lines around the scope of the right to health to aid the interpretation of the concept and this is what appears to have been done in the Convention on Human Rights and Biomedicine 1999, Article 3 of which provides that ‘parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality’ and I think this provision as an example of what the right should entail does set measurable and practical standards with which one could assess compliance as opposed to the sort of generic provisions of earlier international human rights legislation on the right to health care.

In view of the foregoing, it is safe to assume that when the reference is made to the ‘right to health’, what is really meant is the ‘right to health care’<sup>24</sup> because, in my opinion, no government or community can legislate for the health of its citizens. Health as defined by the

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<sup>19</sup> See for example Article 3 of the Convention on Human Rights and Biomedicine.

<sup>20</sup> See for instance, the case of *R v Secretary of State for Health, West Midlands Regional Health Authority and Birmingham Area Health Authority, ex p Hincks* (1980) 1 BMLR 93, where, the UK Court of Appeal held that the statutory duty of the Secretary of State for Health to provide health services is subject to the need to take cognizance of the resources available to them; see also the case of *R v Secretary of State for Social Services, ex p Walker* (1987) 3 BMLR 32 where the court withheld leave to apply for judicial review following the decision of the health authorities to postpone a non-life threatening operation on a baby.

<sup>21</sup> *Okogie v. Attorney General Lagos State* (1981) 1 NCLR 105.

<sup>22</sup> Used in the context of interlinking human rights and having all agencies of government and private agencies working together for the realisation of SER.

<sup>23</sup> John Tobin, *The Right to Health in International Law* (OUP 2012) 1, 122.

<sup>24</sup> Juškevičius (n 14) 95–110.

WHO embodies more contents and entitlements than a government can be reasonably and possibly expected to provide or guarantee without impeding the functioning of other rights.<sup>25</sup> Furthermore, the state of health of citizens is the result of an interplay of a host of factors, arising mainly from the lifestyles and personal choices of the members of the society. Having said that, it is crucial to emphasise that the government of respective states has a significant role to play in realising the right to health care. The provision of quality and affordable health care as well as ensuring access to medical facilities are aspects of the right that the government must guarantee and be willing to be held accountable where it fails or neglects to do so.

#### **4.2.2. The nature of the highest attainable standard**

The preceding arguments in support of the right to health care as opposed to the right to health warrant an analysis of article 12 of the ICESCR in the light of the amplification provided in General Comment 14, concerning the nature of the right to health care in UK and Nigeria. It should be added, that although General comment 14 is not legally binding, it is, however, an authoritative guide for the interpretation of the right to health care and helps in grounding an appeal for the implementation of the right to health care.<sup>26</sup>

Article 12 of the ICESCR provides thus:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.<sup>27</sup>
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;

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<sup>25</sup> Griffin (n 11) 208 -209.

<sup>26</sup> Gunilla Backman et al 'Health systems and the right to health: an assessment of 194 countries' (2008) 372 *The Lancet* 2048; Judith Asher, *The Right to Health: A Resource Manual for NGOs* (Commonwealth Medical Trust 2004) 25.

<sup>27</sup> In contrast, the African Charter on Human and Peoples' Rights refers to the right to enjoy the best attainable state of physical and mental health (article 16). The ECHR and the HRA 1998 do not provide for the right to health care, however, the courts have developed an approach of 'reading in' social and economic rights into the civil and political guaranteed under the HRA 1998.

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

From the broad and extensive provisions of article 12 above, this research will focus on two critical and relevant elements of article 12 with regards to the right to health care in the UK and Nigeria. This is because these two elements help to contextualise the practical application of article 12 of the ICESCR with regards to the UK and Nigeria, and by implication useful for the comparative analysis of the right to health care in both jurisdictions. They are also useful in helping to understand the nature of the highest attainable standard of the right to health care and the crucial role of government in realising the right to health care.<sup>28</sup> Aside from these grounds, these two elements also encapsulate the other aspects of article 12 so that considering them would necessarily extend to the other aspects of article 12. For example, it can be argued that paragraphs a-c of subsection 2 of article 12 are adjuncts of article 12 (2) (d) because to achieve them, will require following the provisions of paragraph (d) to subsection 2 of article 12. This explains the choice of sub-sections 1 and 2(d) as providing a comprehensive conceptual framework for analysing the right to health care in the UK and Nigeria. In any case, the instances or examples listed in subsection 2 (a) to (d) are only for illustrative purposes and are not exhaustive.<sup>29</sup> Following this narrative, these two elements are:

- i. the highest attainable standard of physical and mental health, and the
- ii. creation of conditions which would assure to all, medical service and medical attention, in the event of sickness.

Thus article 12 of the ICESCR entails state's responsibility for providing measures that will lead to 'the highest attainable standard of physical and mental health' through 'the creation of conditions which would assure to all, medical service and medical attention in the event of sickness'. These two elements will provide guidance for the consideration of the relevant themes that feature in the realisation of the right to health care in the UK and Nigeria. This formulation, as can be seen, does not guarantee 'health' within the construct envisaged by the WHO's definition and widely espoused by a group of writers.<sup>30</sup> The level of physical and

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<sup>28</sup> Asher (n 26) 15.

<sup>29</sup> General Comment 14, para 7.

<sup>30</sup> Kristen Hessler and Allen Buchanan, 'Specifying the Content of the Human Right to Health Care' in Allen Buchanan (ed), *Justice and Health Care: Selected Essays* (OUP, 2009) 203, 205.

mental health which each individual enjoys is an interplay of many factors, which no state can fully control.<sup>31</sup> Therefore, it would be unproductive to expect any firm judicial pronouncement on such conceptions of the right as fostered by the WHO. As Tobin has suggested, the phrase ‘highest attainable standard’ recognises that the health status is the sum of factors peculiar to that individual and the resources of the state where they live, and ‘although the right to health care is a universal standard, its implementation and level of enjoyment will remain relative’.<sup>32</sup> It is, therefore, safe to argue that the right does not exist in vacuum or isolation.<sup>33</sup>

Para 8 of General Comment 14 states as follows:

The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

From the above comment, it is clear that the highest attainable state of health and taking measures to attain that state does come with freedoms and entitlements. As for what the content of these are, the author agrees with the position espoused by Daniels that they are ‘system relative and depends on resource allocation decisions that are made using a fair, deliberative process’,<sup>34</sup> and of course subject to the minimum core obligations of the UK and Nigeria, and the various benchmarks and indicators used for measuring and monitoring the implementation and enforcement of the right to health care. As for the nature of the duties arising from the freedoms and entitlement inherent in the highest attainable standard of the right to health care, there are three specific obligations on state parties which are, the obligation to respect, the obligation to protect and finally the obligation to fulfil.<sup>35</sup> Together, these obligations require states not to interfere directly or indirectly with the individual’s right to health care and to take preventive measures to stop others from interfering. These, in turn, require the state to take

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<sup>31</sup> See Norman Daniels, *Just Health: Meeting Health Needs Fairly* (OUP, 2008) 144.

<sup>32</sup> Tobin (n 23) 121.

<sup>33</sup> A popular instance is the decision of the South African court in the popular *Irene Grootboom*’s case. Many years after that decision was handed down by the court, there is no evidence to suggest the full implementation of the court’s decision, because of financial and economic constraints, which might just an ostensible reason after all.

<sup>34</sup> Norman Daniels, *Just Health. Meeting Health Needs Fairly* (Cambridge University Press 2008) 145.

<sup>35</sup> These obligations require a state to make health care services available, accessible (including affordability), acceptable and of good quality. See General Comment No. 14: E/C.12/2000/4 para 12.

suitable steps through legislation, budgetary and judicial measures amongst others towards ensuring the full realisation of the right to health care.<sup>36</sup>

#### **4.2.3 Minimum Core contents of the right to health care and the core obligations of States in the light of General Comment 14**

In chapter 3,<sup>37</sup> I examined the nature of SER in the light of *rights* and *duties* using the Hohfeldian account of rights to drive the analysis of the universal and instrumental nature of SER as a basis for their implementation. I also established that SER, just as is the case with civil and political rights, do require institutions of the state to enable their implementation. It is in the light of the foregoing that I examine the minimum contents of the right and the corresponding core obligations<sup>38</sup> they give rise to.

As I stated in section 4.2.2,<sup>39</sup> the right contains both universal freedoms and entitlements,<sup>40</sup> thus underlying the negative and positive aspects of the right. In my opinion, the minimum core approach<sup>41</sup> provides one of the most viable means for these freedoms and entitlements to be concretised through the instrumentality of the courts.<sup>42</sup> The minimum core approach enjoys wide support in human rights scholarship,<sup>43</sup> according to Muller,<sup>44</sup> the concept of the minimum content of the right to health care was adopted in General Comment 14 by the UNCESCR to give a clearer understanding to the application of the *progressive realisation* principle in article 2 of the ICESCR, which provides that state parties must use the maximum of their available

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<sup>36</sup> *ibid* paras 34-37.

<sup>37</sup> Pg 28.

<sup>38</sup> General Comment 14, para 43.

<sup>39</sup> Pg 60.

<sup>40</sup> General Comment 14, para 8.

<sup>41</sup> Geraldine van Bueren, 'Of Floors and Ceilings: Minimum Core Obligations and Children' in Daniel Brand and Sage Russell (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (Pretoria, Protea Book House, 2002), 183-184; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, (Oxford University Press 2007), chapter 6; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009), 66.

<sup>42</sup> The minimum core approach forms the framework on which I argue for a greater involvement of UK and Nigerian courts in the adjudication and enforcement of the SER I discuss in this research. See pg 166.

<sup>43</sup> Geraldine van Bueren, 'Of Floors and Ceilings: Minimum Core Obligations and Children' in Daniel Brand and Sage Russell (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (Pretoria, Protea Book House, 2002), 183-184; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, (Oxford University Press 2007), chapter 6; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009), 66. For a different perspective, see John Tobin, *The Right to Health in International Law* (Oxford: Oxford University Press, 2012), 243.

<sup>44</sup> Amrei Müller, 'The Minimum Core Approach to the Right to Health. Progress and Remaining Challenges' in Sabine Klotz, Heiner Bielefeldt, Martina Schmidhuber, and Andreas Frewer (eds), *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation*, (Transcript Verlag 2017) 57.

resources<sup>45</sup> with a view towards the progressive realisation of SER. As I mentioned in chapter 1 of this research,<sup>46</sup> the progressive realisation approach has in it the potential of slowing the pace of implementing SER, because of the attitude of states who relying on the progressive realisation approach view SER as programmatic ideals for them, and not immediately realisable.<sup>47</sup> The UNCESCR issued General Comment 3 to clarify the principle of progressive realisation.<sup>48</sup> According to the UNCESCR, the principal obligation on the part of states to take the necessary steps with a view to progressively realising SER should not be wrongly interpreted as depriving the obligation created in article 2 of the ICESCR of all meaningful content,<sup>49</sup> but rather it is a flexibility device that reflects the economic difficulties that could potentially arise from a full and immediate implementation of SER. The UNCESCR reasoned that to interpret the progressive realisation approach otherwise, would be to deny the *raison d'être* of the ICESCR which is to create obligations for states in respect of the full realisation of SER.<sup>50</sup> The UNCESCR further stated in General Comment 3 that given the progressive realisation approach to the implementation of SER, a minimum core obligation to ensure the implementation of the minimum essential levels of each SER in states was required.<sup>51</sup> In the view of the UNCESCR, '...a State party in which any significant number of individuals is deprived ... of essential primary health care... is, *prima facie*, failing to discharge its obligations under the Covenant'.<sup>52</sup> Does this, therefore, mean that the minimum core with regards to the right to health care is access to essential primary health care? And if this is the case, what is the content of the minimum core and what duty does it obligate the states to perform in respect of the right?

Although article 12 of the ICESCR provides for the universal right of 'everyone to the enjoyment of the highest attainable standard of physical and mental health'<sup>53</sup> it does not clarify the specific minimum core or the essential elements of the right. It also fails to provide the duties or minimum core obligations that have to be fulfilled by the state in respect of the right. However, the UNCESCR issued General Comment 14 to clarify these ambiguities with regards

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<sup>45</sup> For a discussion on the contents of the term 'available maximum resources' see Sigrun Skogly 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' [2012] 12(3) Human Rights Law Review Human Rights Law Review 393.

<sup>46</sup> Pg 1-2.

<sup>47</sup> See generally, Kathrine Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) Int'l Journal of Constitutional Law 385.

<sup>48</sup> Article 2 ICESCR.

<sup>49</sup> General Comment 3, para 9; General Comment 14, para 31.

<sup>50</sup> *Ibid.*

<sup>51</sup> General Comment 3, para 10.

<sup>52</sup> *Ibid.*

<sup>53</sup> Article 12, ICESCR,

to the standard of the contents of the right as well the minimum core and non-derogable duties that are required to be fulfilled, in order to progressively realise the full implementation of the right. General Comment 14 is the product of the UNCESCR's several years of examining the reports by state parties, it is divided into five parts. Part one deals with the normative content of article 12, part two is on the state parties' obligations, part three talks about violations, part four is on the implementation at the national level and part five deals with the obligations of actors other than state parties.

According to the UNCESCR, the right creates both general<sup>54</sup> and specific<sup>55</sup> legal obligations. With regards to the general obligations of the right, there is an immediate obligation to ensure that the right is exercised without discrimination of any kind as provided in article 2.1 of the ICESCR; secondly, states such as the UK and Nigeria are to ensure that steps are taken towards the full realisation of the rights.<sup>56</sup> Paras 34 to 36 of General Comment 14 state the specific legal obligations which are to respect, protect and fulfil the right. The obligation to respect creates in my opinion, a negative duty on the part of the state to refrain from denying or restricting equal access to the right. For example, a state that provides discriminatory access to health care facilities based on the status or race of its citizens would be violating this obligation.<sup>57</sup> The obligation to protect requires states to ensure that there are measures in place measures to prevent third parties who provide health care and health-related services from interfering with the access of individuals to the right. For example, there have been many cases of female genital mutilation (FGM) reported in the UK<sup>58</sup> and Nigeria<sup>59</sup> and part of the UK and Nigeria' government response was to outlaw such practices through the instrumentality of legislation.<sup>60</sup> Another example would be the government's regulation of private health care providers. This obligation also underlies the fact that it does not have to be the government alone that can provide all the health care needs of a state; however, it is critical that the state ensures that the

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<sup>54</sup> General Comment 14, para 30.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Lucinda Hiam and Martin Mckee , 'Making a fair contribution: is charging migrants for healthcare in line with NHS principles?' (2016) Vol 109 (6) Journal of the Royal Society of Medicine 226.

<sup>58</sup> Alison Macfarlane and Efua Dorkenoo, *Prevalence of Female Genital Mutilation in England and Wales: National and local estimates* (City University London, and Equality Now 2015) 1.

<sup>59</sup> Chris Onuoha, 'Female Genital Mutilation persists despite outlaw' (*Nigerian Vanguard Newspapers*, 27 April 2018) <<https://www.vanguardngr.com/2018/04/female-genital-mutilation-persists-despite-outlaw/>> accessed 30 January 2019.

<sup>60</sup> Prohibition of Female Circumcision Act 1985, Female Genital Mutilation Act 2003, (UK); Violence Against Persons (Prohibition) Act, 2015, (Nigeria).

provision of health care needs by others is done in line its core obligations.<sup>61</sup> The obligation to fulfil requires states to sufficiently recognise the right to health care in their national political and legal systems and to adopt measures such as the implementation of legislation and a national health policy for the realisation of the right to health care. This obligation creates a positive duty on the government to ensure the provision of adequate resources including trained medical personnel and facilities in order to fully realise the right to health care. Of these three obligations, the obligation to fulfil reflects the core obligations of the right in paragraph 43 of General Comment 14 and the obligations of comparable priority in paragraph 44 of General Comment 14. I critically examine these two set of obligations below in the next section.

#### **4.2.4 General Comment 14 - A critique of the minimum core obligations and obligations of comparable priority.**

Conceptualising the minimum core of SER including the right to health care can be problematic.<sup>62</sup> With regards to the right to health care, the UNCESCR stated in General Comment 3 that a minimum core obligation to ensure the implementation of the minimum essential levels of each SER in states was required.<sup>63</sup> According to the UNESCR, ‘...a State party in which any significant number of individuals is deprived ... of essential primary health care... is, prima facie, failing to discharge its obligations under the Covenant’.<sup>64</sup> So, it is clear that in terms of the minimum core of the right, states should be able to, as a minimum, provide essential primary health care, otherwise it would be failing in its obligation. Accordingly, it is the core obligations of states in respect of the right that gives rise to the minimum core contents of the rights.<sup>65</sup> As to what the contents of the minimum core of the right to health care are, the UNCESCR after referring to the Programme of Action of the International Conference on Population and Development,<sup>66</sup> the Alma-Ata Declaration<sup>67</sup> in General Comment 14, declared that these obligations include at least the following:

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<sup>61</sup> For a critical perspective on the role of non-state actors in SER practice, see Kerstin Mechlem ‘Treaty Bodies and the Interpretation of Human Rights’ (2009) Vol 42 Vanderbilt Journal of Transnational Law 905.

<sup>62</sup> Kathrine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 Yale International Law Journal 113.

<sup>63</sup> General Comment 3, para 10.

<sup>64</sup> Ibid.

<sup>65</sup> Sage Russell, ‘Minimum state obligations: international dimensions’, in Daniel Brand and Sage Russell (eds), *Exploring the content of socio-economic Rights: South African and International Perspectives* (Pretoria, Protea Book House, 2002), 11 -21.

<sup>66</sup> This programme of action was adopted at the International Conference on Population and Development Cairo, 5–13 September 1994.

<sup>67</sup> International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.<sup>68</sup>

The UNCESCR went on to state in General Comment 14 that the following though not part of the core obligations of States are part of the obligations of comparable priority:

- (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) To take measures to prevent, treat and control epidemic and endemic diseases;
- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

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<sup>68</sup> General Comment 14, para 43.

(e) To provide appropriate training for health personnel, including education on health and human rights.<sup>69</sup>

To be critical, I must say that there are a number of inconsistencies between the version of the core obligations of the right as stated in General Comment 14 and the minimum core obligation of the right to health care stated in General Comment 3 which relates to the provision of ‘essential primary health care’.<sup>70</sup> Apart from the mention of the provision of essential medicines, paragraph 43 of General Comment 14 on the core obligations of the right to health care, does not explicitly list the provision of essential primary health care as part of the core obligations of states with regards to the right, so that it is unclear which other health services fall within the core obligations of the state in respect of the right. However, I would argue that paragraph 44 of General Comment 14 (obligations of comparable priority) does by implication of the items listed in the paragraph, include essential primary health care. It is difficult to understand the reason for this inconsistency on the part of the UNCESCR especially as it can be argued that paragraph 44 of General Comment 14 unlike paragraph 43 is subject to the principle of progressive realisation enunciated in article 2 of the ICESCR.<sup>71</sup> A better and more functional approach, in my opinion, would have been the inclusion of the elements of essential primary health care listed in paragraph 44 of General Comment 14 in paragraph 43, such an inclusion would have meant that the items listed in paragraph 44 are immediately realisable<sup>72</sup> and non-derogable.<sup>73</sup> It could have contributed to the amplification of the term ‘essential primary health care’ which is the standard of the minimum core obligation of the right used in General Comment 3.<sup>74</sup> Furthermore, it would have provided more clarity as to the contents of the core obligations because, under the current state of affairs, the relationship between the core obligations of the right in paragraph 43 and the obligations of comparable priority in paragraph 44 of General Comment 14 remains unclear.<sup>75</sup> The lack of clarity in the relationship

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<sup>69</sup> Ibid, para 44.

<sup>70</sup> General Comment 3, para 10.

<sup>71</sup> General Comment 14, para 43.

<sup>72</sup> For example, para 73 of General Comment No. 15 (on the right of the child to the enjoyment of the highest attainable standard of health) containing the core content of the right is similar to para 44 of General Comment 14.

<sup>73</sup> General Comment 14, para 47.

<sup>74</sup> General Comment 3, para 10.

<sup>75</sup> Lisa Forman, Claudia Biermann, Claire Brolan, Martin McKee, Rachel Hammond and Gorik Ooms ‘What Do Core Obligations under the Right to Health Bring to Universal Health Coverage?’ (2016) Vol 18 (2) Health and Human Rights, 23; Amrei Müller, ‘The Minimum Core Approach to the Right to Health. Progress and Remaining Challenges’ in Sabine Klotz, Heiner Bielefeldt, Martina Schmidhuber, and Andreas Frewer (eds), Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation, (Transcript Verlag 2017) 57.

between the two set of obligations has led to questions about the relevance of paragraph 44 (obligations of comparable priority) and whether the items listed under it are subject to the principle of progressive realisation and resource constraint considerations.<sup>76</sup>

With regards to the minimum core obligation, another area that is unclear between General Comments 3 and 14 is whether resource constraints can provide states with a ground for non-compliance with the minimum core obligations by states. General Comment 3 mirroring the provisions of article 2 of the ICESCR provides that ‘...any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned’.<sup>77</sup> Conversely, General Comment 14 provides ‘...that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable’.<sup>78</sup> This disparity on the effect of resource constraints on the implementation of the minimum core obligations raises two questions. Firstly, does it mean that there are two notions of minimum core obligations of the right to health care, one that is limited by resource constraints and subject to progressive realisation and another that is not limited by resource constraints and non-derogable? Secondly, does General Comment 14 provide a conceptual clarity with regards to the nature of the minimum core? On the first question, I am inclined to say that the explication of the nature of the minimum core obligations provided in General Comment 14 is more supportable because I do not see the need for a minimum core which impact is effectively extinguished by being subjected to resource constraints.<sup>79</sup> As for the second question, I think the latter is more likely the case especially as General Comment 14 was issued 10 years after General Comment 3. Although the provision of maximum resource allocation is critical to the realisation of the right to health, it is not in all aspects of the minimum core obligations that resources are required in the sense of money. Some of the issues that come within the legal obligation to respect (e.g. non-discriminatory access to health care) might not need resources on the same level as if a state wanted to provide free dental health care to all or school meals to all pupils in public schools.

The minimum core approach to implementing SER can become a formidable framework for the implementation of SER especially in cases where judicial remedies are sought. Minimum

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<sup>76</sup> Ibid.

<sup>77</sup> General Comment 3, para 10.

<sup>78</sup> General Comment 14, para 47.

<sup>79</sup> The UNCESCR has dealt extensively with how limitations created by inadequate resources could be navigated using international cooperation and assistance. See General Comments 3, 12 and article 2 ICESCR; see also the Limburg Principles on the Implementation of the ICESCR, June 1986, para. 25.

core obligations, in my opinion, will avail the court a useful tool within which to measure the compliance of government. However, in my opinion, I think the minimum core obligations of the right to health care as formulated in paragraph 43 of General Comment 14 is rather broad and vastly incoherent. It covers other free-standing SER as part of the minimum core obligations in a manner that makes the concept and application of the minimum core obligations of the right to health care vague. This can be problematic when it comes to applying the contents of the minimum core of SER including the right to health care. My preference would be for a streamlined notion of the minimum core approach of the right, one that makes it easy to measure states' compliance in line with the obligations of conduct and obligations of result that the UNCESCR mentioned in General Comment 3.<sup>80</sup> In my opinion, paragraph 44 (obligations of comparable priority) provides a more sustainable basis for such an approach than the unduly broad position of paragraph 43. The availability, accessibility, and acceptability and qualitative (AAAQ framework)<sup>81</sup> can provide a functional basis for measuring states' compliance with essential primary health care, for example. In my opinion, such a paradigm, would provide the court with a more realistic basis for accessing whether a country is meeting its minimum core obligations or not, and as I argue in chapter 7 of this research<sup>82</sup>, what constitutes the contents of the minimum core within the internationally recognised baseline is more a question of fact than it is of law because as society advances essential primary health care needs will also change. I think understanding the minimum core of the right as a right to equal access to essential primary health care that is available, accessible, affordable and of good quality would help towards the full realisation of the right to health care.

#### **4.2.5 Are Minimum core contents of the right to health care universal or relative?**

The universalism versus cultural relativism debate which was analysed in chapter two of this research does have an implication for the application of the core obligations of states in respect of the right to health care. As I have stated in 4.2.3,<sup>83</sup> the minimum core contents of the right to health care can be gleaned from the core obligations of states in respect of the right.<sup>84</sup> The question, therefore, is whether the minimum core obligations of the right to health care is universal or culturally relative? To put it in context, by whether the core obligations of the right

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<sup>80</sup> General Comment 3, para 1.

<sup>81</sup> General Comment 14, para 12.

<sup>82</sup> Pg 181 – 183.

<sup>83</sup> Pg 63.

<sup>84</sup> Sage Russell, 'Minimum state obligations: international dimensions', in Daniel Brand and Sage Russell (eds), *Exploring the content of socio-economic Rights: South African and International Perspectives* (Pretoria, Protea Book House, 2002), 11 – 21.

to health care are universal or relative to specific cultures, I mean whether the minimum core obligations apply universally or are subject to national considerations? There is a myriad of opinions on this question,<sup>85</sup> the vast majority of those<sup>86</sup> against setting a universal approach to the minimum content and the obligations they give rise to, argue that it is unrealistic to expect all states to have the same minimum core in view of the varying levels of development among the different States. Their argument is reinforced by the rather broad definition of the core obligations of the right in paragraph 43 of General Comment 14. Although General Comment 14 also refers to international cooperation and assistance for the realisation of minimum core obligations, fulfilling all the items listed in paragraph 43 of the General Comment can become challenging for low to middle-income countries because of the wide scope of the core obligations. Whilst I agree with UNCESCR that the universal right to health care is indispensable for the exercise of other SER, I do not think that the underlying social determinants of health such as essential food, housing, adequate supply of potable should have been included in the minimum core obligations of the right as these are free-standing rights with their respective minimum core obligations.<sup>87</sup> A better approach would have been for the UNCESCR to make references to the social determinants as important to health, and then qualify their inclusion by stating that for purposes of interpreting the minimum core of the right to health care, these social determinants are to be considered within the specific rights that encapsulate them in the ICESCR.

My support for a nuanced and realistic minimum core obligation of the right calls for the UNCESCR to focus on interpreting the SER contained in the ICESCR rather than trying to promote it by creating extensive core obligations for states that might be hard to fulfil. Having said that, I take the position that human rights including SER are universal as a result of the inherent dignity of all human beings irrespective of where they live in the world, and so, the minimum core obligations of the right to health care would only make sense if it had a universal

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<sup>85</sup> See generally Lisa Forman, *et al* 'Conceptualising minimum core obligations under the right to health: How should we define and implement the 'morality of the depths' (2016) *The International Journal of Human Rights* 1.

<sup>86</sup> Kathrine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' *Yale International Law Journal* (2008) 33 138. She reviews different approaches that have been used to determine the minimum core contents of SER and concludes that there is no universally accepted minimum core content; see also Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (Oxford: Clarendon Press 1995)141; Craig Scott and Philip Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) *16 South African Journal of Human Rights* 250.

<sup>87</sup> The right to adequate housing is protected by Article 11 ICESCR and has two applicable General Comments (4 and 7) where the minimum core obligations of the right is defined.

standard independent of the different levels of development around the world.<sup>88</sup> Without such an international standard of the minimum core, states might start creating their own minimum core obligations which may be below the standard of the minimum core obligations expected and could impact negatively on the nature of human rights and SER in particular.<sup>89</sup>

A universal standard of the core obligations of the right it has been argued could lead to inertia among developing countries where the health care standards are mostly better than developing countries.<sup>90</sup> However, there is no evidence this could happen; were it to be so, such inertia could amount to taking ‘retrogressive measures’<sup>91</sup> which is generally not permissible.<sup>92</sup> I think it is important to state that having a universal minimum core of the right is the starting point,<sup>93</sup> the ‘base-line’,<sup>94</sup> as Bilchitz puts it, towards the full realisation of the right. Therefore, having a universally determined standard provides a useful approach for monitoring the progress made towards the full realisation of the right.

### **4.3. Analysis of the emergent themes in article 12 of the ICESCR with regards to Nigeria and the UK.**

#### **4.3.1. Article 12 and the right to health care in the Nigerian legal system**

Having addressed the preliminary issues with respect to the right to health care under article 12 of the ICESCR, which essentially has to do with governments creating the conditions that would assure to all the highest attainable standard of the right to health care, the focus shifts to a consideration of those items that are critical to the realisation of the right in relation to both jurisdictions. Because of the broad nature of the right to health care, the comparative discussion of the right in Nigeria and the UK is focused on the two principal themes of resource allocation and access to health care facilities from a rights-based perspective through the aid of relevant statutes and decided cases. Critically, the approach of UK and Nigerian courts in realising the right to health care is also evaluated.

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<sup>88</sup> Limburg Principles on the Implementation of the ICESCR, June 1986, para. 25.

<sup>89</sup> Pg 48.

<sup>90</sup> Amrei Müller, ‘The Minimum Core Approach to the Right to Health. Progress and Remaining Challenges’ in Sabine Klotz, Heiner Bielefeldt, Martina Schmidhuber, and Andreas Frewer (eds), *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation*, (Transcript Verlag 2017) 63.

<sup>91</sup> General Comment 14, para 48.

<sup>92</sup> *Ibid*, para 32.

<sup>93</sup> David Bilchitz, ‘Towards a reasonable approach to the minimum core: laying the foundations for future socioeconomic rights jurisprudence’ (2003) 19 *South Africa Journal on Human Rights*. 12.

<sup>94</sup> *Ibid*.

#### 4.3.2. An overview of the legal framework for the protection of the right to health care in Nigeria.

With respect to the issues of access and resource allocation in Nigeria, there are a few questions which might be asked to help guide the analysis on the right to health care in Nigeria. The questions are: what is the legal position of the right to health in Nigeria? Is Nigeria meeting the obligations of the highest attainable standard of health care in line with the core principles that have been analysed in this chapter? What is the state of health in Nigeria? Does Nigeria allocate resources appropriately? Is there access to health care facilities? What factors militate against these? What in all these, is the role and attitude of courts to the right to health care in Nigeria? Unlike the UK, Nigeria has a federal constitution (the constitution)<sup>95</sup> which is supreme over all other laws, including international treaties<sup>96</sup> as far as their domestic application is concerned in Nigeria.<sup>97</sup> The implication of this is that, no matter how popular and desirable the provisions of an international treaty might be, such provisions would not be deemed as comprising part of the domestic laws in Nigeria unless there have been definite measures on the part of the legislature to locally enact such treaty<sup>98</sup> into the *corpus juris* of Nigeria. This is known as dualism. With reference to the local application of international treaties, it can often pose difficult challenges in accessing SER since anyone seeking to approach the Nigerian courts to enforce their right to health care under such international human rights laws will indubitably be met with an obstacle based on the position of the law stated above, made worse by the absence of enforceable local remedies in Nigerian law. The right to health care under the Nigerian law is not explicitly provided for. Section 17 (3)(c)(d) of the constitution under chapter 2 of the constitution,<sup>99</sup> makes what could be described as a passing and vague reference to the right to health care by stating that the state must ensure that ‘there are adequate medical

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<sup>95</sup> This is known officially as the constitution of the Federal Republic of Nigeria, 1999 which was amended in January 2011.

<sup>96</sup> Nigeria operates a dualist legal system and international treaties such as the ICESCR and ACPHR do not assume automatic force of law in Nigeria, except their provisions have been enacted into law by an Act of the National Assembly. See s12 of the constitution.

<sup>97</sup> Section 1 of the constitution see also *Abacha and Others v Fawehinmi* (2001) AHRLR 172, where the Supreme Court of Nigeria held that although the African Charter (Ratification and Enforcement Act) is in a special class of legislation following from Nigeria’s international obligation, it is nonetheless subject to the constitution.

<sup>98</sup> See s12 of the constitution. The Nigerian Legislature has domesticated the African Charter on Human and Peoples’ Rights and this under Nigerian law is known as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement Act) The status of this Act vis a vis the Nigeria has been clarified in the case of *Abacha and Others v Fawehinmi* (2001) AHRLR 172.

<sup>99</sup> This chapter is titled Fundamental Objectives and Directive Principles of State Policy. It first entered Nigeria’s constitutional law lexicon in the 1979 constitution which is the predecessor to the 1999 constitution. It is believed to have been transplanted from the Indian constitution of 1949, as amended in 1951. See Jadesola Akande, *The Constitution of the Federal Republic of Nigeria 1979 with Annotations* (Sweet & Maxwell 1982) 13.

and health facilities for all persons'. However, in section 6(6)(c) of the constitution, the judicial powers of the courts to review any question relating to the rights created under chapter 2 including section 17 is ousted. Section 6(6)(c) states that the judicial powers vested in the courts shall not 'extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.' The implication of this provision is that it effectively extinguishes any hope of a legal foundation for access to the right to health care in Nigeria, at least from a rights-based perspective, because of the state's reluctance to accept its 'duty and responsibility'<sup>100</sup> to provide health care for its citizens.

The African Charter on Human and Peoples' Rights (the African Charter)<sup>101</sup>, a treaty to which Nigeria is a signatory clearly provides for the right to health care.<sup>102</sup> Article 16<sup>103</sup> states as follows:

1. Every individual shall have the right to enjoy the best<sup>104</sup> attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Given that there is no clear-cut provision for the right to health care in the Nigerian constitution, the provision of article 16 referred to above, would have been adequate to fill the lacuna in the constitution. However, there is a constitutional impediment in Nigeria to enforcing the above provision of the African Charter. Section 1(3) of the constitution is very instructive in this regard. It provides that 'If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.' It follows, therefore, that when section 1(3) is read together with section 6(6)(c)<sup>105</sup> of the

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<sup>100</sup> Section 13 of the constitution.

<sup>101</sup> Nigeria is yet to domesticate the ICESCR. However, the provisions of the ICESCR relevant to this research are substantially provided in the African Charter.

<sup>102</sup> Although the African Charter refers to this right as the right to health, the term 'right to health care' is used instead because of the position of this research that contends that the 'right to health' is not clearly defined and involves far too many obligations which a near an impossibility for any state will be to guarantee.

<sup>103</sup> Also, section 16 in the Nigerian Act (African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act) is worded similarly.

<sup>104</sup> Article 12 of the ICESCR refers to the 'highest attainable state'. It is submitted that this does not make any difference to the standard of the right set in the ICESCR. The difference it would appear is only a matter of semantics. See Art 7 of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 2004.

<sup>105</sup> This section ousts the jurisdiction of the courts in respect of SER in chapter two of the constitution.

constitution, the unavoidable conclusion is that article 16 of the African Charter is not enforceable in Nigeria.<sup>106</sup>

The above situation raises an important question regarding the status of the African Charter and its provisions, within the Nigerian legal system. It was assumed<sup>107</sup> for a long time that the provisions of the African Charter as ratified by the legislature, enjoyed the same measure of supremacy with the constitution. However, in the Nigerian case of *Abacha v Fawehinmi*,<sup>108</sup> the Nigerian Supreme Court relying on the decision of the UK's Privy Council in *Higgs & Anor v. Minister of National Security & Ors*<sup>109</sup> held that:

No doubt Cap. 10<sup>110</sup> is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation... But that is not to say that the Charter is superior to the Constitution ...Nor can its international flavour prevent the National Assembly ...removing it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another statute to be necessarily affected by the mere fact that it violates the African Charter or any other treaty, for that matter....<sup>111</sup>

The import of this foregoing is that, as it currently stands in Nigeria, the African Charter only applies subject to the extent permitted by the legislature,<sup>112</sup> and since the courts do not have the judicial powers to adjudicate on SER, including the right to health care, then this position of the law in Nigeria constitutes a serious impediment to the right to access health care in Nigeria, when sought to be enforced from a rights-based perspective. Because of the ouster

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<sup>106</sup> There is an international mechanism for adjudicating SER at the international and regional level such as art 2 of the Optional Protocol to the ICESCR and art 5 of the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights under the African system, however, there still remains the issue of whether the Nigerian government would be willing to implement the decisions of such agencies, especially as it is yet to ratify the Optional Protocol to the ICESCR.

<sup>107</sup> See generally, Obiajulu Nnamuchi, 'Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria' (2008) 52 (1) *Journal of African Law* 1; Oyeniyi Ajigboye, 'Realization of Health Right in Nigeria: A Case for Judicial Activism' (2014) 14 (3) *Global Journal of Human Social Science* 23.

<sup>108</sup> (2001) AHRLR 172.

<sup>109</sup> (2000) 2 WLR 1368.

<sup>110</sup> Cap 10 is the domesticated version of the ACPHR in Nigeria.

<sup>111</sup> This position was only recently fully restated by the court in *Odebunmi v Oladimeji* (2012) LPELR-15419.

<sup>112</sup> *AG Ondo v AGF* (2002) 9 NWLR (Pt.772) 222.

clause<sup>113</sup> in section 6(6)(c) in relation to domestic law, the courts have as a matter of practice refrained from exercising jurisdiction in matters relating to the justiciability or enforcement of SER.<sup>114</sup> The principle of law here is that the courts can only invoke their judicial powers under the constitution where a matter is justiciable. The courts will have no competence to invoke their judicial power if a matter is not justiciable.<sup>115</sup> Sadly for litigants, any attempt to bring health care right violation cases before the court under chapter two of the Nigerian constitution is considered an exercise in futility by the courts, a factor that is likely responsible for the tiny body of SER case law in Nigeria.

The position of the Nigerian law with regards to SER, in general, has attracted a considerable amount of debate from scholars on the subject of human rights and constitutional law. For instance, according to Okere, a recommendation to the Constitutional Drafting Committee (CDC) to allow for limited justiciability of the SER was refused on the basis that it could lead to friction between the various arms of government and that the CDC did not think that SER were proper rights individuals could claim.<sup>116</sup> Even the remedy of declaratory relief was also rejected by the CDC because it was thought that these rights would be too expensive for the government to implement and that courts should not interfere in the area of public and social policy.<sup>117</sup> However, Onyemelukwe argues that by virtue of section 13 of the constitution, the judiciary has a responsibility and is duty bound to observe and apply the provisions of the constitution<sup>118</sup> including chapter two of the constitution. Akande does not agree. She hinges her objection on the well-known grounds of limited resources and that the enforcing the provisions of chapter two of the constitution would come at considerable cost to the government,<sup>119</sup> which unlike the governments of the more affluent and industrialised Western States like the UK and US, cannot afford to guarantee the right to health care for its citizens.<sup>120</sup>

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<sup>113</sup> An ouster clause is a term, or provision found in statutes mostly used in countries with Common Law legal systems by the executive or legislature to exclude judicial review, or purport to limit the supervisory powers of the courts. This is done to preserve the finality of decisions reached by the executive without judicial interference. See *Inakoju v Adeleke* (2007) 4 NWLR (pt.1025) 423 for a discussion of the approach by Nigerian courts to ouster clauses; see also *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; *R (Hillingdon London Borough Council) v Secretary of State for Transport* [2017] EWHC 121 (Admin) on the approach of UK courts.

<sup>114</sup> *Okogie v. Attorney General Lagos State* (1981) 1 NCLR 105.

<sup>115</sup> *Nigericare Dev. Co. Ltd. v. Adamawa S.W.B.* (2008) WRN (Vol. 20) 166, 176.

<sup>116</sup> Obinna Okere 'Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution' (1983) 32 (1) *The International and Comparative Law Quarterly* 214, 220-221.

<sup>117</sup> *Ibid.*

<sup>118</sup> Cheluchi Onyemelukwe 'Access to Anti-retroviral Drugs as a Component of the Right to health in International Law: Examining the Application of the Right in Nigerian Jurisprudence' (2007) 7 *African Human Rights Law Journal* 446.

<sup>119</sup> Akande (n 99) 18.

<sup>120</sup> *Ibid.*

However, Nnamuchi<sup>121</sup> sharply disagrees with the above position. She contends that whilst Nigeria cannot provide access to health care, at the same level as wealthier Western countries, it can progressively improve in the area of meeting the core obligations of the right. Nigeria might not be able to operate the social welfare model of affluent Western countries, but it can certainly provide at least some basic services such as primary health care. Odinkalu relies on the decision in *Social and Economic Rights Action Centre (SERAC) v Nigeria*<sup>122</sup> to contend that although there might be issues with adequate resources, the government has a duty to ensure the immediate realisation of the non-derogable elements of the right to health care which are consistent with the obligations to respect, protect and fulfil.<sup>123</sup> All things considered, it is true that the position of law in Nigeria today with respect to the right to health care leaves much to be desired because, in spite of far-reaching international commitments to take the necessary steps towards ensuring the protection SER, the country inexcusably still lags behind when compared to other countries in terms of the various health performance indicators outputs.<sup>124</sup>

As mentioned previously, this research does not seek to give the impression that rights-based approach is the only effective means by which the right to health care in Nigeria could be realised, what it does seek to portray, however, is that projecting human dignity through a rights-based framework does indeed help to give added visibility to the realisation of SER, and the indispensable role of States in this regard has been well documented.<sup>125</sup> Secondly, as has been established in chapter three,<sup>126</sup> the idea of a rights-based approach does create corresponding duties and obligations on the part of the state and its agencies to pay more than a passing attention to the realisation of the right to health care. For instance, in December 2014, Nigeria finally passed a long-awaited and much debated National Health and Social Care Act, which among others, provides for the right to emergency health care treatment.<sup>127</sup> Although

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<sup>121</sup> Obiajulu Nnamuchi, 'Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria' (2008) 52 (1) *Journal of African Law* 1.

<sup>122</sup> (2001) AHRLR, 44–47.

<sup>123</sup> Chidi Odinkalu, 'The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights' in Varun Gauri and Daniel M. Brinks (eds) *Courting Social Justice Judicial Enforcement of Social and Economic Rights in the Developing World*. (Cambridge University Press, 2008) 187-188.

<sup>124</sup> World Health Statistics 2014 available at <[http://www.who.int/gho/publications/world\\_health\\_statistics/EN\\_WHS2014\\_Part3.pdf?ua=1](http://www.who.int/gho/publications/world_health_statistics/EN_WHS2014_Part3.pdf?ua=1)> accessed 13 October 17.

<sup>125</sup> See generally CESCR, *General Comment No. 9: E/C.12/1998/24*; Asher (n 23) 15.

<sup>126</sup> Section 3.3, pg. 42.

<sup>127</sup> See Section 20 of the Act. This provision was meant to check the attitude of some health care providers in Nigeria who refuse to treat victims of crimes without a 'police report' especially in cases where such victims suffered a bullet wound. This is because of the county's strict laws on fire arms. It is also meant to protect patients who need emergency care but have no means of paying since health care practitioners in Nigeria normally ask for a deposit before administering any treatment to patients.

refusal to offer this treatment by a health care provider is an offence,<sup>128</sup> the question is what remedy would be available to such patient (assuming they are still alive by the time), since they are effectively barred from approaching the court to enforce the right? Why would the government seek to punish the health care provider, whereas it is the government that has effectively failed to provide the needed resources for the provision of health care treatment? This can lead to a serious moral dilemma for the health care provider especially as health care, in my opinion, should be provided on need and not the ability to pay. Furthermore, it is doubtful whether, any claim can be brought on the basis of section 20 of the Act, in view of the clear provisions of section 6(6)(c) of the constitution even though one could argue on the authority of the Supreme Court of Nigeria's decision in *Olafisoye v FRN*<sup>129</sup> that section 20 of the National Health and Social Care Act could potentially activate the relevant section of chapter two of the constitution.

#### **4.3.3. Right to health care in Nigeria - funding and resource allocation**

Despite all the rhetoric about making SER justiciable, realising health rights does have implications for funding and effective resource allocation. Indeed, the ICESCR does enjoin state parties to take steps, individually and through international assistance to the maximum of available resources, towards a progressive realisation of SER through the adoption of appropriate means, including particularly the adoption of legislative measures.<sup>130</sup> From the available evidence, Nigeria is yet to fully commit to meeting its minimum obligations as envisaged by the relevant international and regional SER treaties. To complicate matters, there is no effective legal mechanism within which to challenge the actions or inactions of the government as we have seen in South Africa, for example.<sup>131</sup> In 2001, the Heads of State of African Union countries met and pledged to allocate a minimum of 15 per cent of their annual budget to improve health care in their respective countries. The latest progress report by the WHO in 2011 indicates that Nigeria has failed to meet this target at any time during the period.<sup>132</sup> Although the foregoing report was released in 2011, there is no evidence of a shift

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<sup>128</sup> See s20(2) of the Act.

<sup>129</sup> (2005) 51 WRN 52.

<sup>130</sup> Art 2 of the ICESCR.

<sup>131</sup> See for instance, *Minister of Health and Others v Treatment Action Campaign* (2002) AHRLR 189.

<sup>132</sup> WHO The Abuja Declaration: Ten Years On (WHO 2011)

<[http://www.who.int/healthsystems/publications/abuja\\_report\\_aug\\_2011.pdf?ua=1](http://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf?ua=1)> accessed 30 January 2018.

in the direction of achieving the 15 per cent minimum budgetary allocation to health care.<sup>133</sup> Also, in the latest WHO Health System Financing Country Profile on Nigeria<sup>134</sup>, the government only provided for 5 per cent of the total cost of funding health care. Also, with respect to health care expenditure, 69 per cent of the amount came from private households<sup>135</sup>. Indeed, in Nigeria's latest periodic report on the implementation of the African Charter, household expenditure on health care otherwise known as out of pocket expenses (OOPE) was as high as 86 per cent in some northern States between 2003 -2005.<sup>136</sup> This underscores the huge economic burden of health care expenditure on households, and in my opinion, the responsibility to alleviate the burden of household expenditure for health care rests squarely at the foot of the government through the provision of accessible, adequate, quality and affordable health care to Nigerians as envisaged under article 12 of the ICESCR.

In 2004, Nigeria published a revised National Health Policy.<sup>137</sup> The overall objective of this policy, it was claimed, was 'to strengthen the national health system such that it will be able to provide effective, efficient, quality, accessible and affordable health services that will improve the health status of Nigerians through the achievement of the health-related Millennium Development Goals (MDGs)'.<sup>138</sup> However, contrary to a number of the health-related MDGs,<sup>139</sup> Nigeria still has one of the highest incidences of child and maternal mortality rates in the world.<sup>140</sup> During the course of writing this thesis, the UN released the Sustainable Development Goals (SDGs) and following the limited success of health-related MDGs in Nigeria, it is hoped that the approach to actualising the SDGs will be totally different. The issue with the right to health care in Nigeria is not the dearth of policies, but a puzzling absence of

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<sup>133</sup> There is evidence to suggest that Nigeria is not meeting this target. A huge chunk of the paltry sum allocated to the health is spent on payment of salaries and other overheads. See Thisday 'Nigeria's Grossly Inadequate 2017 Health Budget' <<https://www.thisdaylive.com/index.php/2017/02/09/nigerias-grossly-inadequate-2017-health-budget/>> accessed 30 January 2018.

<sup>134</sup> WHO Health System Financing Profile by country. (WHO 2016) <[http://apps.who.int/nha/database/Country\\_Profile/Index/en](http://apps.who.int/nha/database/Country_Profile/Index/en)> accessed 30 January 2018.

<sup>135</sup> Ibid.

<sup>136</sup> Federal Ministry of Justice Nigeria's 5th Periodic Country Report: - 2011-2014. The Implementation of the African Charter on Human and Peoples' Rights in Nigeria (Federal Ministry of Justice 2014) <<http://www.achpr.org/states/reports-and-concluding-observations/>> accessed 30 January 2018.

<sup>137</sup> The initial policy was made in 1988.

<sup>138</sup> Federal Ministry of Health Revised National Health Policy (Federal Ministry of Health 2004) 7 <<http://cheld.org/wp-content/uploads/2012/04/Nigeria-Revised-National-Health-Policy-2004.pdf>> accessed 30 August 17.

<sup>139</sup> WHO 'Nigeria statistics summary (2002 - present)' (WHO 2016) <<http://apps.who.int/gho/data/node.country.country-NGA>> accessed 12 October 17. During the course of this research, the UN released the Sustainable Development Goals (SDGs) and following the very little success of health related MDGs in Nigeria, it is hoped that the approach to actualising the SDGs will be totally different.

<sup>140</sup> Index Mundi, 'Country Comparison - Maternal mortality rate' <<https://www.indexmundi.com/g/r.aspx?v=2223>> accessed 30 January 2018.

the required will to follow through with these policies. As a result, the progressive realisation requirement for the right to health care has been anything but progressive. Despite all the rhetoric and ‘target setting’ that has characterised the push for the realisation of the right to health care in Nigeria, there is still a marked evidence of lack of commitment as can be seen from the negligible amount often allocated to health care in Nigeria.<sup>141</sup> The ICESCR<sup>142</sup> enjoins States to take steps to progressively achieve the highest attainable standard of health care to the maximum of available resources. It is doubtful whether in the light of what has been revealed above, whether five per cent of the annual budget of Nigeria amounts to the maximum of available resources.<sup>143</sup> Although the term available resource is not defined in the ICESCR, the opinion of experts<sup>144</sup> points to the fact that it is the totality of a state’s resources including but not limited to budgetary allocation. So, these would include technical, administrative, and other resources that can be maximally deployed without comprising other rights.<sup>145</sup> Given Nigeria’s financial resources alone, especially from the sale of petroleum minerals,<sup>146</sup> it cannot be described as a poor country,<sup>147</sup> its biggest challenge is the high level of institutional corruption and near absence of accountability by state institutions.<sup>148</sup> In view of these significant shortcomings in the Nigerian health care policy approach, I am of the considered opinion that Nigeria is in violation of its obligations under the ICESCR.<sup>149</sup> Also, as was

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<sup>141</sup> The sum of 340.45 billion Naira (approximately £706 million) has been proposed for health care in the 2018 Nigerian national budget. This sum represents 3.9 percent of the total budget sum well below the 15 percent of national budget African Heads of State agreed to devote to developing health care in their countries in 2011. See Budget Office of the Federation, *2018 Budget Proposal* Budget Office <<http://www.budgetoffice.gov.ng/index.php/2018-budget-proposal?task=document.viewdoc&id=667>> accessed 22 December 2017.

<sup>142</sup> Article 2(1).

<sup>143</sup> Paras 26 – 27, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights <<http://www.escr-net.org/docs/i/425445>> accessed 30 January 2018.

<sup>144</sup> See Rory O’Connell et al *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (London, Routledge, 2014) chap. 3; Diane Elson, Radhika Balakrishnan and James Heintz, ‘Public finance, maximum available resources and human rights’, in Aoife Nolan, Rory. O’Connell and Colin. Harvey (eds), *Human Rights and Public Finance: Budget and the Promotion of Economic and Social Rights* (OUP 2013) chap 1.

<sup>145</sup> See report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, (UN Human Rights Council 2009) A/HRC/11/12/Add. 2.

<sup>146</sup> Nigeria is the 13 largest oil producer in the world. See CIA The *World Factbook* (CIA 2017) <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2241rank.html>> accessed 28 December 2017.

<sup>147</sup> Alex Enumah ‘EU Withdraws Financial Support for Nigeria, Says Country Not Poor’ (Thisday Newspapers Jun 2017) <<https://www.thisdaylive.com/index.php/2017/06/30/eu-withdraws-financial-support-for-nigeria-says-country-not-poor/>> accessed 30 January 2018.

<sup>148</sup> Obiajulu Nnamuchi ‘Bloated Remuneration of Political Office Holders as a Violation of Human Rights: The Case of Right to Health in Nigeria’ (Centre for Health, Bioethics & Human Rights 2013) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2306486](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306486)> accessed 30 January 2018.

<sup>149</sup> See for instance para 22, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (ICJ 1997).

discussed in chapter three,<sup>150</sup> rights give rise to duties and section 13 of the constitution clearly creates a duty. The constitution cannot, therefore, create a duty without a corresponding right to demand the performance of such. Rights are what people possess by reason of their humanity,<sup>151</sup> they are not granted by the state and where there is a systemic failure to grant access to these rights, then the courts must be able to find ways of getting around these obstacles on the presumption that the legislature cannot legislate to oust the obligations into which a state has freely entered into internationally.<sup>152</sup> In the case of *Odafe vs AG Federation*,<sup>153</sup> the applicant and three other inmates suffered from HIV/AIDS and were being held in a prison facility in Nigeria. They applied to the court, seeking to enforce their right to treatment pursuant to sections 8 and 12 of the Nigerian Prisons Act, which created a duty on the prison authorities to cater for the health of prisoners in their charge. Relying on this, the court found for the applicant. Interestingly, the court in the process of reaching its decision also referred to article 16 of the African Charter which is materially on all fours with article 12 of the of the ICESCR. According to the court:

The second and third respondents are under a **duty**<sup>154</sup> to provide medical help for applicants. Article 16 of African Charter Cap 10 which is part of our law recognises that fact and has so enshrined that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health' Article 16(2) places a duty on the state to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. All the respondents are federal agents of this country and are under a duty to provide medical treatment for the applicants.<sup>155</sup>

However, this reasoning hinged on the fact that the Minister for Internal Affairs and the Controller General of Prisons were under a legal duty to provide health care for prisoners under their charge since these could not afford to do so on their own, because of being in detention. Also, the fact of the case seems to suggest that the decision was reached to prevent infection, as the applicants were suffering from HIV.<sup>156</sup> It is therefore doubtful, whether the court could

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<sup>150</sup> Sections 3.3 and 3.4. pg. 40, 46.

<sup>151</sup> Bas de Gaay Fortman 'Adventurous' Judgments: A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Development' (2006) 2 (2) Utrecht Law Review 22.

<sup>152</sup> Article 25 Vienna Law of Treaties.

<sup>153</sup> (2004) AHRLR 205.

<sup>154</sup> Emphasis mine.

<sup>155</sup> See also *Falana v AGF* (Unreported) FHC/L/CS/1122/11 28 May 2014.

<sup>156</sup> HIV/AIDS is a dreaded disease, especially in Nigeria, because of the popular misconceptions about how the virus is spread; see the case of *Ahamefule v Imperial Medical Centre* [Unreported suit no ID/1527/2000 (HC)]

have reached a similar verdict if the applicants, in this case, were not in detention. Further, this decision was made by a High Court in Nigeria, whereas the overriding principle that the SER created in chapter two of the constitution are generally not justiciable was handed down in a case decided by the Supreme Court of Nigeria, and so the law in Nigeria today appears to be the one stated by the Supreme Court in *Abacha v Fawehinmi*<sup>157</sup> case with respect to the right to health care as well as other SER.<sup>158</sup>

#### **4.3.4. Legal framework for access to health care and resource allocation in the UK – the attitude of courts**

The UK, unlike Nigeria, does not have a written constitution, its human rights document is effectively the ECHR, which before the advent of the HRA was enforced in a residual fashion because the UK evolved a system of parliamentary sovereignty as opposed to popular sovereignty. This meant that citizens had the right to act if such an act did not go against anything forbidden by Parliament.<sup>159</sup> So, individual rights are perceived more, in the words of Feldman,<sup>160</sup> as ‘an undifferentiated mass of liberty’,<sup>161</sup> since there was not a single document in which individual rights and freedoms were codified. Parliament was supreme and would legislate whilst individuals retained the rights not to act against the law, so that the freedoms individuals could be said to enjoy, were ever subject to the principle of parliamentary sovereignty, some impermeable powers, which the courts could not interfere with.<sup>162</sup>

With respect to the right to health care, UK law is quite similar in some respects to the Nigerian position, in that there is no specific piece of legislation in the UK where the right to health care is expressly guaranteed, although section 1(1) of the NHS Act 2006 imposes a duty on the

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where the court ruled that unless an expert gave evidence that the court room would not be infected, the applicant ([Georgina Ahamefule](#)) would not be allowed access to court to give evidence in her case.

<sup>157</sup> (2001) AHRLR 172; see also *AG Ondo v AG Federation* (2002) 6 S.C (Pt.I) 1.

<sup>158</sup> The effect of the widely cited decisions of the ECOWAS court in *Socio-economic Rights and Accountability Project (SERAP) v Nigeria and Another (2010) AHRLR 145* and the African Commission on Human and Peoples’ Rights in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (2001) AHRLR 60*, is yet to be seen in judicial reasoning in Nigeria. It is doubtful whether the Nigerian government will ever implement the decision.

<sup>159</sup> [David Feldman, \*Civil liberties and human rights in England and Wales\*, \(2<sup>nd</sup> edn, Oxford University Press 2002\) 70.](#)

<sup>160</sup> See Austen Garwood-Gowers and John Tingle ‘The Human Rights Act 1998: A Potent Tool for Changing Health care Law and Practice’ in Austen Garwood-Gowers, John Tingle and Tom Lewis (eds), *Health care Law: Impact of the Human Rights Act 1998* (Cavendish Publishing 2001) chap 1.

<sup>161</sup> [David Feldman, \*Civil liberties and human rights in England and Wales\*, \(2<sup>nd</sup> edn, Oxford University Press\) 70](#)

<sup>162</sup> Overtime, the traditional principle of absolute parliamentary sovereignty has been questioned and it is now widely held that the idea of an unqualified sovereignty by the parliament is no longer sustainable. See *Jackson v A-G [2006] 1 AC 262*; see also *European Communities Act 1972*.

Secretary of State for Health to ‘continue the promotion in England of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England, and in the prevention, diagnosis and treatment of illness. The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.’<sup>163</sup> However, section 3(1) of the NHS Act amplifies the provisions of section 1 regarding the contents of the duty imposed on the Secretary of State which includes the provision of certain health care services<sup>164</sup>. As to the nature of the duty imposed, it is submitted on the authority of *R v Secretary of State for Social Services ex p Hincks*<sup>165</sup> that although the duty is mandatory, the obligation to provide is not absolute, because of limited finances. The obligation in section 3(e) of the Act to provide ‘such facilities... as he considers are appropriate’, according to Foster, is not couched in absolute terms<sup>166</sup> so as to impose an unqualified duty on the Secretary of State. However, as shall be seen below, the duty imposed on the Secretary of State does have implications for the right to health care in the UK and a couple of decisions have been founded on this duty.

In the absence of any domestic legislation providing for an article 12 ICESCR-type right to health care in the UK, the approach used in the Nigerian section is adopted. Article 12 of the ICESCR and article 11 of the European Social Charter 1961, though not legally enforceable in the UK’s domestic jurisdiction are persuasive. It is clear that the highest attainable standard of the right to health care as provided for in article 12 of the ICESCR is the standard of assessing how compliant the UK is with regard to the right to health care since the UK has ratified the ICESCR.<sup>167</sup> However, according to the UK government, ‘there is no provision in the ICESCR that requires States Parties to incorporate the provisions of the ICESCR into domestic law or to accord to it a specific status in domestic law.’<sup>168</sup> The government has instead preferred implementing the right to health care (if any) through domestic legislation and administrative measures, even though the UN Committee on Economic, Social and Cultural Rights (UNCESCR) has rightly, in my opinion, disagreed with the UK on such approach.<sup>169</sup> The UK

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<sup>163</sup> S1(1) NHS Act, 2006.

<sup>164</sup> See sections 1-6 of the Health and Social Care Act 2012 which provides for a similar list of duties that the Minister of State for Health is required to perform.

<sup>165</sup> [1980] 1 BMLR 93.

<sup>166</sup> Charles Foster ‘Simple rationality? The law of health care resource allocation in England’ (2007) 33(7) J Med Ethics 404

<sup>167</sup> The UK signed the ICESCR in 1968 and ratified it in 1976. It should be mentioned that the UK, just like Nigeria, operates a dualist legal system and is yet to enact the provisions of the ICESCR into its domestic law.

<sup>168</sup> Ministry of Justice, Sixth Periodic Report to the International Covenant on Economic, Social and Cultural Rights in the United Kingdom, British Overseas Territories, Crown Dependencies (Ministry of Justice) 10

<sup>169</sup> UNCESCR ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland.’ E/C.12/GBR/CO/6. [Paras 5 and 6.](#)

has been criticised for seeing the right to health care as provided in article 12 as no more than an aspirational goal. According to the concluding observations of UNCESCR, the UK is yet to give full legal effect to it in its domestic law by ensuring that the rights in the ICESCR rights are made justiciable and that effective remedies are available for victims of all violations.<sup>170</sup> The UNCESCR has criticised the continued violation by the UK of its obligations under the terms of the ICESCR.<sup>171</sup> The refusal or unwillingness to accord justiciable status to the right to health care in the light of article 12 of the ICESCR does have serious implications for access to courts, especially for the poor and vulnerable groups since they are more likely to suffer from the violation of the right particularly in cases where they are unable to seek judicial remedy.

Essentially, the grounds of objection to judicial protection for the right to health care in the UK are not different from those of Nigeria, predicated on the long-standing principle of parliamentary sovereignty and that judges do not have the institutional capacity to make decisions about resources or choose between competing priorities in a democracy – a role more appropriate to the elected representatives of the people. Another often heard objection in the UK is that ‘the rights themselves are too vaguely expressed and will only raise expectations and encourage time-consuming and expensive litigation against public bodies’,<sup>172</sup> however, Bates opines that the objection on the grounds of vagueness is unsustainable, since vagueness is also a characteristic of civil and political rights which are generally enforceable.<sup>173</sup> The author agrees to a substantial extent that some of the provisions in the ICESCR<sup>174</sup> are vague; however, as Bates has argued, vagueness is not unique<sup>175</sup> to the rights provided for in the ICESCR so as to constitute an impediment to enacting them as part of domestic law, or allow some judicial enforcement, as has been done with HRA. With proper drafting and consultation, there is no doubt that the supposed ‘inadequacy’ of the ICESCR on the ground of being vague

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Houses of Lords and Commons Joint Committee on Human Rights Twenty-Ninth Report (JCHR 2008) <<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16508.htm#n158>> accessed 30 August 17.

<sup>173</sup> Ed Bates ‘The United Kingdom and the International Covenant on Economic, Social and Cultural Rights’ in Mashood Baderin and Robert McCorquodall (eds) *Economic, Social and Cultural Rights in Action* (OUP 2007) 19.

<sup>174</sup> See for instance article 2(1) of the ICESCR

<sup>175</sup> For instance, the provisions of articles 3 and 8 of the ECHR, subject to some exceptions, are very elastic and could be extended to cover almost every case of human rights violations. However, the courts have been wary not to construe these articles widely, because of the attendant consequences. The case of *North West Lancashire* is very instructive; the Court of Appeal refused to apply article 8 of the ECHR as imposing a blanket positive obligation to health care treatment.

can be cured by advocating for a narrower and more manageable concept of the right to health care, with inputs from all parties, nonetheless the courts. The UK's Parliamentary Joint Committee on Human Rights was, therefore, right to say that 'the inclusion of social and economic rights in a Bill of Rights is not, in the end, objections of principle, but matters which are capable of being addressed by careful drafting'.<sup>176</sup>

#### **4.3.5. The right to health care - resource allocation and the courts in the UK**

Effective resource allocation is a critical factor in realising the right to health care as envisaged in article 12 of the ICESCR. Although successive UK governments have argued that there is no such thing as rationing in the NHS, it is patently clear from a review of the cases below that many of the clinical decisions taken are affected by the funding restrictions faced by the NHS hence the unavoidable need for rationing and prioritising<sup>177</sup>. As funding is critical, so also is the issue of its adequacy to meet a growing demand for the right to health care-based services. This means that difficult resource management decisions will be made which can have an impact on the access to the right to health care in the UK, even though the level of health care in the UK is generally better and more responsive when compared to Nigeria's. Exploring the reasons for this disparity is beyond the scope of this research, but it may not be unconnected with the poor management<sup>178</sup> of available resources and consistently low budgetary allocation as we have seen in the case of Nigeria above. According to the latest World Bank records, Nigeria spent about \$117 per capita on health in 2014, whereas in neighbouring Gabon in the same middle-income category spent \$321.<sup>179</sup> In a comparative survey carried out among 11 developed countries by the Commonwealth Fund in 2017, the National Health Service (NHS)<sup>180</sup> was ranked overall, the most impressive. It was also rated as one of the best in terms of efficiency, effective care, safe care, coordinated care, patient-centred care, access and cost-

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<sup>176</sup> (n 104).

<sup>177</sup>Zafar Iqbal, Alison Pryce, Musarrat Afza 'Rationalizing rationing in health care: experience of two primary care trusts' (2006) (2)1 *Journal of Public Health* 125.

<sup>178</sup> For instance, in 2008, the then Minister of Health in Nigeria, Professor Adenike Grange, was indicted for corrupt practices following the misappropriation of funds meant for the Nigerian health sector.

<sup>179</sup> The World Bank, *World Bank Open Data* <<http://data.worldbank.org/indicator/SH.XPD.PUBL>> accessed 30 December 2017.

<sup>180</sup> The NHS is the principal provider of health care in the United Kingdom. It is said to be the world's largest publicly funded health care system. See NHS in England. <<http://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx>> accessed 30 January 2018.

related problems.<sup>181</sup> In spite of this impressive run of the NHS against other health systems of developed and developing countries such as Nigeria, it has continued to grapple with issues around inadequate funding leading to rationing or poor resource allocation decisions<sup>182</sup>, and as result difficult choices have had to be made with regards to patient care and some of these decisions have had to be reviewed by the courts.<sup>183</sup>

With respect to health care rights, many of the judicial review cases that have been brought to challenge the decisions of health bodies, as already mentioned concern the crucial issue of resource allocation, or clinical decisions made on that basis. Claimants for judicial review will only be successful on the following four grounds:

- a. Where the decision is illegal
- b. The decision was irrational or unreasonable (Wednesbury unreasonable)<sup>184</sup>
- c. Presence of procedural impropriety, and
- d. Breach of Convention rights (ECHR).

Claimants will only be successful if they can establish that the refusal was unlawful or irrational, or to use the words of Sir John Donaldson MR, ‘Wednesbury unreasonable.’<sup>185</sup> With the coming into law of the HRA, there is now a fourth ground on which claim could be made for judicial review in the UK. Claimants applying for judicial review are now able to argue that the decision violates their human rights under the HRA. If their claim is successful, the court will ask the health authority to review its decision as the court will not set aside the decision of the body that made the decision.<sup>186</sup> In *R v Secretary of State for Social Services, ex p Walker*<sup>187</sup>

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<sup>181</sup> Commonwealth Fund ‘Mirror, Mirror on the Wall, 2017 Update: How the U.S. Health Care System Compares Internationally.’ <<http://www.commonwealthfund.org/interactives/2017/july/mirror-mirror>> accessed 30 January 2018.

<sup>182</sup> Polly Toynbee ‘Now NHS cuts are stripping basic medicines from the poor’ (The Guardian August 17) <Accessed 13 October 17; see also The Public Administration Select Committee (PASC) ‘On Investigating clinical incidents in the NHS.’ (PASC House of Commons) <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpublicadm/886/88602.htm>> accessed 30 December 17.

<sup>183</sup> *N (Appellant) v ACCG* [2017] UKSC 22; *Doy v Gunn* [2013] EWCA CIV 547.

<sup>184</sup> *R v Secretary of State for Social Services, ex p Walker* (1987) 3 BMLR 32. The term ‘Wednesbury unreasonable’ is the test applied in judicial review cases. It refers to a decision so unreasonable that no responsible authority could be expected to make it. See the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223; see also *R v MOD ex p Smith* 1996 QB 517.

<sup>185</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

<sup>186</sup> Weait Matthew ‘The United Kingdom: The Right to Health in the Context of a Nationalized Health Service’ in José M. Zuniga, Stephen P. Marks, and Lawrence O. Gostin (eds), *Advancing the Human Right to Health* (OUP 2013) 213.

<sup>187</sup> (1987) 3 BMLR 32.

the Court of Appeal refused an application for judicial review of the decision to postpone an operation on a premature baby. According to the court:

It is not for this court, or indeed any court, to substitute its own judgment for the judgment of those who are responsible for the allocation of resources, this court could only intervene where it is satisfied there was a prima facie case...of failure to allocate resources to an extent which was Wednesbury unreasonable.<sup>188</sup>

In *R v North West Lancashire Health Authority, ex parte A*,<sup>189</sup> after holding that the defendant Authority's refusal to fund the applicants' treatment for transsexualism was flawed because of the Authority's failure to recognise transsexualism as an illness, the court remitted the matter to the Authority for reconsideration of its policy and the decision on their individual merits. However, since the reason why the Authority refused to fund the treatment for the applicants was not so much its limited resources but its failure to recognise that transsexualism is an illness, then the court could simply have ordered the Authority to fund the treatment after quashing the Authority's health care policy, because the issue of resource allocation was not central to this case, but the policy of the Authority which was open to review. Also, in the case of *R (Rogers) v Swindon NHS Primary Care Trust*,<sup>190</sup> the applicant required a new cancer drug treatment called Herceptin because the applicant suffered from early-stage breast cancer. The applicant's case was for a judicial review of her Primary Care Trust (PCT)' decision to reject her application for funding of treatment because according to the PCT, it would only fund such treatment in exceptional personal or clinical circumstances. In its judgement, the UK Court of Appeal agreed with the PCT that its policy of funding the treatment only in exceptional circumstances was legal only if the parameters had been clearly set to determine what amounts to exceptional circumstances. In this case, the court held that the PCT had failed to set out such guidelines and as a result quashed the policy on the ground that it was irrational. The court declined to consider whether the PCT' refusal was in breach of articles 2 and 14 of the ECHR and held that the articles did not apply.<sup>191</sup> Despite this decision, the court refused to order the PCT to fund the applicant's treatment but instead left it to the PCT to formulate a lawful policy upon which to base decisions in particular cases, including that of the applicant in the future.

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<sup>188</sup> Ibid.

<sup>189</sup> (2000) 1 WLR 977.

<sup>190</sup> (2006) 1 WLR 2649.

<sup>191</sup> See *R v NSPCT* [2011] EWHC 872 (Admin) where the court also held that articles 6 and 8 of the ECHR did not apply to the appellant in this case.

Similarly, in the case of *R (C) v Berkshire Primary Care Trust*,<sup>192</sup> which concerned the judicial review of the defendant PCT's decision not to fund a breast augmentation surgery for the appellant because breast augmentation surgery was considered a low priority under its general policy on cosmetic surgery. Although the court held that the decision of the PCT was legal and rational, it went further to say that 'court is not appropriately placed to make clinical or budgetary judgements about publicly funded health care; its role is in general limited to keeping-decision-making within the law'.<sup>193</sup> By way of commentary, it appears that the UK courts are very reluctant to make decisions with financial implications to PCTs in cases of judicial review except such cases are manifestly wrong. Even in such cases, it could be argued on the strength of the decisions in the foregoing cases, that if such cases have budgetary implications the UK courts would most likely remit them to the PCTs to make those decisions. Whilst this approach is understandable in view of funding constraints, I am of the opinion that the courts should be more willing to scrutinise funding decisions particularly where there is a substantial interference with the claimant's rights. The courts should also come up with alternative ways to make the entire decision-making process quicker, especially where the treatment sought is a life-saving treatment as was the case in *R (Ross) v West Sussex Primary Care Trust*,<sup>194</sup> where the court held that 'where life and death decisions are involved, the court must subject the decision making process to rigorous scrutiny'. Despite the indication of the court to scrutinise resource allocation decisions in the *R (Ross) v West Sussex Primary Care Trust* case above, the evidence from the many cases reviewed indicates that claimants are more likely to succeed if their case is predicated on the failure of the PCT to follow procedure involving a substantial interference with the claimant's human rights, than it would if such claim was based on rationing. This could mean that PCTs could not be held to account for the grounds on which their rationing decision is based, a situation which I think will make it difficult for claimants to challenge such decisions in courts which in itself does not augur well for the realisation of the right to health care in the UK. I understand that unlike Nigeria, the UK has what Tushnet, has described as the 'weak judicial review approach',<sup>195</sup> however, I think it was time the UK courts reconsidered this approach because it seems too repetitive and time-consuming. It is true that for the UK to progressively realise the right to health care, an effective and robust regime of rationing, resource allocation must be in place. However, the UK courts

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<sup>192</sup> [2011] EWCA Civ 247.

<sup>193</sup> *Ibid* para 56.

<sup>194</sup> 2008 [EWHC] 2252 (Admin) para 18.

<sup>195</sup> Mark Tushnet *Weak Courts Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 24.

should not hold back in considering the decisions with financial implications on the basis that judges have no skill or information on the subject matter. The courts are entitled to know, for example, how the PCT have reached their decisions and subject such process to scrutiny, only then, would the courts be in a better place to offer effective protection of SER.

#### **4.4 Conclusion**

I have examined the right to healthcare in the UK and Nigeria in the light of article 12 of the ICESCR. Whilst article 12 of the ICESCR guarantees the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, States like the UK and Nigeria have argued that the right to health care as provided in article 12 is too wide and variegated that no government that can be reasonably expected to meet and from that point have had to set their national standards within the ambit of their own national laws. Even though I have made the case for a streamlined minimum core approach, the current minimum core obligations in respect of the right are too broad, this might be one of the reasons why the more recent international health care legislation have adopted a narrower definition of the right to health care. From the perspective of my research, I would argue as I have done in this chapter that the right to health care should be more focused on the provision and right of access to health care services, and not the right to health because such an approach, in my opinion, is a more credible way of measuring and monitoring compliance by national governments with their international right to health care obligations, and also carries in it the important element of access to judicial remedies in cases where the right is breached.

The right to health care is expensive, so too are the civil and political rights to free speech and fair hearing. For this singular reason, the provision of adequate funding, and resource allocation are critical towards guaranteeing access to health care services which explains why article 2 of the ICESCR talks about states taking steps to ensure the deployment of the maximum resources available to state to ensure the progressive realisation of SER by adopting appropriate means including the use of legislative measures, so that realising the right to health care in both jurisdictions should include providing a more enhanced role for judicial scrutiny of health care related decisions made especially by public institutions. This appears to be one area where more improvements could be made especially in the face of recent funding gaps in the UK and Nigerian health care sector.

## Chapter Five

### Right to adequate housing

#### 5.1. Introduction

The right to adequate housing which forms the subject matter of this chapter is one of the SER guaranteed by a number of regional<sup>1</sup> and international<sup>2</sup> human rights laws. The chapter examines the meaning and content of the right and its interaction with other rights in terms of the principle of interdependence of rights under international human rights law. The application of the right to Nigeria and the UK is discussed in the light of legal security of tenure, because the security of tenure is the core element of the right, and it is my belief that this element constitutes the hub around which the other elements of the right revolve. It would be futile to discuss the adequacy of housing when there is no real security of tenure to that place or property, and secondly, in comparative terms, security of tenure is measurable in both jurisdictions.

For ease of argument and analysis, the chapter is structured into three interlinking sections. In 5.2 the generic view of international law provisions with respect to the right to adequate housing is analysed with the end of setting out the nature and content of the right especially in reference to Nigeria and the UK. As already alluded to, the analysis here will be on the generic context of the right in article 11(1) of the ICESCR. The relevant themes regarding the right to adequate housing in General Comments 4<sup>3</sup> and 7<sup>4</sup> by the UNCESCR will also be analysed because they help to explain the conceptual foundation and practical functions of the right to adequate housing. Also, reference to article 25 of the UDHR will be made to help trace the origins of the right under international law and to also substantiate the analysis of the right from an international perspective. Overall, the analysis is done with a focus on the security of tenure, which as shall be argued, is at the core of the right to adequate housing.

In 5.3, the focus shifts to the application of the right in Nigeria. The workings of the right in Nigeria is analysed with a focus on security of tenure. In line with the aim of the research, the role of Nigerian courts in providing some interpretative basis for the normative framework of the right is also analysed and compared to Nigeria's obligations under international law

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<sup>1</sup> See Articles 16 and 30 of the Revised European Social Charter and the combined effect of Articles 14, 16 and 18 of the African Charter; see also the case of *SERAC v Nigeria* (2001) AHRLR 60.

<sup>2</sup> Article 11(1) of the ICESCR.

<sup>3</sup> General Comment No. 4: The Right to Adequate Housing E/1992/23.

<sup>4</sup> General Comment No. 7: The right to adequate housing E/1998/22.

especially in the face of the jurisprudence emanating from the African Commission and more recently the Economic Community of West African States (ECOWAS) Court. In 5.4, the same approach, as described in the case of Nigeria is adopted in respect of the UK, where the application of the right as the research finds is more robust and developed when compared to Nigeria. Some of the developments in this area of UK law are largely attributable to the activist and purposive<sup>5</sup> jurisprudence emanating from the European Court of Human Rights (ECtHR) as the analysis of case law in this section reveals. Admittedly, the relationship between the UK domestic courts and the ECtHR has not been an easy one in this area, especially in the face of established and long-entrenched common law principles of UK property and housing laws<sup>6</sup> which have a far-reaching effect on security of tenure. However, the dialogue between the UK courts and the ECtHR has seen a marked shift in the UK courts' approach to housing right cases in the face of article 8 of the ECHR which it is submitted has greatly altered the landscape of housing rights jurisprudence in the UK.

Finally, I will extrapolate the implications of the legal developments in this aspect of human rights law focusing on ways the courts in both jurisdictions can further raise the debate about housing rights to a higher pedestal in order to accentuate the ever-evolving aspects of the right. The tone of this debate has already been set at the UN level where the Special Rapporteur on Housing<sup>7</sup> has recommended the need for international human rights mechanisms to constructively engage with institutions such courts concerning the right to adequate housing.<sup>8</sup>

## **5.2. Theories and conceptions of the right to adequate housing in international human rights law.**

According to the UNCESCR, 'the human right to adequate housing, which is derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights'<sup>9</sup> The right to adequate housing in international law is recognised in a large number of international law instruments such as article 11(1) of the ICESCR, article 25 of the UDHR, article 14(2)(h) of the Convention on the Elimination of all Forms of Discrimination against Women and article 27(3) of the Convention on the Rights of

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<sup>5</sup> See the case analysis in section 5.4 in relation to the application of article 8 of the ECHR. Pg 144.

<sup>6</sup> For example, the proprietary right of an owner to possession.

<sup>7</sup> See UN General Assembly, report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context. (December 2014) (A/HRC/28/62).

<sup>8</sup> Ibid 1-8.

<sup>9</sup> General Comment No. 4, para 1.

the Child. The importance of the right and its relevance to the overall wellbeing of people in every culture, have been widely published in a number of international non-binding but aspirational declarations such as the Vancouver Declaration of 1976, adopted by the United Nations Conference on Human Settlements where it was declared that ‘adequate shelter and services are a basic human right which places an obligation on governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programmes of self-help and community action.’<sup>10</sup> Similarly, in 1996, the second United Nations Conference on Human Settlements (Habitat II) in Istanbul (Turkey) adopted a declaration in which the governments of the declaring states committed themselves to: ‘ensuring adequate shelter for all and making human settlements safer, healthier and more livable, equitable, sustainable and productive.’<sup>11</sup> The declaring states also undertook to work for ‘the full and progressive realisation of the right to adequate housing as provided for in international instruments.’<sup>12</sup>

However, for the purpose of this research, the analysis of the right to adequate housing under international law, will be considered in the light of article 11(1) of the ICESCR which is widely recognised<sup>13</sup> as one of the most comprehensive and significant legal sources of the right in international law and provides the basis for the normative foundation of the right in international law<sup>14</sup>. It reads as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.<sup>15</sup>

When the foregoing is read in conjunction with article 25(1) of the UDHR, which states that ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care’, and article 17(1) of the

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<sup>10</sup> UN HABITAT, Vancouver Declaration on Human Settlement (UN 1976 A/CONF.70/15) para 8.

<sup>11</sup> UN HABITAT, *Report of the United Nations conference on Human Settlements (Habitat II)* (UN 1996 A/CONF.165/14) para 1.

<sup>12</sup> *Ibid.* Para 8.

<sup>13</sup> Leckie Scott ‘The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach’ (1989) 11(4) Human Rights Quarterly 522.

<sup>14</sup> General Comment 4 para 3.

<sup>15</sup> Article 11(1) of the ICESCR.

International Covenant on Civil and Political Rights (ICCPR) which makes the arbitrary or unlawful interference with one's privacy, family and home illegal; then it becomes evident that the right to adequate housing in international law as found in article 11(1) of the ICESCR clearly evinces the principle of interdependency of rights. Interdependency, as Quane argues, 'suggests that there is a mutually reinforcing dynamic between different categories of rights in the sense that the effective implementation of one category of rights can contribute to the effective implementation of other categories of rights and vice versa.'<sup>16</sup> Judging from both the theoretical and practical perspectives of human rights, the right to adequate housing is critical not only to fulfilling other SER such as the rights to health care and work, but civil and political rights as has been demonstrated above with reference to article 17 of the ICCPR, which provides that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home...'. This is easily violated when housing rights are trampled upon because of the effect homelessness inevitably has on the right to privacy and family life. For example, although, there is no explicit provision for the right to housing in the European Convention on Human Rights (ECHR), jurisprudence from the ECtHR has tended to extend the provisions of article 8 of the ECHR<sup>17</sup> to cover violations that have implications for the right to housing.<sup>18</sup> The right to adequate housing as espoused under international human rights law thus bears vital linkages to other human rights<sup>19</sup> and to the foundational principles upon which the universal human rights system is built, which is the 'the inherent dignity of the human person'.<sup>20</sup>

As chapter four of this research explained (4.2), one of the major complications of the right to healthcare under Art 12 ICESCR according to some writers<sup>21</sup> is the lack of exactness and a clear foundational definition<sup>22</sup> of the right. This situation has provoked specific calls from authors such as Griffin for the right to be demoted from the body of human rights<sup>23</sup> because the right to health care cannot be justified within any robust theory of human rights.<sup>24</sup> It is

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<sup>16</sup> Helen Quane, 'A further dimension to the interdependence and indivisibility of human rights? Recent developments concerning the rights of indigenous peoples' (2012) 25 *Harvard Human Rights Journal* 49.

<sup>17</sup> The ECHR's equivalent of article 17 of the ICCPR.

<sup>18</sup> Examples of these cases are discussed in section 5.4, pg. 100.

<sup>19</sup> See para 52, UN General Assembly, report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (2012) (A/67/286).

<sup>20</sup> See preamble to the UDHR.

<sup>21</sup> See for instance, Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427 at 429-31 and Andrew Heard, 'Human Rights: Chimeras in Sheep's clothing?' (1997) <<http://www.sfu.ca/~aheard/intro.html>> accessed 30 December 2017.

<sup>22</sup> John Tobin, *The Right to Health in International Law* (OUP 2012) 1; see also Jennifer Ruger, 'Towards a Theory of a Right to Health: Capability and Incompletely Theorized Agreements' (2006) 18 *Yale JL & Humanities* 273.

<sup>23</sup> James Griffin *On Human Rights* (OUP 2008) 209.

<sup>24</sup> Griffin for instance bases his theory on personhood. See section 3.2, pg. 31.

worth noting here that similar arguments have also been advanced against the conceptual foundation of the right to adequate housing in international law. The following passage from one of Hohmann's writings in respect of the absence of an authoritative definition of the right to adequate housing is instructive:

The first weakness is the failure of interpretive bodies and courts to give sufficient normative content to the right to housing, such that it is only barely possible to say what the right is: there is no concrete definition of the right that can be abstracted from a specific case, nor is it easy to spell out a general state obligation for the right. Secondly, and related to the first problem, is the overly procedural – even 'programmatically' – nature of the right. Finally, and most seriously, is the overall failure of those interpreting and applying the right to attach the right to the actual social conditions – homelessness, destitution, displacement and social and physical marginalisation – which motivated its inclusion in the corpus of human rights in the first place.<sup>25</sup>

The criticism of a lack of a clear conceptual foundation and absence of an interpretative framework is a longstanding<sup>26</sup> argument against SER such as the right to adequate housing. Persuasive as this stance might be, the author does not support it in its entirety because such arguments seek to divert the focus and impact of the debate in a manner that obfuscates the real intent for having such SER in the first place, which is the inherent dignity of the human person. There is no doubt that some of the rights expressed in the ICESCR can sometimes be unwieldy, and difficult to abstract and evaluate in terms of their practical functionality especially at the domestic level. That notwithstanding, the so-called impractical characteristics are not exclusive to SER and this has been consistently demonstrated by this research.<sup>27</sup>

Hohmann emphasises the need to interpret and apply the right in such a purposeful way that it attaches to the reality in practice for the benefit of those who require the protection under such rights.<sup>28</sup> However, Sen,<sup>29</sup> who is widely known for his capability theory,<sup>30</sup> appears to disagree with the final part of Hohmann's quotation above, arguing that since rights do impact positively on the realisation of social and economic freedoms, the mere absence of an agreed institutional

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<sup>25</sup> Jessie Hohmann *The Right to Housing: Law, Concepts, Possibilities* (Hart Pub 2013) 120-137

<sup>26</sup> Section 3.4, pg. 46.

<sup>27</sup> *ibid*

<sup>28</sup> *ibid*

<sup>29</sup> Amartya Sen 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy & Public Affairs*, 320.

<sup>30</sup> Amartya Sen 'Capability and Well-being' in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life*, (Oxford: Clarendon Press 1993) 30.

definition should not by itself, deny people the grounds for claiming that right. Sen's view finds agreement with Fortman,<sup>31</sup> who opines that too much focus on the theoretical and foundational aspects of rights, in general, do not help the realisation of such rights. He argues that agonizing over the theoretical and philosophical underpinnings of rights, apart from being intellectually stimulating to its proponents, is so abstract that it bears no real relevance in the world of rights enforcement and practice and that such an approach is no 'basis for moving the whole mission closer to reality'.<sup>32</sup> In my view, Sen and Fortman are right in their analysis, however, defining the normative content of the right would be very helpful for the courts in interpreting the right, and this is the reason why Hohmann's point cannot be disregarded without some degree of thoughtful consideration, because if judicial means of enforcement is considered as providing a constructive and functional basis towards the realisation of the right to adequate housing, then the courts in Nigeria and the UK must be provided with some normative parameters on the contents and scope of the right to enable them embark on any serious legal evaluation and enforcement of the right, because when this is not the case, it becomes increasingly difficult for courts to consider SER cases. An example is the varying construction that has been given to elements of the right to adequate housing by courts in the UK,<sup>33</sup> not to mention the impact of the jurisprudence that has emanated from the ECtHR<sup>34</sup> and the conflicting opinions of the African Commission on Human Rights<sup>35</sup> and Nigerian courts<sup>36</sup> which to date have mechanically continued to apply the decision of the Supreme Court in *Abacha v Fawehinmi*<sup>37</sup> in refusing to give effect to the provision of the African Charter that have implications for the right to adequate housing in Nigeria.

### **5.2.1. Clarifying the minimum core contents and minimum core obligations of the right to housing**

To achieve a high degree of interpretative clarity with regards to the contents of the right, the UNCESCR released General Comment 4 to set the minimum standards of expectation across all states. It was also meant to define the nature and scope of the right in order to provide a

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<sup>31</sup> Bas De Gaay Fortman, *Political Economy of Human Rights* (Routledge 2011) 3.

<sup>32</sup> *ibid* 3.

<sup>33</sup> Section 5.4, pg. 144.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60; *Centre for Housing Rights and Evictions (COHRE) v Sudan*, African Commission of Human Rights, Communication no 296/05 (2010).

<sup>36</sup> *Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General* Suit FHC/ABJ/CS/640/2010, decision of the Federal High Court Abuja, delivered on 29 November 2012

<sup>37</sup> (2001) AHRLR 172.

clear direction and enable national institutions such as courts to formulate a normative basis for realising the right to adequate housing in their respective jurisdictions. General Comment 4 is the first substantive and authoritative interpretation of the right to adequate housing and deals with the content of the right. According to the General Comment, the right to adequate housing should not be interpreted in a narrow or restrictive sense by comparing it to the shelter provided by merely having a roof over one's head or one that sees shelter exclusively as a commodity. Rather it is the whole of those conditions that protect the right of the individual to live somewhere in security, peace and dignity<sup>38</sup> so that the right to housing is constitutive of other human rights and is premised on the underlying foundation of the inherent dignity of the human person.

Despite the foregoing, General Comment 4 does not quite provide sufficient clarity with regards to what amounts to the minimum core content of the right to adequate housing under the ICESCR. Defining the minimum core content of the right is fundamental to the identification of the minimum core obligations of states in respect of the right. What General Comment 4 does is that it rather lists certain aspects<sup>39</sup> of the right that must be taken into account for the purpose of determining what amounts to adequacy in the right to adequate housing right. This does not mean that there are no specific minimum core obligations on the part of states with regards to the right to adequate housing since the minimum core is an entrenched principle of SER jurisprudence and has been severally referred to in the work of the UNHCR.<sup>40</sup> Furthermore, General Comment 4 itself talks about state parties taking immediate measures aimed at conferring legal security of 'tenure upon those persons and households currently lacking such protection'.<sup>41</sup> General Comment 4 also states that 'regardless of the state of development of any country, there are certain steps which must be taken immediately',<sup>42</sup> although it qualifies this by stating that some of such steps required to promote the right to housing only require states to abstain from certain practices which violate the right of the individual to adequate housing.<sup>43</sup>

A summative evaluation of the above references to General Comment 4 does, in my opinion, reveals the point that the right to adequate housing, just like other SER, does create minimum core obligations on the part of states such as the UK and Nigeria, even though, as I have already

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<sup>38</sup> General Comment 4 para 7.

<sup>39</sup> *Ibid*, para 8.

<sup>40</sup> General Comment 3 para 10.

<sup>41</sup> General Comment 4 para 8(a).

<sup>42</sup> *Ibid*, para 10.

<sup>43</sup> *Ibid*.

mentioned, the nature and contents of the minimum core with regards to the right to adequate housing are not sufficiently specified in General Comment 4. In the absence of this specification, I draw on the provisions of relevant international human rights documents to provide a basis for analysing the minimum core content of the right to adequate housing and core obligations of states with regards to the right. Firstly, I refer to the relevant provision of General Comment 3 on the nature of States parties' obligations to the SER provided in the ICESCR, and secondly, to the African Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.<sup>44</sup> According to General Comment 3:

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived ... of basic shelter and housing, ...is, prima facie, failing to discharge its obligations under the Covenant.<sup>45</sup>

I have already discussed in chapter four,<sup>46</sup> the problematic nature of article 10 of General Comment 3 with regards to ascertaining what constitutes the minimum essential content of the minimum core to the right to health care. The arguments made in chapter four apply with little or no variation to the right to adequate housing. What is even more problematic is the fact that unlike General Comment 14,<sup>47</sup> where the contents of the minimum core obligations in respect of the right to health are listed, General Comment 4 does not provide such core obligations in respect of the right to adequate housing thus making the process of specifying authoritative minimum core obligations in respect of the right to adequate housing difficult. What is obvious though, from a reading of paragraph 10 of General Comment 3, is the point that the minimum core obligations in respect of the right to adequate housing can only be said to be discharged by a state if a significant number of individuals in such a state have access to basic shelter and housing, and as I argue later in this chapter, security of tenure is crucial because no state can be said to be meeting its minimum core obligations if individuals in such states have no guaranteed security of tenure. It, therefore, follows that, like the other SER discussed in this research, the minimum core obligations in respect of the right give rise to housing rights

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<sup>44</sup> Henceforth the African Principles and Guidelines.

<sup>45</sup> General Comment 3, para 10.

<sup>46</sup> Pg 63 -72

<sup>47</sup> General Comment 14 para 43.

and contains freedoms and entitlements. The freedoms in the right to adequate housing would be the protection of individuals from housing rights violations such as forced evictions and interference with one 's home. Such freedoms carry a corresponding duty on the part of the state to ensure that no forced evictions are carried out unlawfully. In terms of entitlement, the individual is entitled to demand from the state equal and non-discriminatory access to housing rights such as security of tenure to which the state is under obligation to comply.

In addition to the general definition of the minimum core obligations of states provided in General Comment 3,<sup>48</sup> the African Principles and Guidelines help to identify the minimum core obligations of states with regards to the right to adequate housing which, in my opinion, could be useful to the UNCESCR in framing the minimum core content of the right to adequate housing at the international level. According to the African Principles and Guidelines,<sup>49</sup> for states to meet their minimum core obligations in respect of the right to adequate housing, they must:

- a. Refrain from and protect against forced evictions from home(s) and land, including through legislation. All evictions must be carried out lawfully and in full accordance with relevant provisions of national and international human rights and humanitarian law. States should apply appropriate civil or criminal penalties against any public or private person or entity within its jurisdiction that carries out evictions in a manner inconsistent with applicable national and international law, including due process.
- b. Guarantee to all persons a degree of security of tenure which confers legal protection upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land, against forced evictions, harassment and other threats.
- c. Ensure at the very least basic shelter for everybody.<sup>50</sup>

Although the Guidelines refer to the paragraphs above as 'minimum core obligations', it should be noted that a more careful reading of the paragraphs reveals that paragraphs 'a' and 'b' refer to the minimum core obligations of states and paragraph 'c' to the minimum content of the

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<sup>48</sup> General Comment 3, para 10.

<sup>49</sup> African Commission Principles and Guidelines para 79.

<sup>50</sup> Ibid (a-c).

right. To be critical, the African Principles and Guidelines do not provide much by way of elaboration on what it means for states to ‘ensure at the very least basic shelter for everybody’,<sup>51</sup> The insufficient elaboration of the contents of basic shelter within the right to adequate housing is unfortunate because it is the minimum content of the right that gives rise to minimum obligations of state in respect of fulfilling the right within the broad framework of the principle of progressive realisation as enunciated in article 2 of the ICESCR. The Guidelines define basic shelter as ‘the basic minimum housing required by the individual for protection from the elements’.<sup>52</sup> The question is whether such a basic definition provides a meaningful basis for considering the aspect of the ‘adequacy’ of the right to housing even though the point could be made that when it comes to the idea of defining the minimum core obligations of states in respect of the right, one can afford to relax the requirements for housing to be ‘adequate’ as defined by the ICESCR,<sup>53</sup> because of the extensive remit of the requirements for housing to be adequate under the ICESCR. From the principle of the minimum core of SER, it would appear that basic essential housing encompassing the minimum core of the right to adequacy housing would be a fitting first step in progressively realising the and General Comment 4 in relation to the function of adequacy in the minimum core of the right to housing. According to General Comment 4,<sup>54</sup> the concept of adequacy is significant to the right to housing because it serves to underline several factors relevant to the discussion of the right to housing ‘that must be taken into account for this purpose in any particular context’<sup>55</sup>. According to the UNCESCR in General Comment 4, a number of conditions<sup>56</sup> must be met before particular forms of shelter can be considered to constitute “adequate housing.” These elements are just as fundamental as the basic supply and availability of housing.<sup>57</sup>

It is obvious that paragraph 10 of General Comment 3 and paragraph 8 of General Comment 4 contain material inconsistencies in respect of what should constitute the minimum core content of the right and the minimum core obligations they give rise to. Whilst General Comment 4 articulates components that must be present in the right to adequate housing, General Comment 3 leans more towards the basic aspect which necessarily does not include the aspect of

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<sup>51</sup> *Ibid*, para 1(o).

<sup>52</sup> *Ibid*.

<sup>53</sup> General Comment 4, para 8.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> General Comment 4, para 8 lists these as including security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

<sup>57</sup> General Comment 4, paras 7-8.

‘adequacy’ a position which is consistent with the African Principles and Guidelines.<sup>58</sup> In my opinion, the approach of adequacy espoused by the UNCESCR in General Comment 4 is desirable because of its robustness and ability to address a wide range of issues that are relevant to the actualisation of the right, although in practice, the components of ‘adequacy’, as stated in General Comment 4, might mean nothing to people who have nowhere at all to call a home. It raises the fundamental question of whether housing which does not meet the standard of ‘adequacy’ can still be referred to as coming under the right to adequate housing in the light of General Comment 4.<sup>59</sup> According to the UN Human Rights Council’s Special Rapporteur on adequate housing, homelessness is ‘the most visible and most severe symptom of the lack of respect for the right to adequate housing.’<sup>60</sup> Therefore, homelessness is one of the greatest manifestations of the violation of the right to adequate housing and having access to basic shelter is one of the first steps that can be taken in addressing homelessness, after this, governments and other stakeholders can then progressively move towards achieving the adequacy components of such shelter because it is well settled that the idea of a minimum core is critical and forms part of the *raison d’être* for the ICESCR.<sup>61</sup> For example, is desirable that homeless people in the UK and Nigeria are ‘adequately’ housed in line with General Comment 4, but because of resource constraints or other factors it might not be presently possible to do that, it will, therefore, be a practical first step towards adequacy of housing in ensuring that ‘basic shelter’ is provided on a non-discriminatory basis to protect them from the elements at an affordable cost.

The foregoing demonstrates that from a practical perspective, the minimum core content of the right to adequate housing should be the one espoused in General Comment 3 which has to do with the provision of basic shelter as a minimum in addressing housing rights violation. This position, in my opinion, is one that aligns with the universal nature of international human rights which was examined in chapter 2.<sup>62</sup>

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<sup>58</sup> African Commission Principles and Guidelines para 1(o).

<sup>59</sup> General Comment 4, para 8.

<sup>60</sup> UNHABITAT *The Right to Adequate Housing* (OHCHR Fact Sheet No. 21/Rev.1 2009) <[www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)> accessed 27 January 2019.

<sup>61</sup> General Comment 3, para 10.

<sup>62</sup> Pg 15 – 19, 63 – 65.

### **5.2.2 Right to adequate housing and specific state obligations**

The minimum core content of the right to adequate housing enables the identification of minimum state obligations ‘i.e. the various initiatives and approaches the state needs to take in order to achieve the minimum core content of the right. Such minimum core obligations on the part of the government are usually discussed under the tripartite obligations to respect, to promote and to fulfil which in themselves carry both positive and negative duties with regards to the implementation of the right to adequate housing. Accordingly, the obligation to ‘respect’ the rights imposes on states the duty to refrain from doing anything that could interfere with the enjoyment of the right or equal access to it. This obligation creates a negative duty on the state and prevents it from doing anything that might, for example, interfere with the security of tenure of individuals such as forced eviction or demolition of peoples’ homes. Furthermore, the positive obligation to protect requires that states implement measures to protect individuals against the activities of third parties that are likely to interfere with the enjoyment of housing rights. For example, rent control measures in the private housing sector would come under this obligation. The obligation to fulfil requires states to take active measures to ensure the effective realisation of rights and freedoms in their states with regards to the right to adequate housing. As I have mentioned previously in this section, these obligations imply both positive and negative duties on the part of the state. With specific regards to the right to adequate housing, just like other SER, these duties manifest themselves in the forms of freedoms and entitlements for individuals. They include protection against forced eviction and arbitrary destruction of homes, non-discriminatory access to housing and security of tenure, among others.

I should emphasise that the right to adequate housing does not require the states to build homes for the entire population, it also does not mean that those without housing can automatically demand housing from the government,<sup>63</sup> rather it is the obligation on the part of the state to take measures to prevent forced eviction, discrimination, and refrain from doing anything can violate the security of tenure of individuals. The right to adequate housing involves the right to live in a decent place in peace, security and dignity.<sup>64</sup>

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<sup>63</sup> Except in specific cases such as natural disasters or the provision of direct housing to vulnerable groups in the society.

<sup>64</sup> See generally General Comments 4 and 7.

### **5.2.3 The universal nature of the minimum core content of the right to ‘adequate’ housing**

The foregoing leads to the question as to whether it is practicable to take a universal approach to the minimum core content of the right, since the issues associated with housing provision differ from one country to another. The equivalent question was addressed in relation to health care in chapter 4 of this research,<sup>65</sup> and the point made there that 'although the right...is a universal standard, its implementation and level of enjoyment will remain relative'<sup>66</sup> is equally applicable to the right to housing. To avoid needless repetition, I would argue that the analysis of this question in respect of the right to health care in chapter 4 applies *mutatis mutandis* to the right to adequate housing. I should add for emphasis that although housing issues might differ from country to country, this does not detract from the broad universal principles of SER jurisprudence which includes the idea of a universal minimum core of the right drawn from common universal principles that can then be applied to each state. These universal principles in respect of the minimum core, I would argue, should be set at the international level. If these universal standards did not exist, states would be at liberty to set their own principles and determine the extent to which they are willing to implement SER in their countries.<sup>67</sup> Admittedly, states may set their own peculiar principles or national standards at a higher level than the international standard, but where this is not the case the consequences could be quite detrimental to the implementation and realisation of SER such as the right to adequate housing. This explains why the UN Commission on Human Settlements (UN-HABITAT) and the UNCESCR have each emphasised the importance of developing universally applicable criteria, as no nation can currently claim to have fully attained the objective of providing adequate housing to its citizens, and as such, ideas and approaches on how to reach such objective are best shared and monitored globally.<sup>68</sup>

### **5.2.4 Components of the right to adequate housing in the light of general comment 4**

According to the UNCESCR, the right to adequate housing applies to everyone regardless of their age, gender, economic status without discrimination in accordance with the provisions of the ICESCR which protects against discrimination in the enjoyment of SER.<sup>69</sup> Furthermore,

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<sup>65</sup> Pg 63 – 65.

<sup>66</sup> John Tobin, *The Right to Health in International Law* (OUP 2012) 1, 122.

<sup>67</sup> Scott Leckie, 'The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach' (1989) 11(4) *Human Rights Quarterly* 522, 539-540.

<sup>68</sup> UN HABITAT, *The Global Shelter Strategy to the Year 2000*, U.N. Doc. H/C/11/3. 15.

<sup>69</sup> See article 2(2) of the ICESCR.

the right to adequate housing as stated in article 11(1) of the ICESCR refers ‘not just to housing or the availability of mere shelter, but to adequate housing.’<sup>70</sup> As I have already stated, the UNCESCR in General Comment 4<sup>71</sup> views the concept of adequacy as particularly significant and encapsulates a number of factors in deciding whether a particular form of shelter is ‘adequate’ for the purpose of article 11(1) of the ICESCR. These factors are described as the components of the right to ‘adequate’ housing<sup>72</sup> and as listed in General Comment 4<sup>73</sup> they include:

- (a) Security of tenure.
- (b) Availability of services, materials, facilities and infrastructure.
- (c) Affordability.
- (d) Habitability.
- (e) Accessibility.
- (f) Location.
- (g) Cultural adequacy.

Of these seven components that help to define the nature of the right to adequate housing, this research focuses on the security of tenure component. There are three main reasons for focusing on the security of tenure component as providing a useful basis for the comparative analysis of the right to adequate housing in Nigeria and the UK. These are considered below in justifying the focus of the chapter on security of tenure.

### **5.2.5. Security of tenure as a core component of the right to adequate housing**

Firstly, I agree with the position of the UK Law Commission when it said that any threat to the occupation of a home is a core housing issue.<sup>74</sup> According to Cowan, ‘tenure is important. In fact, the only way one can think about housing rights is through tenure because it is tenure that

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<sup>70</sup> General comment 4, para 7.

<sup>71</sup> Ibid, para 8.

<sup>72</sup> Jessie Hohmann, *Protecting the Right to Housing in England: A Context of Crisis*. (Just Fair 2015) <[http://media.wix.com/ugd/8a2436\\_c7cdcc19f3084b889b37411b264eec55.pdf](http://media.wix.com/ugd/8a2436_c7cdcc19f3084b889b37411b264eec55.pdf)> accessed 30 January 2018.

<sup>72</sup>Ibid.

<sup>73</sup> General comment 4, para 8.

<sup>74</sup> Law Commission Housing: *Proportionate Dispute Resolution, Issues paper* (Law Commission 2006 ) Paras 1.18-24.

defines the rights which households obtain'.<sup>75</sup> The foregoing underlies the position of this research that security of tenure is a central and an indispensable component of the right to adequate housing. Any activity related to housing, whether in the context of land management, urban renewal, or other related projects, will inevitably carry with them implications for security of tenure. The absence of security of tenure with respect to the right to adequate housing, can, therefore, create the sort of situations where a range of other human rights are violated because it is essential that people are able to live in relative peace and security. In other words, their home should not be subject to seizure or the threat of unlawful or forced eviction. Legal security of tenure is therefore critical and could easily be considered as the cornerstone of the right to housing,<sup>76</sup> a fact that was earlier emphasised in General Comment 4 that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats'<sup>77</sup> and that any eviction that is not carried out in accordance with the law, is *prima facie* a violation of article 11(1) of the ICESCR.<sup>78</sup>

Secondly, legal security of tenure is not subject to the progressive realisation standard set in article 2(1) of the ICESCR.<sup>79</sup> This component of the right to housing is immediately realisable<sup>80</sup> which means that it could be enforced by courts in the UK and Nigeria since both countries have ratified the ICESCR.<sup>81</sup> Also, the enforcement of security of tenure is not tied to the availability of resources or resource allocation; it only requires state parties to refrain from any act of unlawful and arbitrary eviction.<sup>82</sup> Following from that is the provision of General Comment 7 that makes it obligatory for States to take definite and effective measures aimed at protecting against forced evictions since such unlawful acts would be *prima facie* incompatible with the requirements of the ICESCR. State parties are therefore required to adopt 'all appropriate means', including legislation and judicial redress which the ICESCR considers indispensable in providing an essential basis upon which to build a robust system of effective protection for security of tenure, and to ensure that there are a strict control and effective monitoring of the circumstances under which evictions might be carried out, not just in relation

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<sup>75</sup> Dave Cowan *Housing Law and Policy* (Hart 2011) 263.

<sup>76</sup> *Ibid.*

<sup>77</sup> General comment 4, para 8(a).

<sup>78</sup> General comment 7, paras 14-18.

<sup>79</sup> General Comment 4, para 8(d).

<sup>80</sup> *ibid*, paras 8(e) and 10.

<sup>81</sup> Nigeria ratified the ICESCR in July 1993 and the UK ratified it much earlier in May 1976.

<sup>82</sup> General comment 7 para 9. Cf article 17(1) of the International Covenant on Civil and Political Rights.

to states, but also non-state actors especially in the private sector (including private landlords) who also act on the authority of the state.<sup>83</sup>

Thirdly, it should be noted that ‘adequate housing’ remains a subjective and variable term because of the differences in cultures and climate. For example, in considering what amounts to adequate housing in the UK, one would expect such housing to have as a minimum a heating system, whereas in Nigeria the absence of a heating system would be immaterial owing to the differences in climate. Ifeadianwa’s<sup>84</sup> argument in respect of homelessness in Nigeria is very instructive. She argues that the inadequacy or absence of sanitary facilities, potable water, and health services such as the ones that constitute the components of the right to adequate housing do not yet feature in the discussion of housing rights and homelessness in Nigeria as they do in Western societies, because of the level of development in Nigeria, an assertion with which I agree. However, the level of Nigeria’s development should not be an excuse for not meeting its international human rights obligations. According to her, ‘these otherwise basic necessities have remained irrelevant to the definition of homelessness in the entire region’.<sup>85</sup>

Although the UNCESCR has named seven components of adequate housing as listed above, the context of application will obviously vary from one part of the world to another, because most of the components of the right relate to basic facilities in housing and, as a result, the interpretation given to them will most likely be subjective from one country to another. Not only are these elements of adequate housing difficult to measure across cultures, but there is also a significant dearth of relevant information on these components in member states, making it difficult to attempt any useful course of comparative information analysis. However, security of tenure appears to be in a different class apart from the others, because as has already been mentioned, it is the cornerstone of the right to housing, it is of a universal nature and attaches to the right of people everywhere to occupy shelter or live in a place they call home in peace and security, and it provides the foundation for the other components of the right to adequate housing to thrive and flounder. Of the seven components of the right to housing, it is the one that is most primal, not limited by the geographical location or economic advancement of a country. The nature of this component, therefore, highlights its utility in providing a veritable basis for comparing that aspect of the right to adequate housing in Nigeria and the UK. The

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<sup>83</sup> General comment 7, para 10.

<sup>84</sup> Ifeadianwa Chidebell, *Homelessness In Nigeria: Investigating Africa's Housing Crisis* (Xilbris Publishers 2013).

<sup>85</sup> *Ibid* 45.

protection of security of tenure is fundamental to the principle of human dignity which is the fountainhead of all the components of the right to adequate housing.

### **5.3. The right to adequate housing in Nigeria**

#### **5.3.1. Housing rights and the law in Nigeria**

As explained in chapter four (4.3.2), of this research, the SER contained in the ICESCR such as the right to adequate housing does not directly apply in Nigeria even though Nigeria has ratified the ICESCR. Nigeria is yet to enshrine in its law the provisions of the ICESCR, and as long as this continues to be the case, it will be impossible to afford any degree of judicial protection in respect of the right to adequate housing in Nigeria as envisaged by article 11(1) of the ICESCR.

Secondly, the Nigerian constitution is said to be supreme to all other laws, and any piece of legislation that is inconsistent with the provision of the constitution is deemed void to the point of that inconsistency.<sup>86</sup> The Nigerian constitution does not expressly provide for the justiciability of SER, indeed chapter 2 of the constitution, which contains some SER is classed as non-justiciable and excluded from the remit of judicial powers of the courts. As a result, any piece of legislation that provides for the enforcement of SER could be voided on the grounds of being inconsistent with the constitution.<sup>87</sup> The following provision in chapter 1 of the Nigerian constitution makes this clear:

The judicial powers vested in accordance with the foregoing provisions of this section –shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.<sup>88</sup>

The relevant part of the constitution relating to the right to adequate housing is in section 16(2)(d), which provides that ‘the State shall direct its policy towards ensuring that suitable and adequate shelter, suitable and adequate food ... are provided for all citizens’. Sadly, from a human rights-based perspective, the provision serves no practical purpose because of the

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<sup>86</sup> The Nigerian Constitution, section 1(3).

<sup>87</sup> *Abacha and Ors v Fawehinmi* (2001) AHRLR 172.

<sup>88</sup> The Nigerian Constitution, Section 6(6)(c).

ouster from judicial review,<sup>89</sup> so that even if the relevant agencies of government are not living up to their duties in respect of the right to housing under the ICESCR, those who suffer as a result are unable to pursue the right to adequate housing in any Nigerian court. So, what is the import of the foregoing for the right to adequate housing in Nigeria? Clearly, one of the main implications of this provision is that there is no guarantee to the right to adequate housing in Nigeria, and there is no positive duty on the part of the government to protect the right to adequate housing. In what appears to be an incidental protection for security of tenure, the Nigerian constitution provides that:

No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law.<sup>90</sup>

However, whatever good purpose the foregoing section was meant to serve towards the realisation of the right to adequate housing and especially for security of tenure is defeated by the Land Use Act (LUA)<sup>91</sup> which in a purported bid to redistribute land in Nigeria, vests the ownership of all land in every state in the governor of such state.<sup>92</sup> According to the LUA, such provision is meant to ensure social justice, and to check the activities of land speculators who were involved in all sorts of illegal activities such as large-scale land acquisition with the aim of reselling such land at extortionate prices.<sup>93</sup> According to the LUA, the land in each state is vested in the governor of such a state, who holds the land in trust for the use and common benefit of the residents of the state. The governor, pursuant to the provisions of the LUA is empowered to grant occupancy rights to all those with an interest in any land within the jurisdiction of the state, so that such occupants only enjoy their rights at the pleasure of the governor,<sup>94</sup> who can also revoke same on the grounds of ‘overriding public interest’<sup>95</sup>. This

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<sup>89</sup> Ibid.

<sup>90</sup> Nigerian Constitution, Section 44(1).

<sup>91</sup> This was formerly known as the Land Use Decree. It was promulgated to enable state expropriation of land. It was introduced by the then Military Government in 1978. Following the transition from military government to a civilian administration, the Decree was renamed the Land Use Act Cap L5 Laws of the Federation of Nigeria (LFN) 2004. This Land Use Act is a special enactment which has been accorded extraordinary status by the constitution. Though it is not an integral part of the constitution, however, it has special protection under the constitution in terms of its amendment. See *Nigerian Institute of Medical Research v NURTW* (2010) LPELR-4612(CA).

<sup>92</sup> LUA, Section 1. States are administrative divisions in Nigeria each with a governor. Currently, there are 36 of these in Nigeria.

<sup>93</sup> *Gwar v. Adole* (2002) LPELR-7080(CA); *UI v. Governor of Kwara State* (2012) LPELR-14326(CA)

<sup>94</sup> *Savannah Bank of Nigeria Ltd v. Ajilo* (1989) All N.L.R 26.

<sup>95</sup> LUA, Section 28.

system of land ownership in Nigeria has led to a lot of discreditable practices and has been the source of much political and social acrimony,<sup>96</sup> a development that has further alienated access to housing rights especially for the poor.<sup>97</sup> Sadly, this piece of legislation has often been referred to as a justification for forced evictions in Nigeria,<sup>98</sup> since anyone occupying land in Nigeria effectively does so subject to the overriding proprietary rights vested in the governor of the state where such land is situated. This system of land ownership coupled with the associated high cost and time of obtaining the statutory certificate of occupancy from the government has made it very difficult to legally own land in Nigeria, a situation that has a negative impact on the right to adequate housing Nigeria. As a result, many land transactions in Nigeria are done informally and privately. Such alienation of land without the governor's approval is effectively illegal and can lead to forceful and arbitrary eviction by the state pursuant to the powers vested in the governor under the Land Use Act.

From the analysis so far, it is evident that there is no robust framework for the protection of security of tenure in Nigeria as it relates to the right to adequate housing in international human rights law. This, as has already been observed earlier on, does have implications for the other components of the rights as envisioned in international human rights law. It is, therefore, safe to suggest that with respect to the realisation of the right to adequate housing, Nigeria is yet to take adequate steps especially in the area of legislation and judicial redress to abide by its obligations under the ICESCR.

### **5.3.2. African Charter and housing rights in Nigeria: the role of courts**

At the regional level, Nigeria has ratified the African Charter on Human and Peoples' Right.<sup>99</sup> Unlike the case with the ICESCR, the African Charter is considered part of Nigerian law, having been ratified and domesticated in accordance with section 12 of the Nigerian constitution which by implication means that the rights guaranteed under the African Charter could be enforced by Nigerian courts.<sup>100</sup> In *Social and Economic Rights Action Centre*

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<sup>96</sup> See Ola Aluko 'The Effects of Land Use Act on Sustainable Housing Provision in Nigeria: The Lagos State Experience' (2012) 5(1) *Journal of Sustainable Development* 114.

<sup>97</sup> Amnesty International *At the Mercy of the Government Violation of the Right to an Effective Remedy in Badia East, Lagos State, Nigeria* (Amnesty International 2014) <<https://www.amnesty.org/en/documents/AFR44/017/2014/en/>> accessed 30 January 2018.

<sup>98</sup> *Yagba Tsav & 6 others v Minister of the Federal Capital Territory Administration and the Federal Capital Development Authority*. Suit No. CV/437/08.

<sup>99</sup> The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A49 2004

<sup>100</sup> Solomon Ebobrah 'The future of economic, social and cultural rights in Nigeria' (2007) 1 *Review of Nigerian Law and Practice* 117-119.

(*SERAC*) and *another v Nigeria*,<sup>101</sup> the African Commission on Human and Peoples' Rights (African Commission) after reading together the provisions of Articles 14,<sup>102</sup> 16<sup>103</sup> and 18(1)<sup>104</sup> held that although the right to adequate housing is not expressly provided for in the African Charter, the combined effect of the foregoing articles implies into it a right to shelter or housing. According to the African Commission, 'the right to shelter even goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace whether under a roof or not'.<sup>105</sup> Although the foregoing interpretation of the right to adequate housing by the African Commission is very basic in that it sets a low-level standard for the right to adequate housing, it is nonetheless instructive, as it provides the basis for the recognition of the right to adequate housing within the African human rights system, which by implication applies to Nigeria as a member of the African Union. It is therefore sad to note that despite this decision, the Nigerian judicial system has failed to follow or apply the principles of international human rights law enunciated by the African Commission in the *SERAC* case. They have instead followed the decision of the Supreme Court of Nigeria in *Fawehinmi v Abacha*<sup>106</sup> where it was held that the provisions of the African Charter although applicable to Nigeria, are, however, inferior to the Nigerian constitution. An example of this approach by Nigerian Courts is the relatively recent case of *Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another*,<sup>107</sup> where the court declared unconstitutional those provisions of Nigeria's Fundamental Rights (Enforcement Procedure) Rules 2009 which related to the enforcement of SER in the African Charter.<sup>108</sup> The reason given by the court was that the African Charter contained other categories of rights which are not enforceable under the Nigerian constitution and that they are therefore not within the constitutional category of enforceable rights and to make them enforceable will violate the constitution of Nigeria. Similarly, in *Yagba Tsav & 6 others v Minister of the Federal Capital Territory Administration and the Federal Capital Development Authority*,<sup>109</sup> which was filed in a representative capacity by seven members of the Tudun Wada Community on behalf of about 10,000 other members of the community against plans by the Nigerian government to forcefully evict them from the land they occupied

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<sup>101</sup> (2001) AHRLR 60.

<sup>102</sup> The right to property.

<sup>103</sup> Right to health.

<sup>104</sup> Right to the protection of the family.

<sup>105</sup> *Social and Economic Rights Action Centre (SERAC) v Nigeria*, (2001) AHRLR 60, para 61.

<sup>106</sup> (2001) AHRLR 172.

<sup>107</sup> Suit FHC/ABJ/CS/640/2010, decision of the Federal High Court Abuja, delivered on 29 November 2012.

<sup>108</sup> These rules are made by the Chief Justice of Nigeria pursuant to Section 46(3) of the Nigerian constitution.

<sup>109</sup> Suit No. CV/437/08.

for over twenty years, the court refused to uphold Nigeria's obligations under the African Charter with respect to the right to adequate housing. The community had argued that the plan by the government to evict them was a violation of their right to adequate housing by virtue of the provisions of Chapter 2 of the Nigerian constitution and Articles 14 and 16 of the African Charter. In its decision, the court ruled that the right to adequate housing cannot be enforced in Nigeria. However, the court in rejecting this argument ruled that Chapter 2 could not be questioned by the courts as that part of the constitution is excluded from any judicial scrutiny. The court also refused to apply the clear provisions of the African Charter in respect of the right to adequate housing, stating that there was no constitutional basis for such enforcement. Although, the principle enunciated in *Fawehinmi v Abacha*<sup>110</sup> is over ten years old, the Nigerian judicial system has shown little or no willingness to review it in line with some fundamental changes some African countries have made in this regard in that period.<sup>111</sup> Nigeria has failed to make a declaration to activate article 5(3) of the Optional Protocol establishing the African Court, which would give jurisdiction to the court and *locus standi* to individuals to sue Nigeria before the court.<sup>112</sup> The two cases referred to above are Nigeria High Court<sup>113</sup> decisions, and there has been no recent opportunity for appellate courts in Nigeria to review the decision in *Fawehinmi* or pronounce upon the precise implication of the domestication of the African Charter and justiciability of SER in Nigeria such as the right to adequate housing, although Ebobrah<sup>114</sup> and Falana<sup>115</sup> have argued rather speculatively that the African Charter is a sufficient basis for the enforcement of SER, such as the right to adequate housing in Nigeria. Although the assertion by Ebobrah is attractive in principle,<sup>116</sup> however, it is difficult to see how the African Charter could be used in practice as a vehicle to sustain claims for the enforcement of the right to adequate housing, in view of the obvious and absolute provisions of sections 6 (6) (c) and 12 of the Nigerian constitution. Except the constitution is amended by

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<sup>110</sup> (2001) AHRLR 172.

<sup>111</sup> For example, Kenya in 2010 amended its constitution and international treaties including human rights treaties, no longer require legislative assent before becoming part of the law in Kenya. See section 2(6) of the Kenyan Constitution 2010.

<sup>112</sup> *Falana v The AU* Application No 001/2011.

<sup>113</sup> High Courts are courts of records and sits at the first rung of the ladder in the Nigerian judicial system. Their closest equivalent in the UK would be the County courts.

<sup>114</sup> Solomon Ebobrah 'The future of economic, social and cultural rights in Nigeria' (2007) 1 *Review of Nigerian Law and Practice* 117-119.

<sup>115</sup> Femi Falana, *Fundamental Rights Enforcement in Nigeria* (Legaltex Publishing Nigeria, 2010) 14.

<sup>116</sup> Provisions of the African Charter are couched in an equal and interdependent sense and there is no distinction between civil and political rights on the one hand and socio-economic rights on the other. The rights in the Charter are also not subject to the progressive realisation principle in the ICESCR. see *Commission Nationale des Droits de l'Homme et des Libertés v Chad, African Commission on Human and Peoples' Rights*, Communication no 74/92 (1995) para 21.

the legislature, its provisions will continue to take precedence over the African Charter as far as the justiciability of SER in Nigeria is concerned.<sup>117</sup>

### 5.3.3. Forced evictions in Nigeria – the role of courts

It would be illogical to discuss security of tenure in the light of the right to adequate housing, without reference to the challenges posed by forced evictions and the role of courts in Nigeria. This is because forced eviction is one the greatest threat to security of tenure. According to General Comment 7, forced evictions are defined as the ‘permanent or temporary removal against their will of individuals, families and communities from the homes and land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’.<sup>118</sup> In the view of the UNCESCR,<sup>119</sup> forced or illegal eviction is prima facie a violation of article 11(1) of the ICESCR. In Nigeria, forced eviction, especially by the government, is one of the most visible violations of the right to adequate housing because of the adverse effect it has on the victims of such lawlessness, especially women and children. According to a report by the UN-Habitat,<sup>120</sup> ‘the Government of Nigeria is consistently one of the worst violators of housing rights in the world, with over two million people forcibly evicted from their homes in different parts of the country since 2000.’<sup>121</sup> Because of the impact forced evictions can have in peoples’ homes and lives, General Comment 7 requires governments to use eviction only as a last resort and in the most exceptional circumstances<sup>122</sup>. They are also required to explore all other alternatives to avoid or at least minimise the need to use force. The General Comment also introduced a raft of procedural safeguards which a government or any party acting at its behest must comply with in order to justify such forced evictions. Crucially these safeguards are meant to ensure that such forced evictions are reasonable and proportional, and so the General Comment provides that evictions must only be carried out after:<sup>123</sup>

- (a) An opportunity for genuine consultation with those affected;

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<sup>117</sup> Akintayo (n 40) 567; See also Akintunde Otubu ‘Fundamental right to property and right to housing in Nigeria: A discourse’ (2011) 7(3) *Acta Universitatis Danubius Juridica* 38.

<sup>118</sup> [General Comment 7, para 4.](#)

<sup>119</sup> General comment 4, para 4.

<sup>120</sup> UN-HABITAT *Forced Evictions - Towards Solutions? Second Report of the Advisory Group on Forced Evictions to the Executive Director of UN-HABITAT.* (UN-HABITAT 2007).

<sup>121</sup> *Ibid* 67.

<sup>122</sup> [General Comment 7, para 9.](#)

<sup>123</sup> General Comment 7, para 16.

- (b) Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) Information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) Especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (e) All persons carrying out the eviction to be properly identified;
- (f) Evictions not to take place in particularly bad weather or at night unless the affected person's consent otherwise;
- (g) Provision of legal remedies; and
- (h) Provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts

These are the eight steps a government or its appointed agents are expected to follow in carrying any forced evictions. However, this has hardly been the experience in Nigeria. Of these eight steps, Mallo *et al*<sup>124</sup> have identified two key areas of concern in their survey of recent forced evictions in Nigeria. Firstly, many victims of forced evictions were never given adequate or any notice at all, and secondly, is the non-payment of adequate compensation and provision of alternative accommodation to resettle those affected. Any attempt to resist such forced evictions is usually met with the threat of or actual violence. In one of such incidents in September 2015, residents of communities in Badia East in Nigeria were forcefully evicted after just a day's notice of the demolition. They woke up to the presence of bulldozers and fierce looking heavily armed soldiers and police officers. They were never formally consulted neither did they have any access to seek legal redress in line with Nigeria's obligations under the ICESCR.<sup>125</sup> Similarly, in the southern Nigerian city of Port Harcourt, an estimated number of between 13000 – 19000 people<sup>126</sup> were displaced following the forceful eviction from their informal settlement known locally as *Njemaze*. The occupants of this settlement did not have

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<sup>124</sup> Daniel Mallo *et al*, 'Slum Housing Conditions and Eradication Practices in Some Selected Nigerian Cities' (2015) 8(2) *Journal of Sustainable Development*, 236-237.

<sup>125</sup> Amnesty International 'Nigeria: Hundreds face forced eviction as bulldozers descend on informal settlement' (Amnesty International 2015) <<https://www.amnesty.org/en/latest/news/2015/09/nigeria-hundreds-face-forced-eviction-as-bulldozers-descend-on-informal-settlement/>> accessed 30 January 2018.

<sup>126</sup> UN-HABITAT 'Evictions and Demolitions in Port Harcourt, Report of Fact-Finding Mission to Port Harcourt City, Federal Republic of Nigeria' (UN-HABITAT 2009) 26.

the advantage of any genuine prior consultation. They also did not have adequate notice of the government's intention to carry out the demolition, neither were they provided with alternative accommodation nor access to legal redress. In the end, the story was one of horror and misery for thousands including women, children and the elderly, a situation that made them homeless and particularly vulnerable to other human rights violations. The foregoing are only a few of the examples of cases of forced evictions in Nigeria.

Given the fact that SER are generally not justiciable in Nigeria, this author doubts whether the Nigerian judiciary would have held the government responsible for these cases of forced evictions, had the victims been given access to the courts. If this were to have happened at all, it is debatable whether the Nigerian courts would have held the government to account on the grounds of the government obligations under international human rights law such as the ICESCR. On the authority of decided cases, it is more than likely that the court would have justified the actions of the government on the ground that the said land belongs to the government by virtue of the LUA.<sup>127</sup> When considering such intentional human rights violations Nigerian courts are characteristically known to be placid, unduly technical and deferential to the Nigerian constitution on such far-reaching human rights issue. Despite the indivisibility and interdependency approach evident in the limited jurisprudence from the African Commission, the Nigerian courts have continued to give primacy to the Land Use Act, (a decree from the military era that has now been preserved as an Act of Parliament). The LUA empowers the government of any state in Nigeria to expropriate land for 'overriding public interest',<sup>128</sup> a term which can sometimes be nebulous and fluid because of the wide and unfettered margin it gives to the government to carry out forced evictions. It is against this backdrop that the decision of the ECOWAS Court of Justice in *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria*<sup>129</sup> must be commended. In this case, security agents of the Nigerian government shot indiscriminately into a group of people protesting against the decision of the government to forcefully evict them from their settlement in Bundu Ama in Nigeria. The case was filed in 2010 by the NGO SERAP in a representative capacity on behalf of the affected members of the Bundu Ama settlement. In its ruling in June 2014, the court held that there was no

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<sup>127</sup> A Nigerian law that has effectively expropriated all land and vested same in the government of each state. Individuals can now only own land at the pleasure of the governor who can claim the land for overriding public interest.

<sup>128</sup> LUA, Section 28.

<sup>129</sup> ECW/CCJ/APP/10/10.

justification for the shootings and that the Nigerian government had breached its obligation to protect and respect the right to peaceful association and assembly under the African Charter. The court also awarded damages running into millions of Nigerian naira. Although the issue of forced eviction was not considered, the court nevertheless made tangential pronouncements on it, thus highlighting the indivisibility approach to human rights irrespective of their classification, an approach which the courts in Nigeria have refused to adopt so far. The Nigerian government has commenced the payment of damages to the affected residents<sup>130</sup> in compliance with the judgement of the ECOWAS court. The payment of damages to the residents is to be commended as the Nigerian government is reputable for choosing what court judgement it complies with.<sup>131</sup> This case is instructive for many reasons. Importantly, it points to the efficacy of advocacy in changing the government's posture on the justiciability of the right to adequate housing and how much impact the interdependence and indivisibility approach can have on SER in general. Although the government still has a long way to go in the full implementation of the judgement, it, however, demonstrates the need for Nigerian courts to open a much sought-after dialogue with the Nigerian government in respect of its obligations under international human rights law especially SER. The judicial attitude of the ECOWAS court to SER might just be what is needed to persuade the government into the realisation that being a member of the international community is just more than signing up to every international human rights treaty.

## **5.4. The right to adequate housing in the UK**

### **5.4.1. Article 11(1) of the ICESCR in the light of UK housing legislation and policies**

Although the UK government has signed and ratified the ICESCR it is yet to incorporate the rights under the ICESCR such as the right to adequate housing in its national laws or accept the right of individual petition just like Nigeria. With respect to the status of international treaties such as the ICESCR, the UK's approach is similar to that of Nigeria, in that international treaties do not assume the immediate force of law and are inoperative until the parliament takes some definite measures to activate the obligations entered into except with

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<sup>130</sup> SERAP 'FG pays N6.5m to victims of Bundu shooting' (SERAP 2015) <<http://serap-nigeria.org/fg-pays-n6-5m-to-victims-of-bundu-shooting/>> accessed 30 August 2017.

<sup>131</sup> Inibehe Effiong, *Dasuki: Is The ECOWAS Court Judgment Binding On Nigeria?* (Sahara Reporters 5 October 16) <<http://saharareporters.com/2016/10/05/dasuki-ecowas-court-judgment-binding-nigeria-inibehe-effiong>> accessed 30 January 2018.

EU law<sup>132</sup>. This is known as the dualist legal system. As Hohmann<sup>133</sup> argues, the implication of this is that there is no justiciable right to adequate housing in the UK and individuals cannot ask a UK court to adjudicate on a claim to adequate housing on the basis of a breach of article 11(1) of the ICESCR. As mentioned already, the UK, like Nigeria, is yet to ratify the Optional Protocol to the ICESCR that provides a basis for individual citizens to bring complaints before the UNCESCR. Despite this apparently unimpressive picture of the UK with regards to the rights provided for in the ICESCR, it is apposite to remark that the provisions of the ICESCR are nonetheless binding on all parties that have ratified it. Although there is no justiciable article 11(1) standard right to housing in the UK, there are other laws that have provided a formidable basis for the protection of the right to adequate housing in the UK. Legislation such as the Housing Act 1996, Human Rights Act (HRA) 1998, the Equality Act 2010, and more recently the Deregulation Act 2015 can be used by the courts to protect human rights and by implication the right to adequate housing in the UK. This approach will ensure that there is some visibility for the right to adequate housing in the UK, and can also have a positive impact on housing policy formulation in the UK.

It is instructive to refer to the observations of the UK Law Commission that housing laws and policies in the UK are quite broad and complex with the attendant confusion of the various concepts that attach to the entire socio-legal discipline of housing rights.<sup>134</sup> According to Cowan, this legal complexity is as a result of the different historical interactions between the various concepts<sup>135</sup> of land ownership in the English land law and the impact of EU law. However, it is important to emphasise that the focus of this research is not on the right to own property, but on the element of security of tenure within the right to adequate housing, which is broader than the right to own property because the remit of the right to adequate housing as envisaged in article 11(1) of the ICESCR is wider than the concept of ownership.<sup>136</sup> When reference is made to security of tenure on the right to adequate housing, it is intended to ensure that everyone, including those who do not own property, has a secure and safe place to live in

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<sup>132</sup> European Communities Act. During the course of this research the UK voted to leave the EU. In March 2017, the UK government triggered article 50 of the ECA formally starting the process of the UK leaving the EU. Negotiations are still on going and all EU laws will remain in place until such a time when the UK formally leaves the EU.

<sup>133</sup> Hohmann (n 25) 12.

<sup>134</sup> Law Commission *Renting Homes 1; Status and Security* (Law Commission 2002) 162.

<sup>135</sup> Cowan discusses the historical evolution of these concepts such as estates and the doctrine of tenure from ancient times to modern days. He finds that changes in usage has largely been the result of the impact of regulation. See David Cowan *Housing Law and Policy* (Cambridge 2011) Chapter 11.

<sup>136</sup> UNHABITAT *The Right to Adequate Housing* (OHCHR Fact Sheet No. 21/Rev.1 2009) <[www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)> accessed 30 January 2018.

peace and dignity. Property rights, therefore, although not adverse to housing rights, are not coterminous to the idea of security of tenure under international human rights law.<sup>137</sup> For example, to focus overly on protecting property rights alone might indeed lead to situations where the right to adequate housing could suffer some potential violations. An example is the use of force by landlords in eviction cases.

#### **5.4.2. Security of tenure in the UK – the impact of regional legislation**

At the European regional level, there is a host of regional human rights legislation. However, with respect to the right to adequate housing, two of them are relevant for considering security of tenure in the UK in the light of the right to adequate housing. These are the European Social Charter (ESC)<sup>138</sup> and the ECHR. According to Hohmann,<sup>139</sup> the ESC was meant to play a complementary role to the ECHR, however, in the case of the UK, the ESC has not enjoyed much recognition compared to the ECHR, probably because of the UK's preference for dealing with SER through other avenues rather than through the instrumentality of the judicial process.<sup>140</sup> It could also be, as Hohmann suggests,<sup>141</sup> the absence of a direct enforcement mechanism, because there is no court under the ESC that can adjudicate on claims arising from the violations of the provisions of the ESC. There is, however, the European Committee on Social Rights (the Committee) that is empowered to receive periodic reports from member states. The Committee can only go as far as making recommendations based on the conclusions drawn from the reports submitted by members.<sup>142</sup> With respect to security of tenure, the provisions of articles 16 of the ESC (the right of the family to social, legal and economic protection) and especially article 31 (The right to housing) of the ESC are particularly germane. Article 31 of the ESC provides as follows:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

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<sup>137</sup> Ibid.

<sup>138</sup> The UK ratified the European Social Charter on 11 July 1972. It has yet to sign the Additional Protocol providing for a System of Collective Complaints which came into effect in 1998. However, it has signed but not yet ratified the Amending Protocol to the European Social Charter and the Revised Charter. So, although there is a Revised Charter which came into force in 1999, the version of the Charter applicable to the UK is the one ratified in 1961.

<sup>139</sup> Hohmann (n 25) 50.

<sup>140</sup> Ministry of Justice, United Nations International Covenant on Economic, Social and Cultural Rights United Kingdom, British Overseas Territories, Crown Dependencies 6th periodic report (Ministry of Justice 2014) 10.

<sup>141</sup> Hohmann (n 25) 50.

<sup>142</sup> European Social Charter, Part IV.

- 1 to promote access to housing of an adequate standard;
- 2 to prevent and reduce homelessness with a view to its gradual elimination;
- 3 to make the price of housing accessible to those without adequate resources.

Although no particular reference is made to security of tenure, there is no doubt that article 31 does envisage a reasonable degree of security of tenure and unlike the ICESCR, the duty of the state to provide the right to adequate housing under the ESC is immediate,<sup>143</sup> and not subject to the progressive realisation principle of article 2 of the ICESCR.<sup>144</sup> However, a consideration of the provision of article 31 of the ESC here is only academic, because its provisions do not apply to the UK.<sup>145</sup> Article 16 of the ESC which provides that ‘...the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing...’ would be more relevant in pursuing any housing right under the ESC. However, as it stands, it is highly unlikely that decisions of the Committee will have any real impact on the full realisation of housing rights in the UK because of the reasons already referred to in this section.

Turning now to the ECHR which has proven to be a piece of contentious regional human rights legislation and has affected many facets of the UK’s housing law and policy. Most of the provisions of the ECHR have now been incorporated into UK law through the HRA. Although the ECHR provides only for the protection of civil and political rights, the European Court of Human Rights (ECtHR) has rejected a water-tight compartmentalisation between the rights contained in the ESC and the ECHR.<sup>146</sup> This probably explains why jurisprudence emanating from the ECtHR has impacted positively on the right to adequate housing from a UK’s perspective more than the ESC has done, particularly against the backdrop of protecting security of tenure in the UK. This is despite the fact that the ECHR does not contain any substantive provision for the right to adequate housing as provided for in international law. Hohmann<sup>147</sup> reasons that the appeal of the ECHR is strong for two reasons: namely, the ECtHR which is the enforcement mechanism of the ECHR has compulsory jurisdiction over member countries and the decisions of the ECtHR are binding on member countries, and individual citizens of member states can take their complaints to the ECtHR.

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<sup>143</sup> As is the case with security of tenure under article 11(1) of the ICESCR. See General Comment 4, para ?

<sup>144</sup> David Feldman *English Public Law* (2nd ed Oxford University Press 2009) 473 .

<sup>145</sup> The 1961 text of the Charter which the UK has ratified does not contain the right to housing.

<sup>146</sup> *Airey v Ireland* (1980) 2 EHRR 305, para 26.

<sup>147</sup> Hohmann (n 25) 50-56.

Housing right claims under the ECHR are predominantly predicated on article 8 (right to respect for private and family life) which bears a contextual link with the right to adequate housing and has implications for security of tenure. Article 8 of the ECHR provides:

1. everyone has the right to respect for his private and family life, his home and his correspondence.
2. there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Although the provisions of article 8 of the ECHR, strictly speaking, do not cover cases of SER, however, they have become some of the most utilised provisions of the ECHR with regards to protecting security of tenure within the UK and have proved remarkably instrumental across both private and public housing sectors in the UK.<sup>148</sup>

#### **5.4.3. Security of tenure and article 8 of the ECHR - role of UK courts**

Under article 1 of protocol 1 to the ECHR, the right to peaceful enjoyment of property and possession is guaranteed.<sup>149</sup> Although the scope of this provision has been increasingly widened to cover abstract and material goods,<sup>150</sup> it nonetheless can be applied in the protection of security of tenure in the UK.<sup>151</sup> However, as observed above, the use of article 8 of the ECHR has remained pivotal to the protection of security of tenure in the UK particularly in the area of social housing. This will become even more apparent in the case analysis that follows in this and the next subsection (5.4.4). It does appear that the common law right of the owner of the property to take possession as long as the necessary notice has been issued, is now

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<sup>148</sup> Caroline Hunter 'The right to housing in the UK' (2010) 3 *Istituzioni Del Federalismo: Rivista di Studi Giuridici e Politici* 313-324.

<sup>149</sup> As with the other qualified rights, Article 1 Protocol 1 to the ECHR is subject to many exceptions 'in the public interest' See *Sinclair Collis Ltd, R v. The Secretary of State for Health* [2011] EWCA Civ 437

<sup>150</sup> *Re an application by Brewster for Judicial Review (Northern Ireland)* [2017] UKSC 8.

<sup>151</sup> For a historical evolution of the right to property under the ECHR, see Ed Bates *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) Chapters 3 and 4.

subordinated to article 8 of the HRA, at least in cases involving public authorities.<sup>152</sup> In *Sheffield City Council v Smart; Central Sunderland Housing Company Ltd v Wilson*,<sup>153</sup> Laws LJ held that ‘home is an autonomous concept for ECHR, and does not depend on any legal status as owner.’ This implies that security of tenure is a wider and more instrumental concept than the right to own property.<sup>154</sup> The trajectory of what could be described as the incursion of human rights law into the arena of contractual and proprietary rights to possession has led to some conflict between ownership and occupier rights in the UK because of article 8, especially in relation to private landlords. Remarkably, there appears to be an ongoing dialogue between the UK court and the jurisprudence emanating from the ECtHR in respect of housing cases that have implications for security of tenure. An analysis of the housing rights cases involving article 8 of the ECHR indicates that the UK courts are often reluctant to intervene where a clear-cut case for repossession or eviction has been made out and as long as the legal procedure has been complied with. In the case of *Qazi v Harrow LBC*,<sup>155</sup> the court, by a majority decision, held as follows:

It necessarily follows that article 8 was applicable. But it does not follow that it was even arguably infringed. In my opinion article 8 is not ordinarily infringed by enforcing the terms on which the applicant occupies premises as his home. Article 8(1) does not give a right to a home, but only to "respect" for the home. This meaning of "respect" for the home cannot be understood in isolation; it can be understood only if article 8(1) is read together with article 8(2). This forbids interference with the right conferred by article 8(1) except in the circumstances specified. By explaining the circumstances in which there may be lawful interference with the right to "respect", article 8(2) gives meaning to that concept and limits the scope of the article.<sup>156</sup>

However, following the decision of the ECtHR in the case of *Connors v UK*,<sup>157</sup> which effectively overruled the decision of the UK court in the *Qazi* case,<sup>158</sup> the UK Supreme Court

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<sup>152</sup> See *Sheffield City Council v Smart; Central Sunderland Housing Company Ltd v Wilson* (2002) HLR 639, where Laws LJ said ‘In the absence of the Human Rights Act 1998 (“HRA”) neither appellant would have had a defence to the respondent's claim for possession.’ Para 7.

<sup>153</sup> *Ibid* para 26.

<sup>154</sup> *HABITAT* (n 61).

<sup>155</sup> (2003) UKHL 43.

<sup>156</sup> *Ibid*, para 100.

<sup>157</sup> (2005) 40 EHRR 189.

<sup>158</sup> (2003) UKHL 43.

in the case of *Kay v Lambeth LBC and Leeds City Council v Price*<sup>159</sup> revisited and modified its earlier position in *Qazi*.<sup>160</sup> The court in a split decision dismissed the appeal. The majority of the court held that the defendant (the tenant) could not rely on the provisions of article 8 of the ECHR to challenge the legality of possession proceedings as a whole unless such proceedings were not compliant with extant domestic legislation. The court further held that article 8 leaves open two possible challenges to decisions to evict, commonly named as gateway (a) and gateway (b). Gateway (a) challenges the compatibility of the legislation itself with the ECHR and gateway (b) challenges the individual decision where it is made by a ‘public body’. As shown in this case, the UK courts are very reluctant to apply article 8 of the ECHR in possession cases, in order not to upset the balance struck by Parliament between security of tenure and the right to possession. According to Lord Brown:

where under domestic law the owner’s right to possession is plainly made out (whether at common law or, for example, under the legislation providing for assured short-hold tenancies or introductory tenancies), the judge in my opinion has no option but to assume that our domestic law properly strikes the necessary balances between competing interests ... and that in applying it properly he is accordingly discharging his duty under section 6 of the Human Rights Act 1998. ... Where no statutory protection is afforded to occupiers that should be assumed to be Parliament’s will: sometimes that will be clearly evident from the terms of the governing legislation.<sup>161</sup>

The court did not hide its disapproval for the use of article 8 of the ECHR to challenge the compatibility of domestic housing laws with the relevant provisions of ECHR, because the policy in that area of housing relations are well covered and settled by the UK Parliament, and to allow it to be challenged by article 8 of the ECHR is nothing but ‘a recipe for a colossal waste of time and money.’<sup>162</sup> However in the latter case of *McCann v. The United Kingdom*,<sup>163</sup> the ECtHR rejected the UK Supreme Court’s reasoning in *Kay* with respect to the applicability of article 8 of the ECHR to the relevant aspect of UK domestic housing law. According to the ECtHR:

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<sup>159</sup> (2006) UKHL 10.

<sup>160</sup> (2003) UKHL 43.

<sup>161</sup> *ibid* para 203.

<sup>162</sup> *Ibid* para 55.

<sup>163</sup> (2008) ECHR 385.

The Court does not accept that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay* observed, it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings.<sup>164</sup>

This appears to suggest that even where there are no legal rights of occupancy, occupiers should still be able to exercise the right to challenge the eviction as unreasonable and the court of first instance should consider this factor in all cases coming before it as a matter of practice rather than by exception. This approach to eviction cases would fundamentally affect the way UK courts proceed in respect of possession proceedings the reason being that currently, as long as it can be shown that the proper procedures have been applied, then the courts will make such orders for possession as a matter of course<sup>165</sup> because of the landlord's unqualified and inherent right to possession. However, in *Doherty and others v Birmingham City Council*<sup>166</sup> the House of Lords declined to apply the principle enunciated in the *McCann* case, as doing so would upset the balance struck by Parliament between the right of the occupier and that of the Local Authority to take possession of the property in question for public benefit. Lord Hope, in a very forceful and critical manner held thus:

I would resist the invitation ... that your Lordships should now abandon the reasoning of the majority in *Kay* in favour of the reasoning of the minority... I am not convinced that the Strasbourg court ... has fully appreciated the very real problems that are likely to be caused if we were to depart from the majority view in *Kay* in favour of that of the minority... Nothing that was said by the Strasbourg court in *McCann* can alter or has altered, the way acts authorised by primary legislation must be dealt with under section 6(2) of the 1998 Act.<sup>167</sup>

After the House of Lords' decision in *Kay*, the case was taken to the ECtHR.<sup>168</sup> The ECtHR again held that there had been a violation of the applicant's right under article 8 of the ECHR.

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<sup>164</sup> Ibid Para 54.

<sup>165</sup> Housing Act 1996, section 127(2).

<sup>166</sup> (2008) UKHL 57.

<sup>167</sup> Para 21.

<sup>168</sup> *Kay and Ors v. The United Kingdom* [2010] ECHR 1322.

However, the UK courts have subsequently continued to hold that the defence of article 8 of the ECHR would not apply automatically except in very exceptional cases. However, in what appeared to be an apparent softening of the UK court's position, the Supreme Court in *Manchester City Council v. Pinnock*<sup>169</sup> developed the following general principles:

(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8 of the ECHR, even if his right of occupation under domestic law has come to an end

(b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (ie, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues<sup>170</sup>

The import of the foregoing principles is that where a court is asked by the local authority to make an order of possession under domestic law, the court must now consider whether making such order is compatible with article 8 of the ECHR, especially as it affects the proportionality and reasonableness of making such an order. The question, therefore, arises whether making such an order is a proportionate means of achieving a legitimate aim. As part of the process, the court has to satisfy itself that the property in question constitutes the occupier's home because this is the primal condition that activates article 8 of the ECHR. It is only when the occupier's home is under threat that article 8 of the ECHR becomes relevant. This principle is now settled law and has been followed in a number of cases notably the case of *Mayor and Burgesses of the London Borough of Hounslow v. Powell*; *Leeds City Council v. Hall*; *Birmingham City Council v. Frisby*<sup>171</sup> where the court extended the principle enunciated in *Pinnock* to introductory tenancies. Article 8 of the ECHR has changed the way possessory rights are asserted by public landlords in the UK, its influence has served to strengthen the procedural guidelines in favour of the occupier with salubrious effect on security of tenure within the broader remit of the right to adequate housing in international law.

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<sup>169</sup> (2010) UKSC 45.

<sup>170</sup> Para 45.

<sup>171</sup> (2011) UKSC 8.

#### 5.4.4. Security of tenure and article 8 of the ECHR in the private rental sector

So far in this research, the impact of article 8 of the ECHR has been examined concerning the activities of public authorities in the UK housing sector. This is very important given the fact that private rental is one of the commonest housing tenures in the UK.<sup>172</sup> Opinions on whether article 8 of the ECHR applies to the UK's private housing sector vary. In *Qazi v Lambeth*<sup>173</sup> the court held that article 8 would apply 'if the residential property is occupied by the defendant as his home. But nothing I have said in this opinion should be understood as applying to any landlord or owner which is not a public authority'.<sup>174</sup> This was the generally held position in the UK until the ECtHR decision in *Zehentner v Austria*<sup>175</sup> which was to the effect that 'even in cases involving private litigants, the state is under an obligation to afford the parties to the judicial dispute procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly'.<sup>176</sup> However, in *Pinnock*, the UK Supreme Court, which sat with an unusual nine-judge panel, carefully elided the matter. Whilst it made it clear that the decision in the case did not have any bearing on private landlords, it declined to make any authoritative pronouncement on whether an article 8 challenge was available to tenants of private landlords. The attitude of the Supreme Court in this regard had brought more confusion to the subject. In recent cases where the subject has come up for some judicial pronouncement, the absence of a clear and settled position has been evident in the conflicting decisions handed down by the courts.<sup>177</sup> However, in the recent case of *McDonald v McDonald*,<sup>178</sup> the UK Supreme Court did finally lay the matter to rest, when it held that by virtue of chapters I and IV of the Housing Act 1988, article 8 of the ECHR could not be invoked by a residential occupier against a private sector landowner. The court also declared that article 8(2) of the ECHR did not apply to such private contracts because neither of the parties is considered as 'a public authority' even though it could be argued, by way of commentary that the court itself being a public authority was bound by article 8(2) and as such could have applied article 8 of the ECHR, since it was the one making the decision. The author

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<sup>172</sup> Department for Communities and Local Government *English Housing Survey: Households Annual Report on England's Households, 2015-16* (Department for Communities and Local Government 2017) 6.

<sup>173</sup> (2003) UKHL 43.

<sup>174</sup> Para 75.

<sup>175</sup> [2009] ECHR 1119.

<sup>176</sup> See also *Belchikova v Russia* [2010] ECHR 2266, the ECtHR seems to have considered that article 8 of the ECHR was relevant, even when the person seeking possession was a private sector landlord, presumably, on the basis that the court making the order was itself a public authority.

<sup>177</sup> *Southend-On-Sea Borough Council v Armour* (2014) EWCA Civ 231; *McDonald and Others v McDonald* (2014) EWCA Civ 1049.

<sup>178</sup> [2016] UKSC 28.

agrees with the ECtHR when it said in the case of *McCann v the United Kingdom*<sup>179</sup> that ‘the loss of one’s home is a most extreme form of interference with the right to respect for the home’. However, with regards to the right to adequate housing, there is a balance to be struck between two conflicting rights, i.e. the right of the private landlord to their property under article 1 of Protocol 1 and article 8 of the ECHR in the case of the tenant. Where the courts fail to effectively evaluate where to strike a balance, such a failure could potentially lead to a claim by the aggrieved party against the UK at the ECtHR, or worse still, resort to self-help by the landlord which could lead to cases of forced evictions. A major factor that influenced the position of the court in the *McDonald v McDonald*,<sup>180</sup> is the ‘horizontality’ of the ECHR which means that article 8 of the ECHR cannot be directly enforced between private citizens to alter their contractual rights and obligations because the purpose of the ECHR is to protect citizens from having their rights infringed by the state.<sup>181</sup> The position of the court in the case above finds support with Loveland<sup>182</sup> who had earlier on objected to the application of the ECHR to private landlords on the ground that tenants should not be able to rely on article 8 to negate the rights of the landowner under a freely negotiated contract. Similarly, in what Endicott<sup>183</sup> describes as the ‘proportionality spillover’, he disagrees that the loss of one’s home amounts to an extreme form of interference on the basis that discussion should not focus solely on the detriment of the occupier, but also on the nature and the purposes of the interference. However, Lindberg argues whether the differentiation between a private landlord and public housing is necessary when article 8 of the ECHR is involved because the consequence of possession has the same impact-loss of one’s home. He argues that the government should take its portion of the blame, having consistently encouraged private sector renting and having failed to provide adequate safeguards against unethical practices that wholly favours the private sector landowner.<sup>184</sup> In my view, article 8 of the ECHR should be interpreted as applying to all, including the common law applicable to private disputes. This may not always be the case at the ECtHR, however, there is no provision in the HRA that forbids the application of article 8 in private contracts such as a private tenancy agreement. It is therefore hoped that as the UK’s

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<sup>179</sup> 2008) 47 EHRR 40.

<sup>180</sup> [2016] UKSC 28.

<sup>181</sup> *ibid*, para 41.

<sup>182</sup> Ian Loveland, ‘The Shifting Sands of article 8 Jurisprudence in English Housing Law’ (2011) *European Human Rights Law Review*, 151.

<sup>183</sup> Timothy Endicott, ‘Proportionality and Incommensurability’ in Grant Huscroft, Bradley W. Miller and GréGoire Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 331.

<sup>184</sup> *Per Lindberg* ‘Defend my Castle: Is the UK in Violation of article 8 of the European Convention of Human Rights?’ (2010) 22(1) *Denning Law Journal* 1.

legal system evolves, the issue of article 8 of the ECHR not being applicable in private tenancy agreements will be revisited because article 8 of the ECHR enables the court to view such tenancy agreements from a human rights perspective as opposed to the common law principles of contracts.

As already mentioned, in cases of private sector rental, there are two conflicting rights involved and the courts must be careful to consider where to strike the balance and this calls for vigilance because of the importance of housing. It behoves on the courts to strike the right balance between the economic growth of the state, the proprietary interests of private owners and the right of the individual members of the society to a home. This balance, I would suggest, should be struck on a case by case basis instead of having entrenched principles that may not always apply in all cases. There's a substantial case made out in jurisprudence from the ECtHR, and the UK courts must be careful in considering the position of a private tenant in these cases because the legal security of tenure in the private rental sector has been eroded by successive government policies.<sup>185</sup> Currently in the UK, as a standard, all tenants have a minimum security of six months,<sup>186</sup> unless the landlord offers a longer term. On the expiration of that period, the landlord's right to possession is absolute and as long as they serve the appropriate notice on the tenant, the courts will grant a possession order as a matter of course. As already mentioned, over the years, there has been a gradual erosion of whatever was left of security of tenure in the private housing rental sector.<sup>187</sup> Unlike in the past, the private rental sector now forms the second largest form of tenure in England<sup>188</sup> and its role in ensuring adequate housing can no longer be ignored. There is a near absence of any regulation in the private rental sector in the UK. According to Cowan<sup>189</sup> it 'remains a poorly regulated sector, with weak legislative controls'<sup>190</sup> and it was therefore not a thing of surprise when the government itself admitted that the near absence of security of tenure in the private rental sector is now the single biggest contributor to homelessness in the UK.<sup>191</sup> Because of the lack of adequate regulation in this

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<sup>185</sup> See the case of *Macdonalds v Mcdonalds* [2016] UKSC 28, where Lord Harbeuger gave summary of the evolution of housing policy regulations sin the 1970s.

<sup>186</sup> The majority of tenancies in the private rental sector are regulated by the Assured Shorthold Tenancy. See section 5 Housing Act 1988 as amended.

<sup>187</sup> This is in stark contrast to the position prior to 1989 where tenants of private landlords had a high degree of security. All that has now been changed by the Housing Act 1988 which created new forms of tenancy from 15th January 1989 at open market rents. See *Curtis v London Rent Assessment Committee* [1997] APP.L.R. 10/09.

<sup>188</sup> Department for Communities and Local Government *English Housing Survey: Households Annual Report on England's Households, 2015-16* (Department for Communities and Local Government 2017) 6

<sup>189</sup> Cowan, (n 27) 53 -54.

<sup>190</sup> *ibid*

<sup>191</sup> Department for Communities and Local Government *Statutory homelessness and prevention and relief, July to September (Q3) 2017: England* (DCLG, December 2017) 7.

sector, the use of retaliatory evictions normally by serving a section 21 possession notice on the tenant under the Housing Act 1988 is rampant.<sup>192</sup> It remains to be seen how the government's fairly recent response through the Deregulation Act<sup>193</sup> (The Deregulation Act came into effect in October 2015. It provides that where a Local Authority has served a landlord with an improvement notice following a complaint by the tenant, such landlord cannot serve the tenant a Section 21 notice for a period of six months following the complaint by the tenant. The Act appears to have changed the long-standing position of the law enunciated in *Chapman v Honig*,<sup>194</sup> where it was held that A landlord's notice to quit was held valid notwithstanding that the landlord seeking to uphold its validity had himself given it in contempt of court. A contractual right may be exercised for any reason good, bad or indifferent and the motive with which it is exercised is irrelevant to its validity.<sup>195</sup>

## Conclusion

As with the other two SER discussed in this research, the right to adequate housing is an important SER and a basic need of humans irrespective of where they live in the world. The nature of the right explains why it is guaranteed in a number of international and regional human rights laws. The utility of the right to adequate housing explains the unique approach taken in this research to examine the contents and functions of the right in both jurisdictions. Rather than discussing what could be described as subsidiary elements of the right, I have focussed mainly on security of tenure which I have argued is the core of the right to adequate housing because in my opinion, there is no use in discussing the adequacy of housing in the absence of security of tenure to that place or property. It is, therefore, a thing of sadness that despite the widely agreed importance of housing to protecting human dignity, both Nigeria and the UK continue to lag behind in meeting the standards expected under article 11(1) of the ICESCR. I admit that the governments of both countries have made efforts at addressing some of the housing rights issues raised in this chapter such as forced evictions and unaffordable housing, however, the same governments have been known to be one of the biggest violators

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<sup>192</sup> See generally Shelter *Can't Complain: Why Poor Conditions Prevail in Private Rented Homes* (Shelter 2014). <[https://england.shelter.org.uk/data/assets/pdf\\_file/0006/892482/6430\\_04\\_9\\_Million\\_Renters\\_Policy\\_Report\\_Proof\\_10\\_opt.pdf](https://england.shelter.org.uk/data/assets/pdf_file/0006/892482/6430_04_9_Million_Renters_Policy_Report_Proof_10_opt.pdf)> accessed 30 January 2018.

<sup>193</sup> The Deregulation Act came into effect in October 2015. It provides that where a Local Authority has served a landlord with an improvement notice following a complaint by the tenant, such landlord cannot serve the tenant a Section 21 notice for a period of six months following the complaint by the tenant. The Act appears to have changed the long-standing position of the law enunciated in *Chapman v Honig* [1963] 2 QB 502.

<sup>194</sup> [1963] 2 QB 502.

<sup>195</sup> *Ibid.* 520.

of the right to adequate housing whether directly or indirectly through policies that encourage, for example, the commodification of housing and unregulated private investors who are driven mainly by the need to make profit.

A review of current housing right legislation both at the international and local level is required to align the right to adequate housing to meet current housing challenges. The right to adequate housing in the ICESCR needs to be better defined and its contents clarified. At the local level, more needs to be done about the commodification of housing which is one of the greatest threat to adequate housing. Whilst it is desirable for government and the private sector to work together in providing adequate housing, the point must be made that adequate housing as a right should not suffer as a result of this collaboration.

## Chapter six

### The right to work

#### 6.1. Introduction

The right to work is the third and final right of the SER considered in this research. The right to work under article 6 of the ICESCR is unique compared to other SER,<sup>1</sup> it covers an extensive area in human rights practice and has become recently more closely related to labour law.<sup>2</sup> Therefore, it is crucial to set out from the outset the relevant aspects of the right this research intends to examine and the perspective from which it will do so. This is because of the nature of the right in international law in relation to how it is actually practised in the UK and Nigeria. Even though certain aspects of the human right to work and labour law are largely interdependent, reference to the right to work should be taken as the right to work under article 6 of the ICESCR, except as otherwise indicated.

This chapter is written in four interconnected sections. Section 6.2 critically analyses the normative content of the right to work under international law, with reference to the relevant international human rights instruments such as the United Nations Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), relevant ILO Declarations and particularly article 6 of the ICESCR. Because I argue in support of universalism of SER, I have considered the elements of the minimum core state obligations which to my mind are immediately realisable and enforceable. The research examines the evolution and development of the right overtime and some of the different perspectives that have helped to shape the right to work as it is known today. These perspectives will focus mainly on the contemporary status of the right and the impact of UN bodies, such as the ILO, has had on the practical application of the right especially with reference to the UK and Nigeria.

In 6.3, the analysis moves to a more specific consideration of the right to work in the UK in the light of article 6 of the ICESCR. The section opens with a discussion of the right as it applies in the UK and considers the various applicable local and regional legislation and policies that have implications for the implementation of the right in the UK. Specifically, the impact of regional legislation such as the European Social Charter (ESC) and the European Convention on Human Rights (ECHR) are considered. Apart from these, the impact of EU law<sup>3</sup>

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<sup>1</sup> See section 6.2, pg 130.

<sup>2</sup> Keith Ewing, 'Regulating for Decent Work and the Effectiveness of Labour Law' (2014) 39(2) NZJER 3.

<sup>3</sup> Section 6.4 pg. 152.

on the right to work in the UK is also considered. Many of the recent developments in this area of UK law are at least partly attributable to the jurisprudence emanating from the European Court of Human Rights (ECtHR), and the Court of Justice of the European Union (CJEU) as the analysis of case law in this section reveals. I have also considered the impact of globalisation and automation on the nature of the right to work in the UK and Nigeria and experimented with the idea of having a right to basic income instead, or as part of the right to work.

In 6.4, the research focus shifts to the application of the right in Nigeria. The section opens with a discussion of the right as it applies to Nigeria and considers the various local and applicable regional legislation and policies that have implications for the implementation of the right to work in Nigeria. Relevant regional human instruments such as the African Charter are considered, with the aim of evaluating how well the country is progressing towards the realisation of the right to work as per its obligations under the ICESCR. However, from the initial analysis, it does appear that the right to work in Nigeria from an international perspective is largely underdeveloped, and still very much in its inchoate stages with a raft of outdated policies and legislation<sup>4</sup> in dire need of a review. As a result, jurisprudence in this area of Nigerian human rights law is negligible, although some relevant labour law decisions will be considered in analysing the role of Nigerian courts, in providing some interpretative content for the normative framework of the right, in view of Nigeria's obligations under international law.

The concluding section of this chapter, (6.5) extrapolates the implications of the legal developments in this aspect of human rights law, focusing on ways the international right to work could be redefined and streamlined in both jurisdictions in order to give it more effect. In the end, I propose a more holistic and realistic approach to the realisation of the right to work. These proposals anchor centrally on the theme of human dignity, which as I argue, is much more effective than mere declarations of the right under international law without a corresponding application at the local levels where the workings of the right could be most felt.

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<sup>4</sup> See pg 157 - 162

## 6.2. The right to work in international law

As with the SER to health and housing discussed in the preceding chapters of this research, the right to work is contained in a number of international human rights instruments<sup>5</sup> and its relevance to the central human rights theme of human dignity is one that can hardly be disputed. However, unlike the rights to health care and housing, the right to work is unique for a lot of reasons. For example, there is the issue with what the contents of the right should be and how best they could be achieved in member states that have ratified the ICESCR, such as Nigeria and the UK. There is also the central issue of whether national governments can be guarantors of employment of last resort and whether there should be a claimable right that justifies a duty on the part of the state to offer employment to anyone willing and able to work. This research will explore this issue in more detail in the latter part of this section, but for now, it will focus on evaluating the concept of the right from the perspective of the ICESCR which the fundamental source of the right is to work under international law.

Article 6 (1) of the ICESCR provides thus for the right to work:

‘The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right.’ Also, article 6(2) of the ICESCR talks about the steps to be taken by member countries to achieve the full realisation of the right, and this includes technical and vocational training programmes and policies that will aid in the employment of the individual thus guaranteeing economic freedom.

This might appear to be a straightforward and simple concept -the right to a job for any person who wants to work. However, as with the two other SER considered in this research, the right to work has been criticised for being complex and multifaceted, a factor that can have implications for the enforcement of the right. Smith<sup>6</sup> notes that the right is not really a single human right but rather ‘a complex normative aggregate . . . a cluster of provisions entailing equally classic freedoms and modern rights approaches as well an obligation oriented

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<sup>5</sup> Article 8, para 3 (a) of the International Covenant on Civil and Political Civil Rights (ICCPR); article 23 of the Universal Declaration of Human Rights (UDHR); article 32 of the Convention on the Rights of the Child (CRC) article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

<sup>6</sup> Smith Rhona, *Textbook on International Law* (5<sup>th</sup> edn OUP 2012) 18.

perspective made up of strictly enforceable legal obligations and political commitments.’<sup>7</sup> Sarkin and Koenig,<sup>8</sup> have also made the argument that the right to work is used to denote a conglomerate of interrelated rights such as the right to dignified work, equal access to work, among others and assert that the imprecise nature of the right ultimately obfuscates the goal of implementing the right. It is submitted that it would be totally imprudent to ignore these concerns about the absence of a clear conceptual framework for the right, especially if the courts are to be involved in some level of judicial implementation of the right. However, focusing too much on the semantics and technical details of the right can easily become a distraction that takes away the focus on the realisation of the right.<sup>9</sup> The question might be asked: how do you go about implementing a right that has no definite content in terms of a clear and practical focus? This question indeed is a challenge, and formulating an answer is essential because it will help to clarify what the right to work entails in practice, and how it could best be implemented specifically in member states such as the UK and Nigeria.

### **6.2.1. Conceptual analysis of the international right to work under article 6 of the ICESCR, and rights in work**

In an attempt to clarify the normative content of the right to work in Art 6(1) ICESCR, the UNCESCR released General Comment 18<sup>10</sup> which, though not legally binding, does have a persuasive effect in helping to formulate the interpretive framework that could be useful in local situations when it comes to implementing or interpreting the scope of the right to work.<sup>11</sup> According to the General Comment 18, the right to work includes the right of every human being to decide freely to accept work, so that the freedom of choice to engage in any employment of one’s choice is a critical ingredient within the framework of the right to work, and for this to happen, a robust system of protecting access to employment opportunities must be in place so that no one is unfairly denied the right to work.

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<sup>7</sup> Ibid.

<sup>8</sup> Jeremy Sarkin and Mark Koenig, ‘Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy’ (2011) 33 Human Rights Quarterly 8.

<sup>9</sup> George Wright, ‘Toward a Federal Constitutional Right to Employment’ (2014/15) 38 Seattle University Law Review 63.

<sup>10</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work E/C.12/GC/18. (henceforth General Comment 18)

<sup>11</sup> Manisuli Ssenyonjo ‘Reflections on state obligations with respect to economic, social and cultural rights in international human rights law’ (2011) 15(6) The International Journal of Human Rights. 969, 975.

As to the nature of work that the right recognises, the UNCESCR explains that the work specified in article 6 must be of a kind that is decent. Decent work, the UNCESCR explains, is work ‘... that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work, safety and remuneration’.<sup>12</sup> Different theorists have expounded on this principle of the right to work. I consider Branco’s<sup>13</sup> view because of the straightforward way he attempts to link the different dimensions and components of the right to work. Branco’s thesis is assembled on a theoretical framework that is immensely instrumental in defining the contents and nature of the right to work as articulated in article 6 of the ICESCR. He explains that the right to work has two components namely: qualitative and quantitative. The quantitative aspect refers to the right to work which includes the fundamental right that there be enough jobs for those seeking to work, and the qualitative aspect deals with the need for jobs to qualify as decent jobs. However, whilst Branco’s exegesis is convincing on the nature and contents of article 6 and by implication, articles 7 and 8 of the ICESCR, it has been criticised for neglecting the element of freedom of choice in his differentiation on the components of the right, since freedom of choice is crucial in defending to defend the right from becoming a duty to work.<sup>14</sup> I agree with this criticism because the freedom to choose one’s work is a critical element of the right to work under article 6 of the ICESCR, which is fundamental to checking the incidence of forced labour. Branco’s view on the quantitative aspect of the right to work does not fully capture the essence of the right to work. Whilst it desirable to have enough jobs for everyone willing and able to work, the right does not create a duty on the state to be the employer of last resort. It does appear that using Branco’s views as a justificatory basis for the right would be expensive and difficult to sustain by any state.

### **6.2.2. Right to work and rights in work**

The right to work has three dimensions as contained in articles 6, 7<sup>15</sup> and 8. Whilst article 6 provides for the *right to work*, articles 7 and 8 provide for the individual and collective

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<sup>12</sup> [General Comment 18, para 7.](#)

<sup>13</sup> Manuel Branco, ‘The Right to Work and the Political Economy of Human Rights’ (2008) 8 *Universidade de Évora, Departamento de Economia* 6.

<sup>14</sup> Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press 1998) 202.

<sup>15</sup> The CESCR has recently released a new General Comment on this right in March 2016. See General Comment No. 23 on the right to just and favourable conditions of work E/C.12/GC/23.

dimensions of the *rights in work*.<sup>16</sup> The conglomeration of rights within the broader concept of the right to work under article 6 of the ICESCR, does have implications for the overall implementation of the right to work. Firstly, it highlights the interdependence of the rights provided in articles 6,7 and 8 of the ICESCR all rolled up within the gamut of the right to work, so that in practical terms, the right to work not only involves the state stimulating economic growth and development to maximise employment opportunities, but also involves protecting the right of those who are already in some employment, thus incorporating in the right some aspects of labour law.<sup>17</sup> It is therefore hardly surprising that the UNCESCR referred to at least 18 different conventions by the International Labour Organisation (ILO) in General Comment 18 on the right to work.

Secondly, despite the interdependence theory espoused by the UNCESCR in respect of the right, some writers<sup>18</sup> have questioned the aggregation of free-standing rights into the right to work in article 6 of the ICESCR. They argue that such a conglomeration of the rights encompassed in the right to work appears to be a compromise aimed at building a broad consensus on employment rights-based issues. However, such a compromise could potentially relegate to the background some aspects of the right to work including the duty on the part of governments to maximise employment opportunities among others. Apart from this, the indeterminate<sup>19</sup> and unwieldy nature of the right risks obfuscating important debates regarding the obligations of states in ensuring that every willing person has equal access to job opportunities for their subsistence. Since the rights which articles 7 and 8 of the ICESCR seek to protect are the individual and collective dimensions of the rights to work, some writers<sup>20</sup> are not particularly averse to using the instrumentality of article 6 to achieve such goals. What they do argue against is the use of article 6 of the ICESCR (right to work) to bolster the labour rights of those already in work in a manner that seems detrimental to the avowed aim of the right to work under article 6 of the ICESCR. For example, in the UK there has been a steady increase since the early 1970s in the amount of employment protection legislation such as the Equal Pay

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<sup>16</sup> Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work, whilst article 8 broadly provides for the right of everyone to form trade unions and join the trade union of their choice.

<sup>17</sup> Davies ACL, 'The Constitutionalisation' of Labour Law: Possibilities and Problems' in Ziegler K and Huber P (ed), *Current Problems in the Protection of Human Rights: Perspectives from Germany and the UK* (Hart Publishing, 2013) 45.

<sup>18</sup> Ibid (n 7) 8; see also Alan Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in Virginia Mantouvalou (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 149.

<sup>19</sup> Kathrine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale International Law Journal* 113.

<sup>20</sup> (n 8) 6.

Act 1970,<sup>21</sup> Health & Safety at Work Act 1974, Race Relations Act 1976<sup>22</sup>, Trade Union and Labour Relations (Consolidation) Act 1992, Disability Discrimination Act 1995,<sup>23</sup> Employment Tribunals Act 1996, Employment Rights Act 1996, National Minimum Wage Act 1998 and the Equality Act 2010.<sup>24</sup> In addition, there is a substantial amount of secondary legislation in the form of regulations which contain further provisions which affect the employment relationship.<sup>25</sup> With the exception of one or two pieces of legislation, they are all aimed at protecting and promoting rights at work and not the right to work. Although it could be argued that the right to work might have benefitted from some of this legislation, there is no doubt that the clear intention of Parliament and ministers in making these laws and regulations was to protect the provisions of articles 7 and 8 of the ICESCR even if these articles might not have directly triggered the making of these laws. In the end, the sphere of the *rights in work* covered by articles 7 and 8 is one that is heavily regulated by statute, whereas in the area of working to maximise employment opportunities which is the primary focus of article 6, not much progress seems to have been made. Although it is not practicable to expect the government of any state to provide jobs for everyone seeking employment, they can, however, ensure that conditions exist for employment opportunities to thrive and that access to such opportunities is done on an equal and non-discriminatory basis.

In the opinion of the UNCESCR the UK's approach to addressing unemployment and the resultant social ills, does not go far enough.<sup>26</sup> The absence of a clear and concerted approach to development of the *right to work* aspect of the right to work has constituted an obstacle to the evolution of the right to work, so that what we have today in the UK and Nigeria is a right to work that is underdeveloped occasioned by a clear indifference on the part of the national governments to exceed the realm of token policies, to one of clear and purposive action. Furthermore, notwithstanding the work of the UNCESCR, there are differing opinions on what the core elements<sup>27</sup> of the right are, and how best these elements could be sustained.

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<sup>21</sup> This Act has now been mostly superseded by provisions of the Equality Act 2010.

<sup>22</sup> Now repealed by the Equality Act 2010.

<sup>23</sup> Now only applicable in Northern Ireland.

<sup>24</sup> In addition to these legislations which directly provide various employment rights, there are also other legislation that can impact on employees' rights such as the HRA 1998.

<sup>25</sup> Working Time Regulations 1998.

<sup>26</sup> See generally CESCR 'Committee on Economic, Social and Cultural Rights concludes review of the report of the United Kingdom' (OHCHR, June 2016).

<<http://www.ohchr.org/AR/NewsEvents/Pages/DisplayNews.aspx?NewsID=20118&LangID=E> > accessed 30 August 2017.

<sup>27</sup> Kathrine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale International Law Journal 113.

In my opinion, *the right to work* and *rights in work* are different aspects of the same right, because both are important to appreciating the instrumental nature of the right to work. It has long been realised that true individual dignity cannot exist without the means to live a dignified life which having a job can readily provide. As US President Franklin Roosevelt<sup>28</sup> observed in his state of the Union to the US Congress in 1944, ‘we have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made’.<sup>29</sup> It is submitted that more needs to be done in the area of providing decent jobs if the UK and Nigeria are to live up to the expected standards set under the ICESCR.

### **6.2.3 Minimum core contents of the right to work**

As I stated in chapters 4<sup>30</sup> and 5,<sup>31</sup> the minimum core of a specific SER is what gives rise to the minimum state obligations in respect of such right. The same applies in the case of the right to work. The right to work as a specific SER is unique compared to the two other rights discussed in this research, because of the practical difficulties involved in separating the protection of employment rights from the related but competing and overlapping areas of industrial policies and economic development. In designing and implementing such economic policies, the government is to ensure that the right to work is protected given the involvement of private actors who are mostly driven by profit making. The balance should be struck between economic growth and the protection of the right to work. This is one of the reasons why it is important in human rights theory to identify a universal minimum core content of the right to work because, it helps to address potential areas of conflict in the implementation of the right to work, even though what amounts to the universal minimum core contents of the right to work is one that is not yet generally agreed.<sup>32</sup> Article 6 of the ICESCR does not specify such a core content, but it is my considered opinion that to be able to discuss the implementation and the eventual full realisation of the right to work, one must first be able to discover the minimum core contents of the rights

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<sup>28</sup> Franklin Roosevelt, ‘State of the Union Message to Congress’ (American Presidency project 1944) <<http://www.presidency.ucsb.edu/ws/?pid=16518>> accessed 30 January 2018.

<sup>29</sup> Ibid.

<sup>30</sup> Pg 66

<sup>31</sup> Pg 99

<sup>32</sup> Leary Virginia, ‘The Paradox of Workers’ Rights as Human Rights’, in Lance Compa, Stephen Diamond (eds), *Human Rights, Labor Rights, and International Trade*, (University of Pennsylvania Press, 1996) 36-37.

So, what is the minimum content of the right to work? Article 6 of the ICESCR does not provide a holistic insight when it says that ‘the right to work, ... includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will (the State parties) take appropriate steps to safeguard this right’.<sup>33</sup> Although the UNCESCR in General Comment 18 did attempt to elaborate and clarify the intent and contextual application of article 6 of the ICESCR, such an attempt overly focussed on the obligations of states with respect to the implementation of the right to work at the expense of elaborating on the minimum core contents of the right.

Having said that, it is clear from the provision of article 6 of the ICESCR that the right to work does not equate to the right to be employed; it does not mean that every person of working age who is able and qualified to work should have a claimable right against the state to be employed. As Nickel<sup>34</sup> puts it, article 6 of the ICESCR ‘does not include a requirement that governments are employers of last resort’.<sup>35</sup> However, when one considers the instrumental nature of the right to work, especially in ensuring a life of dignity, the question might be asked as to how one could live at least a minimally good life without the means of surviving and supporting themselves through remunerative work? Given such circumstances, and in order to be able to support a dignified live of happiness and security, should they not have a claim against the state to enforce their right to work? Ideally, such a scenario would be the ultimate universal achievement of the right to work, however, it is one that would create a host of complex problems for the state given the interplay of various interests in the area of creating employment opportunities. It would be impracticable because it will be expensive to have the state guaranteeing the right to work in a sense that gives everyone willing and able to work a claimable right to work against the state.

For the foregoing reason, article 6 of the ICESCR is understandably minimal in its approach to defining the core content of the right to work and the minimum core obligations of states. It appears from the analyses of article 6 of the ICESCR, that the minimum core content of the right to work includes the right to have access to the opportunity to gain a living by carrying out work which individuals have freely chosen or accepted. Similarly, Leary adopts the

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<sup>33</sup> Article 6 ICESCR.

<sup>34</sup> James Nickel, ‘Giving Up on the Human Right to Work’ in Virginia Mantouvalou (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 140.

<sup>35</sup> *Ibid.*

minimalist approach in setting the minimum core content of the right to include just the workers' right to freedom of association and prohibition of forced labour.<sup>36</sup>

The ILO gives a more elaborate definition of the core content of the right to work to include:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.<sup>37</sup>

Both Leary and the ILO's definition of the core content of the right to work are inadequate in that they do not address the issue of maximising employment opportunities which I think is crucial to the full realisation of the right to work. I do not by this assertion imply that there is a duty on the state to make employment available to anyone willing and able to work, as it would be, practically speaking, difficult to justify the right to work on such basis not to mention whether such an idea of the right would be feasible. In my opinion, a state that is providing opportunities to work by directly providing employment, or creating the conditions for entrepreneurship, investment, and allowing individuals to exercise their choice in accepting those opportunities to take up such work is at least be meeting the minimum core requirement of the right to work. However, the statement only considers one side of the argument. To be able execute a holistic analysis of whether a state, such as the UK or Nigeria, is meeting the minimum core requirement of the right to work within its jurisdiction, one must approach such analysis by not just considering the minimum core content of the right but also considering the minimum core obligations of the state.

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<sup>36</sup> Leary Virginia, 'The Paradox of Workers' Rights as Human Rights', in Lance Compa, Stephen Diamond (eds), *Human Rights, Labor Rights, and International Trade*, (University of Pennsylvania Press, 1996) 38-39.

<sup>37</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

#### **6.2.4 Right to work - minimum core obligations of state parties**

The ICESCR is silent as to what the minimum core obligations of states are in respect of the right to work. However, General Comment 18 by the UNCESCR covers the different types of obligations with regards to the right. The General Comment<sup>38</sup> identifies four of these broad categories of obligations, which I summarise below:

a. General legal obligations dealing with the principal obligation of states to ensure that measures are put in place for the progressive realisation of the right to work in line with article 2(1) of the ICESCR

b. Specific legal obligations on the part of the state to respect the right to work by ensuring that all incidence of forced or compulsory labour is prohibited and to assure to all equal access to decent employment opportunities including respecting the right of women, minorities and migrant workers to be able to access employment opportunities without discrimination

c. International obligations on the part of the state to seek international assistance and cooperation towards the full realisation of the right to work so that all states have an obligation to work bilaterally or multilaterally towards ensuring full employment.

d. Core obligations of states in respect of the right to work. These core obligations are particularly relevant to my discussion of the minimum core obligations of states in respect of the right to work because, the nature of minimum core obligations is that they apply irrespective of the availability of resources of the state concerned, and as a result are immediately realisable.

<sup>39</sup> Any state that is unable to meet its obligations in respect of the minimum core of such right is prima facie in violation of such right.<sup>40</sup> In line with General Comment 3,<sup>41</sup> the state has the core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the ICESCR. According to the UNCESCR and within the context of article 6 of the ICESCR, the minimum core obligations of the right to work ‘encompasses the obligation to ensure non-discrimination and equal protection of employment’.<sup>42</sup> According to the UNCESCR in General Comment 18, these core obligations include as a minimum, the following duties which are incumbent on states:

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<sup>38</sup> General Comment 18, paras 19-31.

<sup>39</sup> The relevant viewpoints on the nature of the minimum core are discussed in chapters 4 and 7 +refer

<sup>40</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 10. (henceforth General Comment 3).

<sup>41</sup> Ibid.

<sup>42</sup> General Comment 18, para 31.

- (a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
- (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.<sup>43</sup>

What is particularly clear from the consideration of the minimum core obligation of the right is the fact that although there is no absolute right to be provided with a job by a state, the state has the responsibility of ensuring that the right to access employment opportunities is available to all without discrimination and that no one is forced or put under compulsion to carry out work. I would argue that in line with the provisions of article 2(2) of the ICESCR these elements of the right to work are immediately enforceable. The absence of an absolute right to work does not absolve the state of the responsibility to adopt deliberate measures aimed at stimulating economic growth and development with the end of addressing issues that might impact the right to work negatively.<sup>44</sup> A state should ensure that policies are directed in such a way to reduce unemployment and not sustain or increase it.<sup>45</sup>

As with the other two SER discussed in chapters 4 and 5 of this research, the right to work imposes three levels of obligations which are the obligations to respect, protect and fulfil. The underlying concept and application of these three levels of obligations in respect of the state

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<sup>43</sup> Ibid.

<sup>44</sup> General Comment 18, para 26.

<sup>45</sup> Richard Siegel 'The right to work: core minimum obligations' in Audrey Chapman, Sage Russell (eds.) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 34.

are extensively discussed in chapters 4<sup>46</sup> and 5<sup>47</sup> of this research and those comments are broadly applicable within the context of the right to work. However, for the sake of clarity, I shall briefly restate that the obligation to respect requires states not to interfere indirectly or directly with the enjoyment of the right to work. Such interference could be by way initiating employment policies that interfere with the right to work of certain groups of society. The obligation to protect means that states are to ensure that the activities of third parties, i.e. non-state actors do not interfere with the right to work of individuals within such states. However, because of the unique nature of the right to work, there is a tendency for potential conflict between some aspects of the right to work and economic development policies of the state which can sometimes be heavily reliant on the involvement of non-state actors such multinational business organisations. Striking the balance between the economic activities of such non-state actors and the right to work can, therefore, be a difficult route to navigate. Finally, the obligation to fulfil includes a duty on the part of a state to facilitate and promote the right to work through the adoption of effective measures such as legislation, educational training, budgetary and the provision judicial remedies to ensure the full realisation of the right to work.

### **6.2.5 The minimum core obligations of state parties in respect of the right to work; universal or relative?**

From the analyses so far, the minimum core of the right to work, in my opinion, involves two aspects of the right to work leading ultimately to the full realisation of the right to work. These aspects are non-discrimination and equal access to employment opportunities, and the guarantee that work is freely chosen or accepted - all done consistently within the overarching principle of progressive realisation of the right as envisaged under article 2(1) of the ICESCR.

With regards to whether the minimum state obligation is universal, or relative; I discuss in this section, the aspects of the right to work that I have identified as the minimum core state obligations of the right work under international law i.e. non-discrimination in accessing employment opportunities. I critically analyse whether there is a basis to argue for their universal applicability, or whether they are relative to the respective states.

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<sup>46</sup> Pg 61 - 65

<sup>47</sup> Pg 100 -101

The right to work as currently couched under the ICESCR is an instrumental right, more importantly, it is unique when compared to the other SER discussed in this research. For example, under the right to health care which was considered in chapter 4 of this research, the state has a direct responsibility for providing access to health care through the different health care facilities and qualified medical personnel. In contrast, in the case of the right to work, the state can fulfil its duties without directly having to provide jobs. Unlike the other SER, gainful and freely chosen employment, which in my opinion, is one of themes of the right to work, involves an interplay of a complex web of factors, some of which might be external and may be of such nature that the state might not necessarily be able to exert any control over. Such is the level of difference between the right to work and the other SER discussed in this research.

Non-discrimination is one of the aspects I have identified as forming the minimum core obligation of the right to work, because it is critical to the realisation of the right to work at all levels,<sup>48</sup> and is also a central theme in SER practice.<sup>49</sup> According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,<sup>50</sup> any discrimination imposed or condoned by the state which has the aim of discriminating

on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.<sup>51</sup>

Similarly, with specific regards to the right to work, the ILO has defined discrimination as including;

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>52</sup>

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<sup>48</sup> Art 2(2) ICESCR; see also UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20.

<sup>49</sup> Art 2(2) ICESCR.

<sup>50</sup> International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, para 11.

<sup>51</sup> Ibid.

<sup>52</sup> International Labour Organization (ILO), Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, article 1.

What this means in relation to the right to work is that any state in which there is an inability or unwillingness to provide equal protection against discrimination is *prima facie* violating its minimum core obligations with regards to the right to work. Later, in section 6.4 of this chapter, I discuss the application of this element of the minimum core obligations with regards to certain employment practices in the UK and Nigeria. In my opinion, employment discrimination can have a lasting negative effect which remains with the individual or groups of individuals for a long time. The state must therefore not be seen involving itself in acts that are likely going to engender discrimination and unequal treatment in both the public and private sectors or even carry out acts that could potentially undermine existing mechanisms aimed at preventing discrimination.

Considering the extensive nature of the subject of non-discrimination in the right to work, especially as it forms an aspect of the minimum core obligations of the right, I would argue that its nature is necessarily universal and that there is an overwhelming basis for its application universally. Similarly, an aspect of the minimum core obligations consists of an obligation by the state to guarantee that work is freely chosen or accepted by the individual (prohibition of forced labour). I think the case for the universal applicability of this aspect of the minimum core is also made out given the global consensus against modern slavery and forced labour.<sup>53</sup> The fact that such practices are a clear violation of the dignity of the human person is enough to ground the universal appeal for the prohibition of forced labour.

Furthermore, the two elements of the minimum core obligations of states in respect of the right to work are, in my opinion, practicable and enforceable in a court than say, for example, demanding the enforcement of a right to be provided with a job. They are also intended immediately realisable in line with the underlying nature of the minimum core obligations under General Comment 3.<sup>54</sup> Finally, I think these two elements are more standardised as components of the minimum core obligations of the right to work. It is my considered opinion that such quality would make it less difficult to measure national compliance and be able to share experiences across various legal systems which is one of the aims of comparative international law.<sup>55</sup>

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<sup>53</sup> International Labour Organization (ILO), *Abolition of Forced Labour Convention*, C105, 25 June 1957

<sup>54</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 10; see also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para 43.

<sup>55</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (2nd edn Oxford University Press 1992) 14.

### **6.2.6. The right to work - conglomeration and its benefits**

Coming back to the issue of the right to work being a conglomeration of related rights, it could be argued that such conglomeration of rights in work within the broader concept of the right to work does have some benefits for the entrenchment of the right to work, in both theory and practice. First, it underlines the importance of indivisibility as a common objective of all SER, a position that this research espouses. Second, it could be argued that the ability to access work is central to one's subsistence and self-realisation and engenders a sense of inclusion in one's community. For example, article 11 of the ICESCR which was examined in chapter five of this research recognises the right of everyone to an adequate standard of living, including freedom from hunger and homelessness. Although article 11 of the ICESCR does not state that work is a condition for actualising its provisions, it stands to reason that one of the means by which an adequate living standard could be progressively achieved is through the provision of decent work. The right to work and the rights in work should be viewed as constituents of the broader right to work. However, the point should be made (although this appears to be a point of disagreement among human rights theorists<sup>56</sup>) that in the move towards the realisation and protection of the rights at work, the more crucial aspect of the broader right to work should not be relegated to the background. Strictly speaking, the right to work deals with access to a freely chosen employment which is a fundamental stage before the rights in work. Although both are mutually reinforcing, it is reasonable to suggest that within the state's broader economic and social picture, the right to work must continue to be streamlined to ensure that its practical aims continue to feature as a factor in the formulation of economic policies, and legislation. By streamlining, I mean having a right to work that is effective with tangible benefits and not having a conglomeration of different rights in one which in my opinion makes implementation difficult and challenging to monitor.

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<sup>56</sup> Market forces theorist and human right activist opine that government has the duty of creating jobs. See, BBC 'Carney warns about popular disillusion with capitalism' (5 December 2016) <<http://www.bbc.co.uk/news/business-38210169>> accessed 30 January 2018.

### 6.3. Consideration of alternatives to the right to work

#### 6.3.1 Non-wage-based work and the right to work

With respect to what constitutes work deserving of protection within the framework of article 6 of the ICESCR, the UNCESCR has stated that the right ‘encompasses all forms of work, whether independent work or dependent wage paid- work’.<sup>57</sup> The import of this interpretation by the UNCESCR is that for any work to come under the framework of article 6 of the ICESCR, such work must be one that is remunerated,<sup>58</sup> but whether one’s labour must be paid is also another point of debate amongst human rights practitioners and theorists. Those who argue against wage-based labour being the only social and legal construct within which the right to work must be protected hold the view that a wage-based idea of the right is too narrow. One of such writers, Harvey, makes the following point:

to conceive of work only as those activities through which a monetary consideration is obtained is to have a very limited idea of what work means, and it is even worse to rely on the market to determine what is and what is not work...Work can be defined as all those activities which combine creativity, conceptual and analytic thought and manual or physical use of aptitudes.<sup>59</sup>

Harvey’s position has brought with it other strands of opinions on what should be the aim of the right to work under international human rights law, and how such a conception could potentially be applied to UK and Nigerian jurisprudence on the broad subject of the implementation of SER. Harvey’s position is that work is not all about earning a living. Work can have other benefits apart from the money it pays the worker for their subsistence, and in the push towards the realisation of the right to work, market forces cannot be relied on because they are unpredictable and driven by profits. This position resonates with article 11 of the ICESCR that recognises among others, the right of everyone to an adequate standard of living. Although article 11 of the ICESCR does not say how the right of everyone to adequate standard of living could be realised, it has historically been the case that work was one of the prime and

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<sup>57</sup> General Comment 18, Para 6.

<sup>58</sup> *Malawi African Association and Others v. Mauritania, African Commission on Human and Peoples' Rights Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)* where the African Commission held that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being.

<sup>59</sup> Phillip Harvey, ‘The Right to Work and Basic Income Guarantees: Competing or Complimentary Goals?’ (2005) 2 Rutgers Journal of Law & Urban Policy 8.

legitimate means of achieving that goal,<sup>60</sup> and so, to argue that the right to work includes non-wage based labour appears to be contrary to the intendments of article 6 of the ICESCR which recognises the right of everyone to gain their living by work freely chosen by them. The phrase ‘to gain his living’ in article 6 of the ICESCR refers to subsistence which is part of the concept of the right to work.

### 6.3.2 The right to a basic income

Apart from the social benefits of inclusion and a sense of personal realisation that comes with work of one’s choice, the question might be asked how one would gain their living without engaging in some work that pays even if they were self-employed? Can there be any other means by which their daily needs could be met? These sorts of questions have led to the discussion of the right to basic income, a concept that has grown in ascendancy and is considered as providing an alternative to the realisation of the right to work, especially given the advancement in automated jobs and the inability of governments to provide employment for those willing and able to work.<sup>61</sup> There are various definitions of the right to basic income,<sup>62</sup> however, for the purpose of this research, the definition by Jackson<sup>63</sup> is preferred as it encompasses the critical dimensions of the concept. According to him, basic income is:

a cash benefit paid to all individuals regardless of their personal characteristics or employment status. It differs from unemployment benefits in that it is not conditional on unemployment; if paid at a high enough level, it enables people to survive without having to work.<sup>64</sup>

Proponents<sup>65</sup> of basic income argue that traditional ideas of the right to work such as contained in article 6 of the ICESCR focus too narrowly on wage-based work. Rather than viewing the right to work as the right to obtain a job that pays, Harvey argues for an extension of the concept

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<sup>60</sup>See generally Van Donselaar, *The Right to Exploit: Parasitism, Scarcity, Basic Income* (Oxford University Press, 2009) chapter 5.

<sup>61</sup> Richard Berriman, ‘Will robots steal our jobs? The potential impact of automation on the UK and other major economies’ (UK Economic Outlook March 2017 PricewaterhouseCoopers) 30.

<sup>62</sup> William Jackson, ‘Basic Income and the Right to Work: A Keynesian Approach’ (2009) 21(4) *Journal of Post Keynesian Economics* 639.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Jackson (n 37); Guy Standing ‘Why Basic Income is Needed for a Right to Work’ (2005) 2 *Rutgers Journal of Law & Urban Policy* 1.

of the right to work, to include the pursuit of an occupation of one's choosing<sup>66</sup> regardless of whether such work is remunerated or not. Similarly, Standing<sup>67</sup> argues that reference to the right relates to the physical or mental effort in work and causes a measure of distress and unpleasantness and that to guarantee a right to such is a contradiction in terms especially as all known human rights carry in them a positive value. Following Standing's line of thought, it could be argued that work has an undertone of difficulty and unpleasantness, which we only have to do to eke out a living, thus making it more of a duty than a right. These views could prove to be a useful strategy for working against the exploitation of labour that affects most systems based on capitalism such as the UK and Nigeria. However, their views do not quite match the notion of work under article 6 of the ICESCR as explained in 6.2 above.

There is also a less radical perspective that argues in support of a basic income in place of the right to work and holds that since unemployment has not been satisfactorily tackled by traditional means, then basic income could be the solution to the issue of unemployment since those who cannot find jobs in the employment market and or are simply unable to work need a basic income to sustain an adequate standard of living in line with article 11 of the ICESCR. The underpinning philosophical basis for this line of thought originates from a brand of ethical morality espoused by philosophers Thomas More<sup>68</sup> and Juan Luis Vives<sup>69</sup> in the sixteenth century, a concept that was further developed and expounded on by Thomas Paine<sup>70</sup> during the seventeenth century. The following passage from Paine's memoir to the French Revolutionary Government is instructive:

It is a position not to be controverted that the earth, in its natural, uncultivated state was, and ever would have continued to be, the common property of the human race. In that state every man would have been born to property... Every proprietor, therefore, of cultivated lands, owes to the community ground-rent (for I know of no better term to express the idea) for the land which he holds; and it is from this ground-rent that the fund proposed in this plan is to issue...

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<sup>66</sup> Philip Harvey, 'The Right to Work and Basic Income Guarantees: Competing or Complimentary Goals?' (2005) 2 *Rutgers Journal of Law & Urban Policy*. 8-59.

<sup>67</sup> Guy Standing, 'Why Basic Income is Needed for a Right to Work', (2005) 2 *Rutgers Journal of Law & Urban Policy* 91-102.

<sup>68</sup> Thomas More, *Utopia* (Paul Turner tr, Penguin Classics, 1963) 43-44. That part of More's thesis examines the need to give a minimum guaranteed income to the less fortunate in order to prevent criminality and vagrancy in the society.

<sup>69</sup> Juan Vives, *De Subventionem Pauperum, Sive de humanis necessitatibus* (Tobriner Alice tr, University of Toronto Press, 1998) 62.

<sup>70</sup> Thomas Paine, *Agrarian Justice* (Blackmask Online 2001) <<http://public-library.uk/ebooks/10/51.pdf>> accessed 30 January 2018.

out of which there shall be paid to every person, when arrived at the age of twenty-one years, the sum of fifteen pounds sterling, as a compensation in part, for the loss of his or her natural inheritance, by the introduction of the system of landed property...And also, the sum of ten pounds per annum, during life, to every person now living, of the age of fifty years, and to all others as they shall arrive at that age. It is proposed that the payments, as already stated, be made to every person, rich or poor. ... Such persons as do not choose to receive it can throw it into the common fund.<sup>71</sup>

Paine's thesis of endowment for everyone from the common property of the earth in payment for the loss of everyone's right to land and means of production is attractive and patently just because in the contemporary UK and Nigerian economies, work as a means for economic self-actualisation has proved inadequate, especially with the economic downturn following the economic crisis at the turn of the century, and in the case of Nigeria a dwindling sales receipt from crude oil which is the mainstay of the Nigerian economy. Also, not to be forgotten is the increase of automation and artificial intelligence that is, I suspect, likely to take up many jobs hitherto performed by humans. According to research published by PricewaterhouseCoopers up to thirty per cent of UK, jobs could potentially be at substantial risk of automation by the early 2030s.<sup>72</sup>

Although basic income is a policy that is sure to raise questions as to how such an audacious move could be practically implemented, it is one that should also be considered in the drive towards the realisation of the right to work. It will require rigorous scrutiny especially in the capitalist settings of both jurisdictions because those against Paine's theory of endowment could argue that there is already a scheme of that nature in the form of the various taxes levied by the state on companies. Van Parijs,<sup>73</sup> who is one of the leading proponents of the concept of a right to basic income, argues that individuals have an unconditional right to the highest sustainable basic income and this should be paid to every member of society irrespective of whether they are rich or poor, willing to or unwilling to work, in order to ensure real freedom as opposed to a mere formal freedom. By way of commentary, I think that the basic income proposal raises many fundamental questions such as whether it is this workable, affordable,

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<sup>71</sup> Ibid.

<sup>72</sup> Richard Berriman, 'Will robots steal our jobs? The potential impact of automation on the UK and other major economies' (UK Economic Outlook March 2017 PricewaterhouseCoopers) 30.

<sup>73</sup> Philippe Van Parijs, 'Basic Income: A simple and powerful idea for the twenty-first century' (2004) 32(1) Politics & Society 7.

controllable and accountable not to mention the issues of fairness. Is it even conceivable that peoples' unconditional right to a basic income should be premised on the basis of being members of the community and no more? How can you even talk about membership of a community in a world that is becoming increasingly global? An analysis of these questions is provided in the following paragraphs.

The discussion around the issue of non-work based basic income has seen a steady increase in Europe<sup>74</sup> and more recently the UK<sup>75</sup> and Nigeria.<sup>76</sup> The growing popularity of what could be described as a libertarian movement, though radical, has been largely heralded to be a viable alternative to the debate on the realisation of the right to work. Santini and Gobetti<sup>77</sup> refer to a wage based crisis in work, opining that the idea of a right to work that guarantees all members of society employment is becoming increasingly utopian,<sup>78</sup> one that even a combination of institutional and market forces cannot bring to reality and wondered whether the whole concept of work as presently understood was not coming to an end.<sup>79</sup> Although they accept that wage based labour has been the engine of economic growth and development as well as a vehicle for individual self-realisation and wellbeing, they question the adequacy of wage-based labour to provide answers to contemporary challenges such as the provision of decent jobs able to sustain a decent standard of living, and beyond that, to allow individuals to activate themselves beyond the formal productive sphere and increase entrepreneurial skills. Today, in the UK unemployment continues to be an issue of much public concern,<sup>80</sup> and in Nigeria, the

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<sup>74</sup> Jim Edwards, 'Universal basic income could arrive in Europe faster than you think' (*Business Insider UK* Dec 14 2015) <<http://uk.businessinsider.com/adoption-of-basic-income-in-europe-2015-12>> accessed 30 August 2017.

<sup>75</sup> At the time of writing, there was a bill to discuss the feasibility of payment of guaranteed basic income in the UK Parliament. (See House of Commons 'Universal basic income' 12 September 2016) available at <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CDP-2016-0167>> accessed 30 August 2017

<sup>76</sup> This suggestion of a payment of basic income has also been made to the Nigerian authorities in a working paper commissioned by the Centre for Global Development. (Shantayanan Devarajan and Marcelo Giugale with Hélène Ehrhart, Tuan Minh Le, and Huong Mai Nguyen 'The Case for Direct Transfers of Resource Revenues in Africa' (CGD 2013) <<http://www.cgdev.org/sites/default/files/direct-dividend-payments.pdf>> accessed 30 August 2017; see also Xavier Sala-i-Martin, Arvind Subramanian, 'Addressing the Natural Resource Curse: And Illustration from Nigeria' (2013) 22(1) *Journal of African Economies*) 570.

<sup>77</sup> Luca Santini and Sandro Gobetti, 'The Crisis of Labour, Widespread Precarity and Basic Income' (2016) 2(6) *CADMUS* 158.

<sup>78</sup> See Organization for Economic Cooperation and Development (OECD) *Looking to 2060: long-term global growth prospects*, (OECD publishing 2012). The analyses presented in this report forecasts marginal economic growth for most industrialised countries that will lead to substantially static situation economically with the attendant impact on employment.

<sup>79</sup> *Ibid* (n 77).

<sup>80</sup> Matthew Taylor, *Good work: the Taylor review of modern working practices* (Department for Business, Energy & Industrial Strategy 2017) Chap 4. while there has been a significant increase in the number of jobs in the UK, there has been a fall in the quality of those jobs.

unemployment rate has been on the increase.<sup>81</sup> Although the use of human rights language has helped to increase the visibility of the right to work, other beneficial approaches must be considered. This is one of the considerations that has given increasing traction to the idea of paying a basic income to all irrespective of whether they work or not. As with all theories, the idea of a basic income replacing the broad concept of the right to work has been criticised for being unrealistic, impractical and utopian. Mayer<sup>82</sup> asserts that such a system that would pay a basic income unconditionally to able-bodied recipients would be at the expense of fairness and the worst sort of exploitation and injustice to those in work and from whose labour the taxes to pay a basic income would inexorably be drawn. White explains that ‘those who willingly enjoy a decent minimum of the economic benefits of social cooperation without satisfying their suitably adjusted reasonable work expectation violate the principle of baseline reciprocity, and thereby take unfair advantage of – i.e., exploit – those citizens who do satisfy this expectation’.<sup>83</sup> Furthermore, he does not argue with the idea of paying a basic income to all especially the unemployed, rather he prefers that payment should only be made by a demonstrated willingness to work in a way that ensures that those who are unemployed are only unemployed as a result of non-availability of jobs and not a deliberate lifestyle choice, because such a relationship would be in itself unjust and a gross violation of the principle of reciprocity and would weaken the system and de-incentivise work as the process that generates the taxes for paying a basic income.

Against the backdrop of the above arguments in support and against basic income, the relevant question is, what does the concept of the payment of basic income portend for the right to work in practical terms? Does Paine’s theory of endowment from the common property of the earth provide enough justification for the payment of a basic income? Apart from countries like Finland, India and Brazil<sup>84</sup> where the payment of basic income has somewhat been implemented with a smattering of success, nowhere else to the knowledge of the author has this idea left the sphere of animated thought experiments and conference room discussions.<sup>85</sup>

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<sup>81</sup> The unemployment rate in Nigeria has been on the increase since 2009 and its currently at 18.8 percent. See the Nigerian Bureau of Statistics *Unemployment/underemployment Report Q3 2017* (NBS 2017) 1.

<sup>82</sup> Mayer R ‘The Right to Exploit: Parasitism, Scarcity, Basic Income, van Donselaar Gijs. Oxford University Press, 2009. ix + 195 pages.’, (2011) 27(1) *Economics and Philosophy* 69–75.

<sup>83</sup> Stuart White, ‘Reconsidering the Exploitation Objection to Basic Income’, (2007) *Basic Income Studies*, 1.

<sup>84</sup> There are plans across some European countries to implement an unconditional right to Basic Income. Finland is rolling out a test project in 2017 and discussions are ongoing in France, Spain and Italy on the practical implications of implementation. Recently, the Swiss overwhelmingly voted against amending the constitution, a move that would have required the government to implement universal basic income.

<sup>85</sup> Andrew Griffin ‘Mark Zuckerberg Calls for a universal basic income amid rumours of presidential bids by the Facebook founder’ *The Independent* (26 May 2017). < <http://www.independent.co.uk/life-style/gadgets-and->

But as I have already mentioned, automation of jobs might change the nature and focus of the debate in future. The idea of paying a basic income is one that has gained an increasing attention from policymakers in both the UK and Nigeria and has been largely touted as an alternative to redefining the challenges associated with implementing the right to work, hence it is worth considering it along the line of what implications it might have for the UK and Nigeria. And in doing that, it might be worth considering evidence from other jurisdictions. Despite the utilitarian appeal of the basic income project, setting up unconditional access to basic income to replace the right to work, would come with some difficulties. Firstly, it will be expensive to operate and will lead to higher taxes on those generating economic wealth – i.e. those in work. As Toru Yamamori remarked in an article in the *Economist*<sup>86</sup>, if the basic income proposal were to be implemented in place of a right to work, it could be self-defeating as it might reinvent the sort of challenges being faced in welfare societies, where some would make no effort to work, expecting a generous and unconditional payment of a basic income at the end of the day from the labour of others.

Although it has been proposed<sup>87</sup> that not having to work would free people to spend more time on other potentially rewarding activities, however, such theoretical postulations are different from the reality on the ground. In the latest UK Time Use Survey,<sup>88</sup> it was found that the unemployed slept for 539 minutes a day as opposed to 513 minutes for those working. Furthermore, the unemployed spent more 239 minutes on mass media (social media) compared to 173 minutes for those in employment. What this indicates is that the fact that people have more time as a result of not being employed does not translate into their using their time for productive economic activities, so that people using time for trying out new ideas as result of not being employed could be described as an exception rather than the general practice for the unemployed.<sup>89</sup>

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tech/news/mark-zuckerberg-universal-basic-income-harvard-commencement-speech-facebook-president-bid-a7757781.html > accessed 30 January 2018.

<sup>86</sup> Toru Yamamori ‘Basically unaffordable: Replacing welfare payments with a “basic income” for all is alluring, but expensive’ *The Economist* (23<sup>rd</sup> May 2015) <<http://www.economist.com/news/finance-and-economics/21651897-replacing-welfare-payments-basic-income-all-alluring>> accessed 30 January 2018.

<sup>87</sup> Andrew Griffin ‘Mark Zuckerberg Calls for a universal basic income amid rumours of presidential bids by the Facebook founder’ *The Independent* (26 May 2017) <<http://www.independent.co.uk/life-style/gadgets-and-tech/news/mark-zuckerberg-universal-basic-income-harvard-commencement-speech-facebook-president-bid-a7757781.html>> accessed 30 January 2018.

<sup>88</sup> Williams R, ‘An introduction to the UK Time Use Survey from a labour market perspective’ (2004 *Office for National Statistics*) 65.

<sup>89</sup> Nigeria conducted a pilot Time Use Survey in 1998 in five states, however, the results were never published. See *Blackden M and Wodon Q Gender, Time Use, and Poverty in Sub-Saharan Africa. (2006 World Bank working paper no. 73).*

All said, the basic income proposal is attractive and patently justifiable in many respects, but there are still questions both on the moral and legal planes, not to talk of the cost that must be addressed by the proponents of the idea. If these foundational issues are addressed, it is certainly one that would be beneficial if implemented. However, presently and for the foreseeable future, there are doubts whether it can be transformed to a universal right in place of the international right to work, because, aside the issues of implementation that have been identified with basic income, work in itself is important because of its fundamental value to individual well-being and fulfilment<sup>90</sup> which are critical to human dignity. The right to work therefore acts an enabler for other rights such as the rights to housing, health and food.

#### **6.4. Article 6 ICESCR -the right to work in Nigeria and UK: a comparative commentary on common themes.**

Clearly, humanity hasn't quite reached the stage of what Keynes called man's 'permanent problem' – how to use his freedom from pressing economic cares, how to occupy the leisure, which compound interest and science will have won for him, to live wisely and agreeably and well'.<sup>91</sup> Despite the effect of globalisation and automation on the whole concept of work in today's world, work has continued to be regarded as an important source of self-actualisation for all peoples and hence a catalyst for achieving other human rights especially the ones which are social and economic in nature. With this in mind, and from a consideration of the broad outlines of the right internationally, the focus of this chapter shifts to the specifics and actual workings of the right with the Nigerian and UK legal systems. From the examination of the international perspectives of the right to work, this research will extract the salient issues within the right to work that can be commonly found in the realities of the right to work given the socio-legal situation in both countries. The commentary opens by examining the nature of the right to work in the UK and Nigeria, analysing in the process whether there is an enforceable right to work in both jurisdictions?

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<sup>90</sup> Guy Mundlak, The right to work: Linking human rights and employment policy. (2007)146 International Labour Review 189.

<sup>91</sup> John Keynes, *Essays in Persuasion* (London: Macmillan, 1931) <<http://www.gutenberg.ca/ebooks/keynes-essaysinpersuasion/keynes-essaysinpersuasion-00-h.html>> accessed 30 January 2018.

#### 6.4.1. The right to work: Perspectives from the UK – ECHR and EU law

The idea of a rights-based approach to work is comparatively recent in UK jurisprudence, even though Bogg<sup>92</sup> has suggested that these rights have always enjoyed a measure of protection via instrumental legislation but had not been elevated to the status of enforceable rights as they tend to be known today, so that until the inception of the ECHR what the UK had, to use the words of Feldman, was ‘an undifferentiated mass of liberty’,<sup>93</sup> since there was not a single document in which individual rights were codified. Also, as was mentioned in chapter 4 of this research,<sup>94</sup> it had been the case that in the UK, Parliament was supreme and would legislate whilst individual citizens retained the rights not to act against the law, so that the liberties individuals had were subject to parliamentary sovereignty, some sort of inviolable powers that the courts could not impede.<sup>95</sup>

Although there has been a shift in the human rights structure of the UK with the enactment of the HRA, the situation described in the above paragraph has not changed a great deal. This is despite the fact that the UK is signatory to many notable international SER instruments such as the International Labour Organisation (ILO), ECHR, ESC the Charter of Fundamental Rights of the EU (CFREU) which specifically states in article 15(1) that ‘everyone has the right to engage in work and to pursue a freely chosen or accepted occupation’. Notwithstanding the provisions of these international and regional human instruments such as the ones already mentioned, the traditional line of argument by the UK government is that these international SER instruments should be implemented in the UK through the normal legislative process of law and policy making, rather than as fundamental human rights guarantees that could be enforced in the UK’s domestic courts, even though this approach seems to have been slightly altered with the introduction of the HRA. The provisions of the ECHR such as articles 8 (Right to respect for private and family life), 11(Freedom of assembly and association) and 14 (Prohibition of discrimination) have been extended to the area of the right to work and the rights at work.<sup>96</sup> However, there is no right under the ECHR and no domestic legislation in the

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<sup>92</sup> Alan Bogg, ‘Only Fools and Horses: Some Sceptical Reflections on the Right to Work’ in Virginia Mantouvalou (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 149.

<sup>93</sup> David Feldman, *Civil liberties and human rights in England and Wales*, (2<sup>nd</sup> edn, Oxford University Press 2002) 70.

<sup>94</sup> Pg 82.

<sup>95</sup> Overtime, the traditional principle of absolute parliamentary sovereignty has been questioned and it is now widely held that the idea of an unqualified sovereignty held by Parliament is no longer sustainable. See Jackson v A-G [2006] 1 AC 262, see also European Communities Act 1972.

<sup>96</sup> *Paulet v. the United Kingdom* [2014] ECHR 477.

UK that guarantees the right to work.<sup>97</sup> Instead, in the UK there is an aggregation of different rights relating to work and other SER which are free-standing rights and would not need to come under the umbrella of the right to work in order for them to be achieved, e.g. payment of the minimum wage which is protected by law.<sup>98</sup>

However, in EU law, there appears to be a potential legal protection for the right to work in article 15 of the CFREU which states as follows:

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 15 of the CFREU is legally binding on Member States of the EU and has EU treaty status.<sup>99</sup> Although the CFREU does not confer on individuals in the UK a right to work that is directly enforceable in the UK courts, like the ECHR it has had a far-reaching impact on the interpretation of the UK's right to work-related legislation especially with the many work-related directives that have been issued by the EU.<sup>100</sup> Hugh Collins<sup>101</sup> argues that the UK courts are required to interpret work rights-related legislation in line with the provisions of article 15 of the CFREU and that given the wide influence of EU law on the UK domestic legislation, the right to work could be enforceable. Similarly, Davies<sup>102</sup> argues that the UK courts based on the principle of supremacy and judicial precedent must follow the precedents set by the Court of Justice of the European Union (CJEU) and where there is incompatibility between the UK law and EU law, the CJEU can set such laws aside if they are incompatible with EU law,<sup>103</sup> in

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<sup>97</sup>Collins Hugh, 'Progress towards the Right to Work in the United Kingdom' in Virginia Mantouvalou (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 227.

<sup>98</sup> The Minimum Wage Act 1998.

<sup>99</sup> Treaty on European Union (TEU), Art 6, [2010] OJ C83/13.

<sup>100</sup> E.g., Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>101</sup> Collins Hugh, 'Progress towards the Right to Work in the United Kingdom' in Mantouvalou Virginia (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 227.

<sup>102</sup> (n 17). 45 -47

<sup>103</sup> See Paul Craig and Gráinne de Búrca *EU Law Text, Cases, and Materials* (6<sup>th</sup> ed OUP 2015) Ch. 9.

accordance with the primacy of EU law.<sup>104</sup> Although the CFREU draws on certain elements of the ESC and the ECHR and has in it the potential of creating the foundation for the protection of the right to work in the UK, at least from an enforcement perspective, one needs to be careful in assessing what article 15 of the CFREU actually embodies, and the implication of that for the right to work in the UK. It should be mentioned that article 15 does not create the right to a job, but merely confers the freedom for people to engage in the labour market, so that the idea of a right to work that guarantees everyone wanting a job with one is near unachievable in view of the existing fiscal constraints in the UK, even though the right to work is instrumental in helping to meet the human needs arising from such rights as health and housing.<sup>105</sup> However, the CFREU as a binding legal treaty was designed only to regulate the EU institutions and EU Member States when they are implementing EU law rather than to expand the scope of rights such as the right to work,<sup>106</sup> and Brexit is likely to reduce its impact in the UK still further. However, suffice it to say that it remains the law until the process of leaving the EU is finalised.

#### **6.4.2. Article 6 ICESCR and new models of employment in the UK - self-employment and zero hours contract**

It could be argued that there is strong protection of the right to work in UK law, in terms of facilitating the free movement of workers within the EU single market. This freedom of choice is only one component of the right to work under article 6 of the ICESCR. The introduction of legislation such as the Equality Act 2010 and a number of EU Directives<sup>107</sup> have contributed in helping to achieve this state of affairs in the UK. According to Davies, the UK has a relatively good record of implementing directives although it is notorious for its hostility towards new proposals in the employment field'.<sup>108</sup> If this statement by Davies is true, then the UK ought to be given some commendation for having the political will to implement EU directives that are beneficial to the right to work. However, on the flip side of this argument, freedom and flexibility has brought about a precarious employment relationship which over the years has affected job security in the UK aggravated by work that is becoming increasingly global in outlook with its dreadful concomitants.<sup>109</sup> The traditional employment model of full-time work

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<sup>104</sup> *Costa v ENEL* [1964] ECR 585 (Case 6/64).

<sup>105</sup> Thomas Nagel, *Concealment and Exposure & Other Essays* (Oxford University Press 2002) 33.

<sup>106</sup> Art 51 of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

<sup>107</sup> (n 100).

<sup>108</sup> Davies (n 17) 47.

<sup>109</sup> See generally Guy Mundlak, 'Working Out the Right to Work in a Global Labour Market' in Mantouvalou Virginia (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 291.

is gradually being eroded and struggling to keep pace with the ever-changing global economic situation. As a result, there has been a gap in terms of legislation to anticipate and react to these changes. In particular, not all those who work are deemed employees or workers for the purposes of legal rights given to those categories of persons. This can, as a result, affect their right to work at all and their rights in work such as security of employment and sick pay.<sup>110</sup> An example is the so-called self-employment model which is becoming increasingly rampant in the UK,<sup>111</sup> where some employers exploit the difficulties of determining employee or worker status by devising an array of atypical employment relationships. In most cases these are exploitative and a clear violation of the human right to work, but not necessarily of the specific rights accorded to workers or employees under UK law because the people involved are not considered by the law to be employees or workers. A case in point is that of Uber drivers who until a recent decision by the Employment Tribunal were regarded as self-employed and were therefore not entitled to the statutory benefits envisaged by the UK's labour laws for workers and employees.<sup>112</sup> Also, the incidence of employment contracts that do not guarantee a minimum number of hours, otherwise known as zero-hour contracts, and its impact on the broader right to work has been well documented in the UK and currently represents a major challenge to the actualisation of the right to work. According to Ewing,<sup>113</sup> it is impossible to say how many people in the UK are employed on these zero hours' contracts. However, the latest information from the ONS shows that this number is more than two per cent of those in employment.<sup>114</sup> Whilst it can be argued the use of zero-hours' contracts is flexible for both parties, it can often be abused and manipulated by employers who are the stronger party in the

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<sup>110</sup> Under new changes that were introduced in April 2012, an employee alleging unfair dismissal must now be in the continuous employment of the employer to sustain a case of unfair dismissal. See s108(1) of the Employment Rights Act 1996.

<sup>111</sup> According to the OECD, the percentage of self-employed workers in the UK stands at 15.1 % just below the EU average of 16.5% (OECD Employment Outlook 2015). According to the UK labour market statistics from the ONS, as at of November 2016, the number of self-employed people increased by 213,000 to 4.79 million (15.1% of all people in work).

<<http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/november2016>> accessed 30 January 2018.

<sup>112</sup> *Uber B.V. and Others v Mr Y Aslam and Others* UKEAT/0056/17/DA; cf *Stringfellows Restaurant Ltd v Quashie* [2012] EWCA Civ 1735 where the Court of Appeal held that that Ms Quashie who was a lap dancer in the appellant's strip club was not an employee as there was no relevant mutuality of obligation between her and the appellant. See also the recent case of *Pimlico Plumbers Limited v Smith* [2017] EWCA Civ 51.

<sup>113</sup> Keith Ewing, John Hendy and Carolyn Jones (eds) *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (Institute of Employment Rights, 2016) Ch 4.

<sup>114</sup> The latest estimate from the labour force survey shows that the number of people employed on "zero-hours contracts" in their main job, during April to June 2017 was 883,000, representing 2.8% of all people in employment. See ONS 'Contracts that do not guarantee a minimum number of hours' (ONS September 2017)

employment relationship<sup>115</sup> since the arrangement itself has no regularity of employment and there is a clear absence of ‘mutuality of obligation’ which is a prerequisite for having the status of an employee under a contract of employment in the UK.<sup>116</sup>

Under section 230 of the ERA 1996 a worker, and an employee are defined thus:

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
  - (a) a contract of employment, or
  - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly<sup>117</sup>

One obvious shortcoming of the above section of the ERA is its scope, which provides unintended gaps for employers to exploit the zero-hour contracts, as the scope of definition is quite limited and does not provide any coverage or protection for those on zero-hours contracts as their employers could potentially argue that they are not employees or workers even though

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<sup>115</sup> Katie Cruz, Kate Hardy, and Teela Sanders, ‘False Self-Employment, Autonomy and Regulating for Decent Work: Improving Working Conditions in the UK Stripping Industry’ (2016) 55(2) *British Journal of Industrial Relations* 274. This article among other things, discusses the critical distinguishing ingredients of an employment contract and the factors that must be present in the employment contract/mode of work to give rise to an employer/employee relationship.

<sup>116</sup> *O’Kelly v Trust Houses Forte plc* [1984] 1 QB 90. See further the distinguishing case of *Autoclenz Ltd v Belcher* [2011] UKSC 41, where the UK Supreme Court further clarified the ingredients that must be present in a contract of employment for such contract to be enforceable.

<sup>117</sup> See similar provision in the UK’s National Minimum Wage Act, section 54.

such sham arrangements have been condemned by the UK Supreme Court.<sup>118</sup> Parliament made a move to check these sharp practices by introducing the Zero Hours Contract Bill 2014, but the process of this Bill becoming law was discontinued. Had the Bill been passed as law, it could have addressed the dichotomy between contract of service and contract for services which effectively removes the obligation to prove mutuality of obligation in such zero-hour contracts.<sup>119</sup> It would have also shifted the onus to the employer to prove that a worker on a zero hours' contract is not employed by the employer, and the court would have been able to consider many factors both in the written contract and the conduct of both parties to the contract.<sup>120</sup>

In closing this section, it is apposite to remark that regulations in respect of the right to work in the UK are chequered and complicated. Instead of setting general principles, it had been the case to deal with the right to work issues on a case by case basis. Whilst this responsiveness to the dynamics of economic changes and globalisation is commendable, it can also lead to harmful practices which are contrary to article 6 of the ICESCR, and is also bad for the UK's economy.<sup>121</sup> To address these issues and the challenges they pose, on 1st October 2016 the UK government set up an independent panel to review the implications of new forms of work on employee rights and responsibilities and also to look at ways of ensuring that the regulatory framework surrounding employment in the UK is keeping pace with changes in the labour market and the economy. The panel submitted their report in July 2017 for consideration by the government.<sup>122</sup>

### **6.4.3. The international right to work and the Nigerian position**

With respect to recognition and enforceability of the right to work as envisaged under article 6 of the ICESCR, the situation in Nigeria is essentially the same as the UK, despite the differences in their economic and technological standing. Although Nigeria has a written constitution, there is no provision for an enforceable right to work, or strictly speaking, the

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<sup>118</sup> *Autoclenz Ltd v Belcher* [2011] UKSC 41; see also Alan Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *Industrial Law Journal* 328.

<sup>119</sup> *Autoclenz Ltd v Belcher* [2011] UKSC 41; *Stringfellows Restaurant Ltd v Quashie* [2012] EWCA Civ 1735.

<sup>120</sup> *Autoclenz Ltd v. Belcher* [2011] UKSC 41.

<sup>121</sup> Ben Chapman 'Surge in gig economy work and zero-hours contracts costs UK £4bn in lost taxes' (The Independent 14 February 2017) <<http://www.independent.co.uk/news/business/news/gig-economy-zero-hours-contracts-costs-uk-government-4-billion-lost-taxes-insecure-work-employment-a7579556.html>> accessed 30<sup>th</sup> August 2017.

<sup>122</sup> Matthew Taylor, *Good work: the Taylor review of modern working practices* (Department for Business, Energy & Industrial Strategy 2017).

right to be provided with a job. The only reference to what can be described as a semblance of the right to work is in section 17 (3) (a-c, e) of the Nigerian constitution which states:

(a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; (b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life; (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;... (e) there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever.

However, this part of the constitution, as has been stated previously,<sup>123</sup> cannot constitute the basis for any sort of credible enforcement of the right to work under Nigerian law,<sup>124</sup> unless the National Assembly has taken definite and positive steps by making laws to give effect to them.<sup>125</sup> Even if one were to extend the provisions of the above section of the Nigerian constitution into the realm of enforceability, it does appear from the wording of the provision that it was only meant to provide for rights in work and not the right to work as no state can be reasonably expected to provide work for everyone needing a job. For example, section 17(3) (e) of the Nigerian constitution enjoins the government to ensure that its rights at work policies are such that ‘there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever’. However, as has been argued earlier on in this chapter, provisions like section 17(3)(e) only go as far as bolstering the implementation of rights in work, whilst the development of the right to work in the first place continues to be overlooked.<sup>126</sup>

At the regional level, the African Charter, unlike the Nigerian constitution, has provided for the right to work. According to article 15, ‘every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work’. Just like article 15 of the CFREU in the case of the UK, article 15 of the African Charter does not provide any guarantee of a job for everyone willing and able to take up employment but does

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<sup>123</sup> Pg 72-78.

<sup>124</sup> *AG Ondo State v. AG Federation* (2002) 9 NWLR (Pt.772) 222.

<sup>125</sup> *Ibid.*

<sup>126</sup> Wade Cole, ‘Social and Economic Rights in Law and Practice Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices’. (2013) 92(1) *Social Forces* 165.

focus on the critical element of freedom to choose whether to work and the nature of such employment. Conversely, article 29 of the African Charter provides for a duty on the part of individuals to work. Whilst this is a worthy direction to give to citizens of African nations, one is left guessing whether such ‘exhortation’ has any place in a document such as the African Charter that should be entirely focused on freedoms for individuals and duties for governments as a minimum. It is submitted that the incompatibility of both concepts is enough to consider expunging article 29 of the African Charter. As Craven<sup>127</sup> argues, such reasoning was the underlying basis for the non-inclusion of a duty to work in the ICESCR since it was thought that both concepts were mutually exclusive and contradictory. Work must be freely accepted, and there cannot be a coexistent duty to work since that duty could not be enforced against individuals, for any attempt to do so could potentially lead to a case of forced labour which would be incompatible with article 6 of the ICESCR.

Section 17(3) (a) of the Nigerian constitution provides that ‘the State shall direct its policy towards ensuring that all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment’. This provision of the constitution manifests a clear intention by the framers of the Nigerian constitution on the need for the Nigerian government to be guided by fair and selfless considerations when formulating policies that have to do with ensuring that adequate means of livelihood is guaranteed or kept at a sustainable level. One of the ways this could be realised is through the provision of institutional support that provides a responsive framework of employment-related services. However, as has been identified above,<sup>128</sup> this part of the Nigerian constitution also does not provide for the right to work, although it mentions the creation of opportunities to secure adequate means of livelihood, it still lacks that critical undertaking to elevate this provision from a mere aspirational declaration to the status of a legal right from which a claim could be made. This part of the Nigerian constitution, which bears some direct relevance to the implementation of an article 6(2) ICESCR standard of the right to work, is at best only a reference material for policy formulation and guidance and is genuinely unfit for the purpose of enforcing the right to work. Even if section 17 were to be made enforceable under the Nigerian law, it would potentially be more useful in advancing the rights in work rather than the right to work which is just as fundamental, if not more, than the rights in work. However, to reach that point, this part of this Nigerian constitution, as has been

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<sup>127</sup> (n 14) 198-200.

<sup>128</sup> section 17(3)(e) of the Nigerian constitution.

suggested in the two previous chapters, should be amended and recognised as containing enforceable rights. That would be a good starting point towards ensuring some potency for the right to work in Nigeria.

Section 34 (1) of the Nigerian constitution is also worth considering because it is contained in chapter four of the Nigerian constitution, which contains fundamental rights which are actually enforceable. Section 34 (1) provides thus: ‘every individual is entitled to respect for the dignity of his person, and accordingly, no person shall be subject to torture or to inhuman or degrading treatment’. Although this section goes on to list a host of exceptions to this provision, the UNCESCR has stated that decent work, which the right to work encapsulates, is one of the surest ways of checking social maladies such as homelessness, starvation and poverty thus underlying an evident correlation between unemployment and poverty. Therefore, if the whole human rights debate is about the universal and inherent right of all persons to human dignity, could section 34 (1) of the constitution not be used to argue for a more clearly defined and enforceable right to work in Nigeria as we have seen in India or South Africa?<sup>129</sup> Undoubtedly, some might argue, and understandably so, that it is impractical for states to guarantee the right to work in a manner that makes it incumbent on the state to give jobs to every person who is available to work. However, because of the instrumental nature of the right to work, it is imperative that states be ready and willing to take up more responsibilities through concerted strategic interventions in creating employment opportunities and providing that critical cushioning effect on the impact of unemployment on human dignity.<sup>130</sup> For as Guy Mundlak<sup>131</sup> has argued, ‘those who believe in work’s potential must realise that its brighter prospects should be a central pillar in our vision of humanity, community and solidarity and therefore the RTW<sup>132</sup> must be part of the human rights roster’,<sup>133</sup>

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<sup>129</sup> For example, sections 26 and 27 of the South African constitution provides for a rights to housing and healthcare respectively and the state is required to take reasonable legislative and other measures to progressively realise these rights; see also the Indian cases of *Tarachand Vyas v. Chariman, Disciplinary Authority*, (1997) 4 SCC 565; *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.* (2010) 4 SCC 376.

<sup>130</sup> Hugh Collin discusses a number of these initiatives alongside their potential pitfalls. See Hugh Collins ‘Progress towards the Right to Work in the United Kingdom’ in Mantouvalou Virginia (ed), *The Right to Work Legal and Philosophical Perspectives* (Hart Publishing, 2015) 227-254 Nigeria has implemented some of these initiative with very limited success. These are particularly examined in Stella Mbah and Osmond Agu, ‘The Effectiveness of Government Employment Policies in Nigeria’ (2013) (12)3 IOSR Journal of Humanities and Social Science 65.

<sup>131</sup> (n 90).

<sup>132</sup> Right to work.

<sup>133</sup> Ibid.

#### **6.4.4. Access to the right to work and outdated legislation in Nigeria**

Article 6(1) of the ICESCR requires state parties to take appropriate steps to recognise and safeguard the right. It is thus not just about focusing on the main theme of creating decent opportunities, but also ensuring that when these opportunities are created people are given functional access to them. This is one aspect of the right where Nigeria continues to lag behind the UK even though the UK has had to grapple with its own issues.<sup>134</sup> For example, by virtue of section 42(3) of the Nigeria Police Act (NPA),<sup>135</sup> any female candidate wanting to enlist in the Nigerian Police Force (NPF) must be unmarried and by virtue of regulation 127 of the NPA, ‘an unmarried woman police officer who becomes pregnant shall be discharged from the Force, and shall not be re-enlisted except with the approval of the Inspector-General.’ Aside from the discriminatory and distasteful nature of this law, its impact on the right to work especially for intending female candidates into the NPF hinders access to employment in the NPF for married women. Furthermore, it remains to be seen what meaningful benefits this provision in the NPA is meant to serve. Similarly, under the Nigerian Labour Act, which as one might expect, should be the bastion of protecting the right to work in Nigeria, women are barred from being employed on night work in a public or any agricultural undertaking. The only exception to this provision of the Nigerian Labour Act is women nurses and women in management positions who are not engaged in manual labour section.<sup>136</sup> This situation is very worrisome in view of the fact that in Nigeria, the government is the chief employer of labour,<sup>137</sup> and should not be violating obligations it has entered into under international human rights law as it relates to the right to work. The sad thing is that until these outdated laws are reviewed, they will continue to impact negatively on the enforcement of the right to work for significant parts of the population in Nigeria. As can be seen, in Nigerian legislation relating to the right to work, is not so much about government providing jobs to all persons available to work, but rather about the immediately realisable goal of guaranteeing functional access to employment opportunities for all without discrimination which falls within the country’s minimum core obligations. This probably explains the paucity of jurisprudence on the right to work in Nigeria. In my view, Nigerian courts ought to be doing more in developing the legal basis for the realisation of the

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<sup>134</sup> Laura Hughes ‘NHS problems ‘completely unacceptable’, admits Jeremy Hunt ’ (The Telegraph 10 February 2017) < <http://www.telegraph.co.uk/news/2017/02/10/nhs-problems-completely-unacceptable-admits-jeremy-hunt/> > accessed 30 January 2018.

<sup>135</sup> Police Act 1967.

<sup>136</sup> Police Act, Section 55(1).

<sup>137</sup> Kola Odeku and Sola Animashaun, ‘Ensuring equality at the workplace by strengthening the law on prohibition against discrimination’ (2012) 6 (12) African Journal of Business Management 4689.

right to work especially when they are faced with matters involving the protection of the right, however, there have only been few cases such as *Tolani v Kwara State Judicial Service Commission*<sup>138</sup> where the courts have come out to make consequential pronouncements on matters relating to the right to work in Nigeria.

Sadly, various employment strategies at the policy-making level have been badly implemented or not implemented at all.<sup>139</sup> In terms of employment rights which are key to the recognition and enforcement of the right to work, the outdated common law concept of master and servant still applies in Nigeria. Nigerian courts have held that one cannot force a servant on an unwilling master when it comes to employer and employee relations. So as the law stands, there is nothing like unfair dismissal in Nigeria.<sup>140</sup> Instead, there is wrongful dismissal. Wrongful dismissal applies especially in employment in the private sector where most employment relationships lack what the Supreme Court of Nigeria has described as employments enjoying 'statutory flavour'.<sup>141</sup> Under Nigerian law, a worker's contract of employment is wrongfully terminated if it is done in breach of the clear terms of the employment contract, for example, a violation of the notice period, wrong payment in lieu of notice and other preconditions to terminating the employment relationship. This does not protect against dismissal which under UK law would be regarded as unfair.<sup>142</sup> Under Nigerian law, parties are required to give notice of termination or payment in lieu of notice. This process comes with the agreed terminal benefits. Malice on the part of the employer,<sup>143</sup> false or unproven allegations of crime,<sup>144</sup> or even ill health of the employee<sup>is</sup> irrelevant, as long as the terms of the employment contract have been complied with.<sup>145</sup> In such cases of termination, which would usually be challenged as unfair under the UK labour laws, the employer does not have to give any reason at all, and as a result, the Nigerian courts will usually not consider the

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<sup>138</sup> (2009) LPELR-CA/IL/2/2008.

<sup>139</sup> Mbah SA and Agu OC 'The Effectiveness of Government Employment Policies in Nigeria' (2013) (12)3 IOSR Journal of Humanities and Social Science 65.

<sup>140</sup> M Umenweke and M Anushiem, 'Curbing the Incidence of Unfair Dismissal in Nigeria: Lesson from Other Jurisdictions' (2015) 3(4) International Journal of Business & Law Research 95.

<sup>141</sup> *FCSC v Laoye* (1989) All NLR 350; *Longe v FBN* (2010) 6 NWLR (pt 1189) SC 1.

<sup>142</sup> S98(2) ERA 1996; see similarly article 4 of ILO Convention 158 of 1982 which provides that: 'the employment of a worker shall not be terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'

<sup>143</sup> *Nigerite Limited & Anor v. Rasaki Oremosu* (2003) 31 WRN 64.

<sup>144</sup> *Dudusola v. Nigeria Gas Company Limited* (2013) 10 NWLR 423 – 441.

<sup>145</sup> *Olaniyan v. University of Lagos* (1985) 2 NWLR (Pt. 9) 599 – 685; see also *Opuo v. NNPC* (2001) 14 NWLR (Pt. 734) 552.

reasons or motives for terminating the employment relationship.<sup>146</sup> In this regard, Nigerian law is such that it is almost impossible to prove a case of unfair dismissal under Nigerian law, as the employer is not obliged to give reasons for terminating the employment, regardless of how unfair such reason might be.

#### **6.4.5. Nigerian Industrial Court (NIC) -jurisdiction and finality of decisions**

When it comes to challenging employment rights violations in Nigeria, the jurisdiction for dealing with such cases lie exclusively with the Nigerian Industrial Court (NIC) which operates on very technical rules<sup>147</sup> thus effectively restricting access to only those who can afford to pay for the services of a lawyer. The NIC is usually presided over by judges.<sup>148</sup> Having judges as presiding officers in the NIC is not an issue, however, I believe the demands of justice would be better served if the judges had assistants who are versed in the subject matter of the litigation before the court. This would mean that the judgements of the NIC have the benefit of inputs from impartial experts, an aspect which I think would serve the ends of justice more as well as making the decision of the NIC more respectable. Aside from the issue of limited access, the court's decisions are not usually appealable except in instances where an employee alleges a breach of their constitutionally guaranteed fundamental rights, either by their employer or by the NIC itself in the course of adjudicating the employee's case.<sup>149</sup> Therefore, appellate courts in Nigeria have been known to turn down appeals arising from the NIC except such appeals relate to a violation of the employee's fundamental rights. However, recently there have been two conflicting cases from two different divisions of the Nigerian Court of Appeal as to whether NIC decisions are final or not. In *Lagos Sheraton Hotel & Towers v Hotel and Personal Services Senior Staff Association*,<sup>150</sup> the Nigerian Court of Appeal unanimously dismissed the application for leave and held that the right of appeal against NIC decisions lies of right only if it relates to fundamental rights and criminal matters. It stated that an appeal relating to other matters prescribed by statute would lie only by leave of the court; and went further to say that until a statute is enacted which provides otherwise, no appeal can lie against

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<sup>146</sup> Article 4 of ILO Convention 158 of 1982 to which Nigeria is a signatory clearly states the procedure for terminating an employee's appointment. It provides that the employment of a worker shall not be terminated unless there is valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

<sup>147</sup> National Industrial Court Rules, 2007 currently undergoing review.

<sup>148</sup> Laymen and union representatives used to sit in this court when it used to be known as the Industrial Dispute Panel.

<sup>149</sup> s243 (2)(3) Nigerian Constitution 1999.

<sup>150</sup> (2014) 9 CLRN 61.

NIC decisions, except in the circumstances provided by the constitution. However, in *Local Government Service Commission Ekiti State v Bamisaye*,<sup>151</sup> the respondent successfully filed a suit against the appellant as a result of which the NIC decision was challenged. Contrary to what was thought to be the position of the law, the leave to appeal was granted. In the process, the Nigerian Court of Appeal held there was no express provision in the NIC Act 2006 that provides for the NIC to be the final court in respect of matters before it. It is submitted that the decision of the Nigerian Court of Appeal in *Local Government Service Commission Ekiti State v Bamisaye*<sup>152</sup> is preferred because of its more progressive approach to the issue of the finality of the NIC in matters coming before it and more importantly the impact of such decisions on the right to work, as opposed to the more mechanical legal principle of *expressio unius est exclusio alterius*<sup>153</sup> which was applied in the former case. However, there is no law made by the National Assembly that confers the right of appeal against any NIC decision. To hold that the decisions of the NIC are final and not subject to review by an appellate authority is contrary to ensuring that the right to work is enforced in Nigeria and the National Assembly will need to review the NIC Act to avoid further conflicting decisions from the Court of Appeal on the appealable status of the judgements coming from the NIC. In my opinion, it stands to reason that the NIC not being the highest court in Nigeria cannot have the finality over its decisions. It is only reasonable that the NIC's decisions be subjected to a higher reviewing authority as with the decisions of other courts of similar standing in the Nigerian legal system.<sup>154</sup>

## 6.5. Conclusion

The enforcement of the right to work in article 6 of the ICESCR has to do with the provision of access to the freedom to engage in any job of one's choosing. It makes governments the enabler of the conditions favourable towards achieving full employment that manifests in fair and decent work. According to the UNCESCR in General Comment 18, 'the right to work should not be understood as an absolute and unconditional right to obtain employment'.<sup>155</sup> As I have argued previously, although it is desirable that a state is able to guarantee work to anyone

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<sup>151</sup> (2013) LPELR- 20407 (CA).

<sup>152</sup> (2013) LPELR- 20407 (CA).

<sup>153</sup> This term is a principle of statutory interpretation meaning that when one or more things of the same class are expressly mentioned others of the same class are excluded

<sup>154</sup> Section 243 of the Constitution guarantees an interested party a right of appeal against a judgment emanating from a High Court which affects the interest of that interested party, even though that interested party was not a party to the suit in which the judgment was delivered. But this right of appeal as an interested, party does not extend to decisions of the NIC.

<sup>155</sup>

willing and able to work, it would be unrealistic to expect the government of any state to be the employer of last resort, because the right to work is unique in the sense that the creation of employment opportunities is determined by a host of macroeconomic factors some of which are external to the state in the sense that a lot of these factors are driven by the private sector.

I think General Comment 18 which was designed to clarify the theoretical and practical implications of the right is riddled with exceptions and inconsistencies in such a way that there have been no practical changes with respect to the right since the General Comment was released in 2005. The world of work is not static; so too should be the right to work. For article 6 of the ICESCR and General Comment 18 to be continually relevant, they must be able to address the contemporary challenges associated with the ever-changing intersection of work and economics globally. They also must be laid out in such a way to address the dynamic nature of the obligations which states are meant to fulfil in respect of the right.

## **Chapter Seven**

### **Conclusion and Recommendations**

#### **7.1. Introduction**

This is the final chapter of this research work and is divided into three sections. Section 7.2 is a summary of the conceptual and foundational theories explored in this research. These theories are essential to the nature of SER as they have become known over the years in international human rights jurisprudence. These theories seek to justify the relevance and instrumental nature of SER in international law, and by implication domestic legal systems, which are crucial to the realisation of these rights. In 7.3, the narrative goes on to consider what could be described as the common themes and insights that have emerged from the consideration of the right to health, housing and work in relation to the UK and Nigeria. As with most research work of this nature, section 7.4 considers the relevance of this study in the light of its original contribution to knowledge with the main focus being on the realisation of SER in both jurisdictions. These are discussed in the light of the recommendations of this research. The key point of my recommendation is setting a functional framework for a minimum core approach to the realisation of SER. This position is informed by the fluid and open-ended nature of the SER contained in the ICESCR. I am of the view that a minimum core approach will provide a more practicable basis for international and local human rights agencies to monitor and evaluate the progress being made in respect of SER in the light of article 2 of the ICESCR which provides for the progressive realisation of SER. It will also make it easier for states to assess and reflect on their compliance with their international obligations in respect of the implementation of SER. I have also considered how instrumental the local courts can be towards the success of my recommended model and how judicial review in SER cases can be used by the UK and Nigeria as a vehicle to inject the minimum core approach into SER jurisprudence in view of the challenges posed by the duality of their legal systems.

## **7.2. A review of the foundational theories revolving around the existence and value of SER**

### **7.2.1. SER - universal or relative?**

The theories considered in this research includes universalism and relativism. The debate as to which is more valid is a key factor that touches on the nature of rights, so that if the level of obligations of state parties in respect of SER are universal, then their enforcement and application must be capable of being evaluated taking into account other critical variables such as the level of development of the states concerned.<sup>1</sup> The universalism versus relativism question is also important because of the impact that international human rights law such as the ICESCR, ECHR and African Charter can have on a country's sovereignty because, as Goodhart and Taninchev<sup>2</sup> argue, the application of international law in nations is contrary to the notion of sovereignty and is undemocratic because such laws are made by agencies that have no direct accountability to the citizens of such nation. In my opinion, those<sup>3</sup> who argue against the universal nature of human rights overlook the impact that human rights as a universal concept can have on human dignity. The universal nature of human rights, in my opinion, enables a standard template for assessing human rights across all countries. Furthermore, the universalism of human rights creates a common process of minimum standards for human rights practice and implementation in the various countries of the world.

Secondly, in considering the validity of universalism as a prevailing human rights construct, there have been attempts to suggest that cultural relativism could be an alternative to universalism. However, upon a close examination of the concept of cultural relativism, it would appear that it is no more than a kind of nuanced universalism. For example, according to the theory of cultural relativism, there are some certain overlapping societal values that can be used to form a common foundation for human rights, rather having what constitutes human rights dictated in the name of universalism. Whilst this position is supportable,<sup>4</sup> the end product of such a process leads back to universalism. To illustrate this position, in most cultures taking a

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<sup>1</sup> Johannes Morsink, *Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 2000) ix; Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281.

<sup>2</sup> Michael Goodhart and S Taninchev 'The New Sovereignist Challenge for Global Governance: Democracy without Sovereignty' (2011) 55 *International Studies Quarterly* 1047, 1049.

<sup>3</sup> For example, Adamantia Polliss and Peter Schwab, 'Human Rights: a Western Construct with Limited Applicability' in Pollis, A. and Schwab, P. (eds.) *Human Rights: Cultural and Ideological Perspectives* (Praeger Publishers, 1980) 1.

<sup>4</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and US. Foreign Policy*, (2<sup>nd</sup> edn, Princeton University Press, 1996). Ch 1.

life without any legal justification is unacceptable. Hence there is the universal right to life. This right does not only consist of refraining from taking life, but it also includes positive measures that should be provided to nurture the right, such as adequate housing, accessible quality healthcare and the means (work) to be able to afford food in order to stay alive. If this illustration is acceptable in most cultures, then such values that underpin the right to life can only be described as universal. Therefore, the argument against universalism, does in my opinion, runs in a vicious circle concluding with propositions that bear characteristics of universal human rights<sup>5</sup> and by implication applies to SER.

### **7.2.2. Other relevant justificatory theories of SER**

Aside from universalism versus relativism debate, some other relevant theories of rights were considered because such theories do help to ground a justificatory narrative for the existence of SER. Crucially, we must understand the form (internal structure and composition) and the functions (what they actually do for us) of the relevant right theories because such theories do go a long way in determining how far countries are willing to implement their obligations under international human rights treaties.<sup>6</sup>

The Will and Interest theories of rights were two of such theories examined because they are widely regarded as the main theories of rights, and they apply to rights both in their legal and moral manifestation<sup>7</sup>. By way of explanation, the Will theory espouses the view that having a right involves having the power to control the performance of a duty in respect of the right and be able to exercise an inherent choice to waive the performance of duties arising from the ownership of such right. On the other hand, the Interest theory holds the view that the central function of rights in any system is to protect the interest of the right holder. A characteristic difference between this theory and the Will theory is that rights under the Interest theory cannot be waived by the right holder. For example, everyone has a right to individual freedom, and no one is allowed to waive this right by having themselves sold into slavery. Furthermore, the SER considered in this research have yet to be implemented in the UK and Nigeria up to the level required by the ICESCR, however, the absence of such level of implementation, does not

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<sup>5</sup> Michael Goodhart 'Neither Relative nor Universal: A Response to Donnelly' (2008) 30(1) Human Rights Quarterly 183.

<sup>6</sup> Mark Franke. 'A Critique of the Universalisability of Critical Human Rights Theory: The Displacement of Immanuel Kant' (2013) 14 Human Rights Review 367.

<sup>7</sup> P Eleftheriadis *Legal Rights* (OUP 2008) 6; W Edmundson *An Introduction to Right*. (Cambridge University Press 2012) 96-107.

mean that such SER have been waived by the right holders, rather it forms the basis for demanding the implementation of such rights.<sup>8</sup>

As already stated in chapter three of this research, I prefer Interest based theories because they provide a more solid conceptual and justificatory basis upon which the idea of SER could be implemented. The conceptual principles of the Interest theory appear to have been applied in the case of *P v Surrey County Council*,<sup>9</sup> where the UK Court of Appeal held that the right in Article 5 ECHR not to be deprived of personal liberty without due process applies equally to all persons, regardless of whether they are mentally or physically incapacitated. This notwithstanding, both theories are useful in so far as they agree on the indispensability of rights and duties in SER theory and these have been discussed in chapter three of the research with the aid of Hohfeld's<sup>10</sup> work on the nature of rights.

### **7.3. The right to health, housing and work: A summary of themes and insights**

#### **7.3.1. On the justiciability of SER**

In chapter two of this research, I examined objections to SER being described as justiciable rights.<sup>11</sup> One such objection is that SER are by their nature imprecise and therefore unenforceable,<sup>12</sup> Hohmann<sup>13</sup> argues that the courts and other interpretative bodies have failed to give sufficient normative content to SER such that it is only barely possible to say what SER are. Another objection in the view of the UK's Joint Committee on Human Rights<sup>14</sup> is that SER being justiciable 'will only raise expectations and encourage time-consuming and expensive litigation against public bodies'. However, I take the position that objecting to the enforcement of SER on the grounds of vagueness is unsustainable since vagueness could also be a characteristic of civil and political rights.<sup>15</sup> Furthermore, the case was also made that all human

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<sup>8</sup> *SERAC v AGF* FHC/ABJ/CS/640/2010 (unreported).

<sup>9</sup> [2014] UKSC 19.

<sup>10</sup> Wesley Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) Yale Law Journal 710.

<sup>11</sup> Pg 25-27.

<sup>12</sup> Onora O'Neill 'The Dark Side of Human Rights' (2005) 81 International Affairs. 29-431; J Tobin *The Right to Health in International Law*. (OUP 2012) 1.

<sup>13</sup> Jesse Hohmann *The Right to Housing: Law, Concepts, Possibilities*. (Hart Publishers 2013) 120-137.

<sup>14</sup> Joint Committee of Human Rights. 2008. *A Bill of Rights for the UK?* 29<sup>th</sup> Report of Session 2007-08 House of Lords. Available at <[www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16508.htm#n158](http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16508.htm#n158)> accessed 30 January 2018.

<sup>15</sup> Ed Bates 'The United Kingdom and the International Covenant on Economic, Social and Cultural Rights' In M Baderin and R McCorquodale (eds.) *Economic, Social, and Cultural Rights in Action*. (OUP 2007) 258.

rights whether SER or civil and political are interdependent and indivisible so that the division is no longer justifiable. The UNCESCR must, therefore, be commended for the work they have done at clarifying the conceptual ambiguities of the rights in the ICESCR through the issuance of General Comments on the SER discussed in this research. But I also made the point that some of the General Comments discussed in this research are becoming outdated and in need of a review in order to keep pace with the ever-changing nature and focus of SER, especially the rights to health care, adequate housing and work.

### **7.3.2. The status of SER in the UK and Nigerian human rights law**

Although the UK and Nigeria have ratified the ICESCR, they are yet to incorporate such rights into their national laws. With respect to the legal status of international treaties such as the ICESCR, both countries take a similar approach. In both jurisdictions, international treaties do not assume the immediate force of law and are inoperative until the national parliament takes some definite measures to activate the obligations entered into (except EU law in the case of the UK (European Communities Act 1972). As Hohmann<sup>16</sup> argues, the implication of this is that there is no justiciable right to adequate housing as well as the rights to healthcare and housing in the UK (or Nigeria) and individuals cannot ask a domestic court to adjudicate on a claim to SER on the basis of an alleged breach of the ICESCR. Further, neither country has ratified the Optional Protocol to the ICESCR which provides a basis for individual citizens to bring complaints before the UNCESCR. Despite this unimpressive picture of the UK and Nigeria with regards to the rights provided for in the ICESCR, it is apposite to remark that the provisions of the ICESCR are nonetheless binding on all parties that have ratified it.<sup>17</sup>

### **7.3.3. Right to health care - resource allocation and access to healthcare facilities**

Despite the debate about making SER justiciable, realising SER does have implications for funding and effective resource allocation. Indeed, the ICESCR requires states to take steps, individually and through international assistance to the maximum of available resources, towards a progressive realisation of SER through the adoption of appropriate means, including judicial remedies. According to General Comment 14 on the right to the highest attainable standard of health, there are three specific obligations which countries have to meet in order to

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<sup>16</sup> Pg 114 – 115.

<sup>17</sup> Article 27 of the Vienna Law of Treaties.

be considered as making progress towards the realisation of SER especially in the area of the right to healthcare. These are the obligations to respect, to protect and to fulfil SER which require a state to make SER available, accessible (including affordability), acceptable and of good quality.

Notwithstanding the foregoing, as was stated in chapter four,<sup>18</sup> available evidence indicates that Nigeria is yet to fully commit to meeting its minimum obligations as envisaged by the relevant international and regional SER treaties. To complicate matters, there is a near absence of a judicial process for effectively challenging the violations of SER by the government as is the case in South Africa, for example.<sup>19</sup> In 2001, African Heads of State met and pledged to allocate a minimum of 15 per cent of their annual budget to improve healthcare in their respective countries. As of 2011 when the WHO released the latest report on compliance,<sup>20</sup> Nigeria did not meet this target at any time during the ten-year period which the report covers. Nigeria's latest periodic report on the implementation of the African Charter indicates that individual expenditure on healthcare was as high as 86 per cent in some parts of the country between 2003 -2005<sup>21</sup>. This highlights the huge impact of healthcare expenditure on households, a situation made worse by the inadequate provision of adequate, quality and affordable healthcare facilities to Nigerians.

From a comparative perspective, the level of healthcare in the UK is generally of a higher standard when compared to Nigeria's. However, there is evidence to suggest that consistently low budgetary allocation in the Nigerian healthcare sector could be one of the major reasons for this disparity.<sup>22</sup> The NHS also has its challenges occasioned by inadequate funding and poor management.<sup>23</sup> The crux of the matter is that at the core of realising the right to healthcare, is the need to provide adequate funding and effective management of resources.

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<sup>18</sup> Pg 72 -80.

<sup>19</sup> *Minister of Health and Others v TAC* [2002] AHRLR 189.

<sup>20</sup> WHO *The Abuja Declaration: Ten Years On* (WHO 2011)

[www.who.int/healthsystems/publications/abuja\\_report\\_aug\\_2011.pdf?ua=1](http://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf?ua=1) accessed 23 April 2017.

<sup>21</sup> Federal Ministry of Justice 5th Periodic Country Report 2011-2014). *The Implementation of the African Charter on Human and Peoples' Rights in Nigeria* (Federal Ministry of Justice Nigeria 2015).

[www.achpr.org/states/reports-and-concluding-observations/](http://www.achpr.org/states/reports-and-concluding-observations/) accessed 30 January 2018.

<sup>22</sup> World Bank *Health Expenditure, Public (Percentage of Total Health Expenditure)* (World Bank 2015)

[data.worldbank.org/indicator/SH.XPD.PUBL](http://data.worldbank.org/indicator/SH.XPD.PUBL) accessed 30 January 2018.

<sup>23</sup> *R v NHS Oldham* [2011] Med LR 10.

#### **7.3.4. Security of tenure and the right to adequate housing:**

Security of tenure is a core component of the right to adequate housing under international human rights law. The reason for this position is particularly discussed in chapter five of the research, and it is a core theme that features in both Nigeria and UK housing rights law.

According to Cowan:

Tenure is important. In fact, the only way one can think about housing rights is through tenure because it is tenure that defines the rights which households obtain... Tenure is related to the identity of ... the holder of the property. It also reflects the different types and range of rights and obligations held by the occupier.<sup>24</sup>

Tenure, as used in the context of the right to adequate housing does not necessarily equate to ownership of land or housing, rather it is the right of anyone to occupy and live in a home in peace and security. The right is broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that everyone has a safe and secure place to live in peace and dignity, including non-owners of property.<sup>25</sup>

In Nigeria, there is no enforceable law requiring the government to protect the right to adequate housing in line with the ICESCR. In what appears, in my opinion, to be an incidental protection for security of tenure, section 44(1) of the Nigerian constitution provides that; ‘no movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law’ However, the benefit the above section was meant to serve for the realisation of the right to adequate housing, and especially for security of tenure, is defeated by the Land Use Act 2004 (LUA), since according to the LUA, anyone occupying land in Nigeria does so subject to the overriding proprietary rights vested in the governor of the state where such land is situated. This is one of the biggest threats to the security of tenure in Nigeria. If the citizens cannot legally access land in the first place, it is futile to talk about security of tenure. The LUA is a unique piece of legislation which

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<sup>24</sup> David Cowan *Housing Law and Policy* (Hart Publishing 2011) 263.

<sup>25</sup> UNHABITAT *The Right to Adequate Housing* (Office of the United Nations High Commissioner for Human Rights Fact Sheet No. 21/Rev.1 2009) <[www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)> accessed 30 January 2018.

has been accorded an extraordinary status by the Nigerian constitution,<sup>26</sup> and therefore, the courts are unable to review its provisions just like any other Act of the Nigerian Parliament.

Within the African human rights framework, the African Commission has held in the case of *SERAC v Nigeria*<sup>27</sup> that the right to shelter goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace whether under a roof or not. In my opinion, this interpretation of by the African Commission is very basic as it fails to consider the fundamental aspects of the right such as the role of a state in ensuring that the right to housing is implemented, and thereby setting a low standard for the right to housing. Despite this criticism of the decision, I think that the interpretation provides the foundation for the recognition of the right to adequate housing within the African human rights system, which by implication applies to Nigeria as a member of the African Union. However, Nigerian courts have yet to apply the principles enunciated by the African Commission in the *SERAC* case above because the provisions of the African Charter although applicable to Nigeria, are, however, subject to the Nigerian constitution which make SER non-justiciable under chapter two of the Nigerian constitution.

The position in the UK is similar to Nigeria in that the ICESCR right to housing is not directly enforceable. However, in contrast to the Nigerian position, there are a number of non-human rights statutes which apply to the UK<sup>28</sup> and have been used by UK courts to protect human rights and by implication the right to adequate housing in the UK. In terms of the wider impact on SER practice, the ECHR has affected aspects of UK housing law and policy. The provisions of the ECHR have now been incorporated into UK law through the HRA. Although the ECHR largely provides only for the protection of civil and political rights, the ECtHR has rejected a watertight compartmentalisation between civil and political rights on the one hand and SER on the other.<sup>29</sup> When security of tenure is considered within the context of the right to adequate housing, it can be argued that the ECHR has had a positive impact on the protection of the right to adequate housing in the UK more than the African Charter has on Nigeria, despite the fact that the ECHR, unlike the African Charter, does not contain substantive provision for the right to adequate housing.<sup>30</sup>

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<sup>26</sup> *Nigerian Institute of Medical Research v. NURTW* [2010] LPELR-4612.

<sup>27</sup> [2001] AHRLR 60.

<sup>28</sup> (Article 8 of the ECHR, Equality Act 2010 (non-discrimination in access to housing within the protected characteristics) and more recently the Deregulation Act 2015 (protects against forced and illegal evictions.)

<sup>29</sup> *Airey v Ireland* (1980) 2 EHRR 305.

<sup>30</sup> *Manchester City Council v. Pinnock* (2010) UKSC 45.

### **7.3.5. The right to work and considerations of basic income as an alternative**

In chapter six of this research, the right to work was examined in the light of article 6 of the ICESCR and how both jurisdictions were working towards the realisation of the right to work under international law. As I stated in chapter 6,<sup>31</sup> the right to work is unique when compared to other SER because of the interplay between the need to sustain economic growth and ensuring the realisation of the right to work.

With regards to how the provisions of article 6 are complied with in both jurisdictions, I think that the current legislation in both jurisdictions is inadequate in meeting the standards of article 6 of the ICESCR. I reasoned that for article 6 of the ICESCR to be effectively applied in both jurisdictions, it will have to be subject to some rigorous analysis in order to extrapolate the essential aspects of the right with regards to the UK and Nigeria. At the end of this unbundling process, it was discovered that article 6 was indeed a complex normative aggregate of other work-related rights – essentially, it had elements of the ‘right to work’ and ‘rights in work’. It was also found out that it will be futile to engage in discussing the practical application of article 6 without reference to articles 7 and 8 of the ICESCR because of their complementarity (article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work, whilst article 8 of the ECHR broadly provides for the right of everyone to form trade unions and join the trade union of their choice). Article 6 deals with the ‘right to work’ whilst articles 7 and 8 deal with ‘the right in work’, interestingly, it appears that the ‘rights in work’ is more fully developed than the ‘right to work’ in both jurisdictions and this sort of relationship has had a negative impact on the development of the right to work, so that most of the time, debate about the right to work gets subsumed under the rights in work and yet it is realised that for there to be rights in work there must be a right to work. However, the misconception that the government must provide a job for everyone willing to work has not helped in engendering the right to many, not the least, national governments.<sup>32</sup>

Bearing the foregoing in mind, I sought to test what the implications would be for the wholesale application of article 6 in the legal systems of the UK and Nigeria, and in the process of doing this, I gleaned some major sub-themes from the analysis with regards to the right to work in the UK and Nigeria. One of the themes discussed was the impact of the zero-hours contract on

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<sup>31</sup> Pg 128 -135.

<sup>32</sup> Luca Santini and Sandro Gobetti, ‘The Crisis of Labour, Widespread Precarity and Basic Income’ (2016) 2(6) *CADMUS* 158.

the right to work, and how gaps in the UK's legislation particularly section 230 of the Employment Rights Act 1996 has led to unethical practices that have a negative impact on the realisation of the right. For example, there are workers in the UK whose employment status is not fully determined under UK labour laws and as a result, affects their right to work, and rights in work.<sup>33</sup> There is also the so-called 'self-employment clause' which is becoming increasingly rampant in the UK that some employers are using as a scheme to dodge their obligations to their employees.<sup>34</sup> Some employers have devised an array of atypical employment relationships which have been known to be contrary to the right to work and exploitative. An example of this kind of relationship is that of Uber drivers who until a recent decision by the Employment Tribunal were regarded as self-employed and therefore did not have the entitlement to the statutory benefits under the UK's labour laws for workers and employees.<sup>35</sup> This is a fast-evolving area of UK employment rights law and will most certainly see some new developments in the coming years. The efforts of the UK government at keeping pace with these challenges was also considered in the light of the review set up by the government<sup>36</sup> to make recommendations on how best to tackle these employment challenges that have an impact on the right to work in work. The review has suggested the need for greater clarity in the UK's employment law to reflect emerging business models.<sup>37</sup> Whilst I agree with this proposal, I think more needs to be done especially in the area of clarifying the status of working for someone and self-employment because most of the recent 'right in work' issues in the UK has come from the lack of clarity in such employment relationship.<sup>38</sup> There is, therefore, the need for a more flexible and adaptive legislature framework that will provide the guidance for these new working models in a manner that addresses potential areas of conflict rather having to approach the courts. An example of such adaptive legislation would have been the Zero Hours Contracts Bill 2014 that sought to guarantee equal treatment of zero hours contract workers on the same basis as comparable workers engaged by their employer on fixed and regular working

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<sup>33</sup> Under new changes that were introduced in April 2012, an employee alleging unfair dismissal must now be in the continuous employment of the employer to sustain a case of unfair dismissal cases. See 108(1) of the Employment Rights Act 1996.

<sup>34</sup> *Pimlico Plumbers Limited v Smith* [2017] EWCA Civ 51.

<sup>35</sup> *Uber B.V. and Others v Mr Y Aslam and Others* UKEAT/0056/17/DA; cf *Stringfellows Restaurant Ltd v Quashie* [2012] EWCA Civ 1735 where the Court of Appeal held that that Ms Quashie who was a lap dancer in the appellant's strip club was not an employee as there was no relevant mutuality of obligation between her and the appellant.

<sup>36</sup> Matthew Taylor, *Good work: the Taylor review of modern working practices* (Department for Business, Energy & Industrial Strategy 2017).

<sup>37</sup> *Ibid* Chap 4.

<sup>38</sup> *Ibid* (n 36).

hours contracts. Unfortunately, the Bill has now been prorogued by Parliament and will make no further progress.

In the case of Nigeria, there is also no enforceable right to work.<sup>39</sup> It was found that existing right to work legislation was grossly inadequate, outdated and what is more discriminatory. For example, some employment laws such as the Police Act and the Labour Act are clearly unfavourable to women which no doubt will lead to discrimination and deny them of equal opportunities with the men in clear violation of the right to work, even though the Nigerian constitution forbids discrimination on whatever grounds especially sex. Some colonial era doctrines of common law continue to apply to and have had an adverse effect on the realisation of the right to work. Such outdated common law doctrines and principles such as master and servant relationship. and the principle that you cannot force a willing servant on an unwilling master has meant that till date there can be no case of unfair dismissal in Nigeria's right to work jurisprudence giving employers a wide scope to perpetrate right to work violations.

It was found that the crucial aspects of the right to work in both jurisdictions as envisaged by article 6 of the ICESCR were far from being achieved. Also, there has been an increasing incursion of automation into the world of work so that it is now predicted that by the 2030s thirty per cent of jobs in the UK will be done by machines.<sup>40</sup> In the light of the foregoing, the research considered whether all the issues associated with the realisation of the right to work, including the high level of unemployment in Nigeria and the emerging atypical employment relationships in the UK, could be addressed with a right to a basic income paid to all members of the community without conditions so that they are then able to channel their abilities into other creative initiatives without having to worry about their subsistence. The idea of a right to a basic income as one of the alternative ways of addressing the limitations inherent in the right to work, is one that has gained an increased traction lately in the UK, however, there are concerns that this may lead to idleness and may break down the social cohesion of a working society and the intrinsic value of self-worth which comes from a feeling of contributing to society which as has been argued can come mainly from having to work.<sup>41</sup> It well accepted that aside from the economic value, work also creates an intrinsic human sense of worth and community which underlies the instrumental nature of the right.

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<sup>39</sup> As at September 2017, unemployment level in Nigeria was 18.8 percent. (The Nigerian Bureau of Statistics *Unemployment/underemployment Report Q3 2017* (NBS 2017) 5.

<sup>40</sup> Richard Berriman, 'Will robots steal our jobs? The potential impact of automation on the UK and other major economies' (UK Economic Outlook March 2017 PricewaterhouseCoopers) 30.

<sup>41</sup> Pg 143 - 150.

## 7.4. Recommendations and implications:

### 7.4.1. Towards the minimum core of SER -

It is now well settled that the implementation of SER is crucial and runs in tandem with the implementation of political and civil rights.<sup>42</sup> Despite all the arguments by certain writers<sup>43</sup> about SER being indeterminate and incapable of judicial interpretation, a compelling narrative continues to be made for an appropriate and effective means of enforcement of these rights through the involvement of the courts. Having critically examined the nature and contents of the rights to health care, adequate housing and work, and how best they could be given effect within the scope provided in the ICESCR, I conclude that enforcing these rights through the minimum core approach would contribute immensely to their progressive realisation. This is one of the reasons why the minimum core approach has been a reoccurring theme in this research. The minimum core approach to the realisation of SER is a part of the progressive realisation principle under SER jurisprudence. According to article 2 of the ICESCR, states are under an obligation to take steps to the maximum of available resources with a view to progressively achieve the full realisation of the rights in the ICESCR through all appropriate means including legislation and the provision of judicial remedies.<sup>44</sup>

The progressive realisation principle in the ICESCR which was meant to be a flexibility device has been utilised as a premise for arguing that the rights in the ICESCR are programmatic and not immediately enforceable.<sup>45</sup> It's perhaps in realisation of the incoherent and extremely broad parameter stipulated in article 2 that the UNCESCR stated in General Comment 3 that:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which

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<sup>42</sup> Manisuli Ssenyonjo (2011) 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15(6) *The International Journal of Human Rights* 969.

<sup>43</sup> Onora O'Neill 'The Dark Side of Human Rights' (2005) 81 *International Affairs*. 29-431; John Tobin *The Right to Health in International Law*. (OUP 2012) 1.

<sup>44</sup> Article 2(1) ICESCR; see also [General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, paras 1-2.](#)

<sup>45</sup> See generally, Kathrine Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) *Int'l Journal of Constitutional Law* 385.

is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.<sup>46</sup>

The foregoing position by the UNCESCR on achieving a meaningful content for the rights in the ICESCR was analysed in chapter four of this work<sup>47</sup> where the point was made that SER such as the right to healthcare, for example, is not clearly defined in the ICESCR thus making it difficult to afford the right a coherent basis for judicial enforcement in the UK and Nigeria. As a result, if the SER discussed in this work are to be effectively implemented, then it is critical that the basis of the rights be set in the idea of a minimum core and in this wise the efforts of the UNCESCR must be commended.<sup>48</sup>

The minimum core approach enjoys wide support in human rights scholarship.<sup>49</sup> With regards to SER, the idea of the minimum core was adopted by the UNCESCR to clarify what was a growing misconception about the idea of the application of the progressive realisation principle in article 2 of the ICESCR, that creates an obligation on states to use the maximum of their available resources<sup>50</sup> with a view to progressively realise SER. According to the UNCESCR, in view of the progressive realisation approach to SER;

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party so that any state in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic

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<sup>46</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 9.

<sup>47</sup> Pg 56 – 60.

<sup>48</sup> The UNCESCR is made up of 18 human rights experts who routinely issue text to clarify and amplify the rights contained in the ICESCR. The UNCESCR does through the issuance of general comments, which though not legally binding but have are generally regarded as authoritative for examining the rights in the ICESCR.

<sup>49</sup> Geraldine van Bueren, 'Of Floors and Ceilings: Minimum Core Obligations and Children' in Daniel Brand and Sage Russell (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (Pretoria, Protea Book House, 2002), 183-184; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, (Oxford University Press 2007), chapter 6; Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009), 66. For a different perspective, see John Tobin, *The Right to Health in International Law* (Oxford: Oxford University Press, 2012), 243.

<sup>50</sup> For a discussion on the contents of the term 'available maximum resources' see Sigrun Skogly 'The Requirement of Using the 'Maximum of Available Resources' for Human Rights Realisation: A Question of Quality as Well as Quantity?' [2012] 12(3) Human Rights Law Review Human Rights Law Review 393.

shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.<sup>51</sup>

The UNCESCR goes on to state that an assessment as to whether a state is meeting its minimum core obligation has to take into cognisance the resource constraints of the state concerned, so that all the state has to do is to show that it has taken the necessary steps to the maximum of its available resources (including through international cooperation and assistance) in respect of fulfilling its minimum core obligations under the ICESCR. This creates a derogable standard for the minimum core approach. It injects an element of subjectivity into the idea of the minimum core that bears in it some elements of the reasonableness test that has been widely applied by the constitutional court of South Africa, in deciding SER cases.<sup>52</sup> I will return to the subject of the reasonableness principle later in this chapter, however, for the moment, I do not subscribe to the idea of having a subjective or derogable minimum core because it destroys the foundation of having the minimum core in the first place. If the minimum core of SER is as the UNCESCR describes it to be ‘at the very least, minimum essential levels of each of the rights’,<sup>53</sup> then what is the point of having a minimum core if a country cannot fulfil such minimum core obligations in respect of SER. To my mind, such a subjective approach destroys the justificatory basis for having the progressive realisation principle in respect of SER. SER might as well be treated as programmatic or aspirational goals, not worthy of any minimum core content or state obligations. My position against having derogable minimum core obligations does enjoy some support. In General Comment 14 which was released 10 years after General Comment 3, the minimum core obligations of states in respect of the right to health care is stated as absolute and non-derogable, according to the UNCESCR;

If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, **that a State party cannot, under any circumstances**

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<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 10.

<sup>52</sup> David Bilchitz, ‘Towards a reasonable approach to the minimum core: laying the foundations for future socioeconomic rights jurisprudence’ (2003) 2(19) South Afr. J. on hum. Rts. 1.

<sup>53</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23 para 10.

**whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.<sup>54</sup>**

According to the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, states are ‘are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.’<sup>55</sup> similarly, the Maastricht Guidelines provide that ‘minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties’.<sup>56</sup>

I think the foregoing statement on the non-derogable standard of the minimum core, and UNCESCR’s position in General Comment 14 in respect of minimum core obligations to the right to health care is a more progressive approach to take in considering whether a state is meeting its minimum core obligations in respect of SER. For the most part of it, the minimum core obligations of the SER discussed in this research contain negative duties that come with the obligation to respect, i.e. duties or obligations on the part of the state not to interfere with the ability of someone to gain access to basic aspects of the right they are entitled to. For example, in chapter 5 of this research, it was identified that homelessness and forced evictions were the greatest manifestations of the violation of the right to adequate housing. All the state is required to do in this wise is to ensure that the incidence of forced eviction is minimised, or done in line with the state’ obligations under the ICESCR and the clarification provided in General Comment 7.<sup>57</sup> According to Bilchitz, minimum core obligations are placed upon the state to realise without delay the most urgent survival and basic interests protected by such SER.<sup>58</sup> To interpret the ICESCR as not establishing a non-derogable minimum core would mean that the SER created in the ICESCR are largely deprived of their essence.

I admit that some countries might already fulfil their minimum core obligations with regards to some of the SER provided for in the ICESCR, however, there is still more work to be done amongst the different states in ensuring that the different regional and national agencies

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<sup>54</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para 47 (emphasis mine).

<sup>55</sup> UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987, E/CN.4/1987/17, principle 25.

<sup>56</sup> International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, para 9.

<sup>57</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

<sup>58</sup> David Bilchitz, ‘Towards a reasonable approach to the minimum core: laying the foundations for future socioeconomic rights jurisprudence’ (2003) 2(19) South Afr. J. on hum. Rts. 2.

embrace the concept of a minimum core of these rights, in line with the universal duties to respect, fulfil and protect SER.

Although the UNCESCR advocates for the use of appropriate means in realising these SER, the indispensability of a judicial enforcement mechanism is also admitted where it becomes necessary as in most cases to provide an effective remedy in cases of violation,<sup>59</sup> and towards actualising the provision of effective judicial remedy, the concept of minimum core contents and minimum core obligations for each SER is essential. There are many arguments and counter-arguments of what potentially amounts to the minimum core.<sup>60</sup> Having considered these arguments, I propose that what amounts to the minimum core is essentially a question of fact which the courts can consider specific to each country, within the scope specified by the UNCESCR, which are contained within the various General Comments including the state's obligation to respect, obligation to protect and finally the obligation to fulfil. Minimum core obligations are essentially a minimalist<sup>61</sup> definition of SER without prejudice to the principle of progressive realisation in the ICESCR. Crucially this will enable the courts to enforce the basic irreducible essential of each right and hold the state to account for failures in the protection of SER as the progressive realisation criterion is often fraught with problems and inconsistencies. I should hasten to add that the minimum core approach which I espouse is not perfect, however, it gives the courts a more realistic and interpretative<sup>62</sup> basis for considering if there had been a breach of SER. According to Young,<sup>63</sup> the concept of a minimum core seeks to situate a minimum legal content by recognising minimum essential levels to say, for example, health and housing. It reflects a minimalist rights strategy that seeks to minimise goals in order to maximise gains. It follows in the nature of the moral and legal justifications for human rights in the society, one that is set in human dignity as the underlying foundation for human rights.

Shue describes the idea of a minimum core in a very poignant tone when he says, 'basic rights, above all, is indeed to provide minimal protection against utter helplessness ...basic rights are

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<sup>59</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para 9.

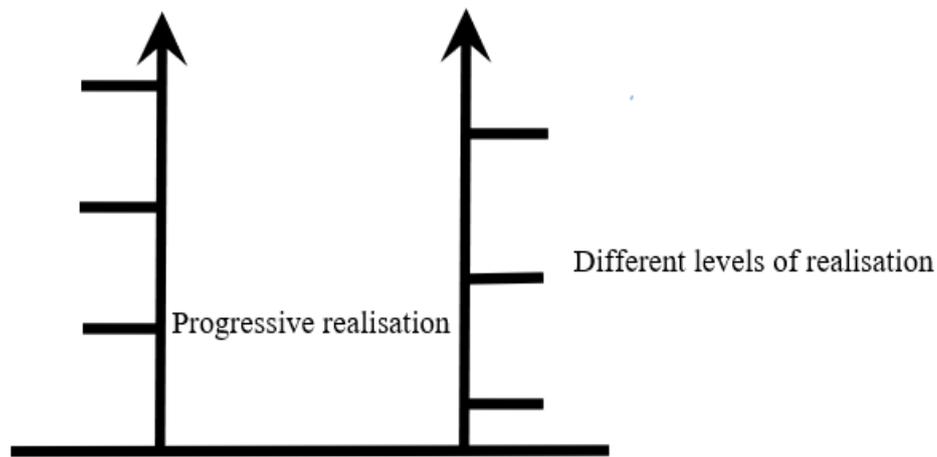
<sup>60</sup> John Tobin, *The Right to Health in International Law* (Oxford: Oxford University Press, 2012), 243 -247.

<sup>61</sup> *Ibid.*

<sup>62</sup> For example, the right to healthcare is accused of being 'so broad as to constitute an unreasonable standard for human rights, policy, and law' (Jennifer Ruger, *Health and Social Justice* (OUP 2009) 122.

<sup>63</sup> Kathrine Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' *Yale International Law Journal* (2008) 33 114.

the morality of the depths ... [because] they specify the line beneath which no one is to be allowed to sink.’<sup>64</sup>



Morality of the Depth (International Benchmark by the UNESCR)

Adopting Shue’s ‘morality of the depth’ concept with regards to SER, the diagram above sets out my idea of how the minimum core could operate in the states that have ratified the ICESCR including the UK and Nigeria. The horizontal line at the base of the diagram represents the morality of the depth beneath which no one should be allowed to fall.<sup>65</sup> That line for understandable reasons should be set by the UNCESCR and reviewed from time to time. The international community must provide the relevant technical support and cooperation to enable this line to be set and also ensure that no one falls that line. The vertical arrows represent the principle of progressive realisation of SER as contained in the ICESCR. These arrows are understandably upwardly pointed because the ICESCR does not, as a general rule, allow for any retrogressive steps to be taken by states with regards to the realisation of ICESCR.<sup>66</sup> The levers on each side of the vertical arrows depict the various levels of realisation of each SER which will understandably differ from one country to another or even between different SER in one country depending on national economic priorities. These differences are acceptable as long as the minimum core (morality of the depth) of such SER is not breached. Having effective courts as well as justiceable SER will be critical to the success of this minimum core model that I propose. The point as to whether a state is meeting its minimum core obligations is

<sup>64</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (2nd ed. Princeton University Press 1996) 18. Article 6 of the ICESCR talks about the right to gain a living linking this with subsistence.

<sup>65</sup> In line with the work of the UNESCR, the international human rights community can set this parameter as to what constitutes a minimum core for SER. The ICESCR recognises the benefit of international cooperation and assistance in ensuring the realisation and implementation of SER (Article 1 ICESCR).

<sup>66</sup> Article 2 ICESCR.

essentially a question of fact<sup>67</sup> which the court ideally should be able to consider with reference to the provisions of the ICESCR and local statutes in respect of such right and then come to a conclusion whether the state is actually doing enough to meet its international obligations under the law or not.<sup>68</sup> Later on, in the concluding part of this chapter, I back up this approach by suggesting an outline of how the courts in the UK and Nigeria can go about applying the minimum core approach in cases involving SER.

In terms of the actual judicial interpretation and implementation of the minimum core with reference to SER in nations, South Africa,<sup>69</sup> India<sup>70</sup> and Colombia<sup>71</sup> are considered as useful reference points because of the progress these countries have made with regards to the justiciability of SER jurisprudence and the various avenues that the courts in these countries have exploited to hold the state to account for shortcomings in the implementation of SER. Of these three, the South African judicial experience is most relevant<sup>72</sup> in the consideration of what amounts to the minimum core from the perspective of this research, because the South African constitution contains justiciable SER. In a protracted line of cases,<sup>73</sup> the South African courts have refused to adopt the minimum core as a basis for their judgements in cases involving SER in spite of the guidance provided in General Comment 3 and the guidelines provided by the African Commission on Human and Peoples' Rights.<sup>74</sup> Rather the standard often adopted is one it calls the 'reasonableness test' which involves the examination of the obligations imposed on the government by the relevant section of the South African constitution and then scrutinising the reasonableness of the government's actions in respect of

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<sup>67</sup> Colombian courts already doing something similar through the process of *accion de tutela* (writ for the protection of constitutional rights). [The South African court in the case of Minister of Health v Treatment Action Campaign \[2002\] 10 BCLR 1033 \(CC\) also applied this approach under the reasonableness test when considering the measures taken by the state in respect of meeting its obligations under section 27 \(right to health care\) of the South African Constitution.](#)

<sup>68</sup> Para 10 of General Comment 3 provides that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.

<sup>69</sup> The South African constitution has a whole chapter (chapter 2) devoted to rights including justiciable economic and social rights.

<sup>70</sup> The Indian judiciary has been known to adopt a purposive and integrated approach to the interpretation of economic and social rights, even though art 37 of the Indian constitution appears to oust justiciability. See the Indian Supreme Court case of *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37

<sup>71</sup> See the Colombian case in Decision T-760 <[www.esccr-net.org/caselaw/2009/decision-t-760-2008](http://www.esccr-net.org/caselaw/2009/decision-t-760-2008)> accessed 30 January 2018.

<sup>72</sup> Jeanne Woods 'Justiciable Social Rights as a Critique of the Liberal Paradigm,' (2003) 38 Texas International Law Journal 763.

<sup>73</sup> *South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* [2002] 10 BCLR 1033 (CC); *Mazibuko v City of Johannesburg* [2010] 3 BCLR 239 (CC). *Juma Masjid Primary School and others v Essay NO and others* 2011 (8) BCLR 761 (CC).

<sup>74</sup> African Commission on Human and Peoples' Rights *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* <[www.achpr.org/instruments/economic-social-cultural/](http://www.achpr.org/instruments/economic-social-cultural/)> accessed 30 January 2018.

the breach. The courts in deference to the other arms of government have mostly reasoned that defining what amounts to a minimum content of each SER is one for the executive and legislature, one which the court lacks the institutional capacity to dabble into. Such a judicial attitude of the South African courts to the realisation of SER has been blamed in some quarters<sup>75</sup> as the cause for the slow and unimpressive progress made so far in the realisation of SER in South Africa as the South African courts have repeatedly declined to give any normative content to the idea of a minimum core within the South African SER jurisprudence.

Looking more specifically at the UK and Nigeria, and the possibility of developing the concept of a minimum core as a basis for the enforcement of SER, one would observe that more needs to be done with respect to implementing the rights discussed in this research through the minimum core approach. In the case of the UK, the incorporation of the ECHR through the HRA has led to tensions between UK courts and the ECtHR on occasions because of the UK's common law traditions and perception of individual rights.<sup>76</sup> I believe that a more suitable starting point will be to overhaul the entire human rights architecture of the UK. One of the ways this could be done is through the review or abrogation of the ECHR under the HRA, it should be added that my point of view is not influenced by what some perceive to be the overreaching nature of the HRA,<sup>77</sup> on the contrary, the HRA as it currently stands is well founded and has been catalytic to large extent in creating a role for UK courts in the interpretation of the ECHR and holding public authorities to account, even though, as I have already mentioned, the ECHR has sometimes had an uneasy relationship with the UK's entrenched common law traditions.<sup>78</sup> Ideally, a review of the HRA incorporating SER especially the ones discussed in this research would be catalytic in its ability to develop SER

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<sup>75</sup> Lady Hale, 'Human Rights and Social Justice' (York University, Festival of Ideas 2016) <[www.supremecourt.uk/docs/speech-160609.pdf](http://www.supremecourt.uk/docs/speech-160609.pdf)> 6 accessed 24 December 2017; see also David Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 South African Law journal 484; S Liebenberg *Socio-economic rights: Adjudicating under a transformative constitution* (Cape Town: Juta 2010) at 131-223; O Fuo & A Plessis 'In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere' (2015) 19 Law Democracy & Development 11.

<sup>76</sup> Lord Neuberger 'Has the identity of the English Common Law been eroded by EU Laws and the European Convention On Human Rights?' (Faculty of Law, National University of Singapore) <[www.supremecourt.uk/docs/speech-160818-01.pdf](http://www.supremecourt.uk/docs/speech-160818-01.pdf)> 30 August 2017.

<sup>77</sup> Jon Stone 'British Bill of Rights plan shelved again for several more years, Justice Secretary confirms' (The Independent 23 February 2017) <[www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-brex-it-liz-truss-theresa-may-a7595336.html](http://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-brex-it-liz-truss-theresa-may-a7595336.html)> accessed 30 January 2018.; Equality and Human Rights Commission *Socio-economic rights in the UK* (Equality and Human Rights Commission, April 2016) <[http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/GBR/INT\\_CESCR\\_IFN\\_GBR\\_23989\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/GBR/INT_CESCR_IFN_GBR_23989_E.pdf)> accessed 30 January 2018.

<sup>78</sup> *R (Limbuella) v Secretary of State for Home Department* [2005] UKHL 66, for example (article 3); *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; and *United Policyholders Group v Attorney General of T+T* [2016] UKPC 17.

jurisprudence in the UK and set the UK on the road to meeting its obligations under the ICESCR.<sup>79</sup> Admittedly, there will certainly be challenges on the way such as the one envisaged by the UK's Joint Committee on Human Rights when it said that having justiciable SER in the UK 'will only raise expectations and encourage time-consuming and expensive litigation against public bodies',<sup>80</sup> however, I think that such challenges would be reasonably addressed by a normative concept of the idea of minimum core which the courts<sup>81</sup> will be readily available to address working in conjunction with the other arms of the UK government, and with inputs from relevant NGOs. Besides, the idea of SER being 'time consuming' and 'expensive'<sup>82</sup> is indefensible as the same arguments could be made in respect of civil and political rights. There is also the need to ratify the Optional Protocol that allows individual complaints to be brought against the UK. Although the UK claims to be meeting its obligations under the ICESCR,<sup>83</sup> recent political developments, especially in the area of welfare reforms, have had unsalutary effects on the SER such as the right to work and housing.<sup>84</sup> This has led to the UNESCR decriing the absence of effective remedies for SER violation. According to the UNESCR in its latest reaction to the periodic report submitted by the UK:

While the Committee takes note of the State party's views on the incorporation of the Covenant rights into the domestic legislation, the Committee regrets that the Covenant rights cannot be directly applied by domestic courts, which may restrict the access to effective legal remedies for violations of Covenant rights. The Committee recalls its previous recommendation (E/C.12/GBR/CO/5, para. 13) and urges the State party to fully incorporate the Covenant rights into its domestic legal order and ensure that victims of violations of economic,

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<sup>79</sup> Not long ago there was the discussion about repealing the HRA and replacing it with a UK Bill of Rights, however recent reports indicate that this is not likely to happen until after 2019 when the UK would be expected to officially leave the EU. See Jon Stone 'British Bill of Rights plan shelved again for several more years, Justice Secretary confirms' (The Independent 23 February 2017) <[www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-brex-it-liz-truss-theresa-may-a7595336.html](http://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-brex-it-liz-truss-theresa-may-a7595336.html)> accessed 30 December 2017).

<sup>80</sup> Joint Committee of Human Rights. 2008. *A Bill of Rights for the UK?* (29<sup>th</sup> Report of Session 2007-08 House of Lords) <[www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16508.htm#n158](http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16508.htm#n158)> accessed 30 August 2017.

<sup>81</sup> Daniel McDougall 'The vibe of the Thing' Implementing Economic, Social and Cultural Rights in New Zealand' (2015) 21 Auckland University Law Review 86.

<sup>82</sup> *Ibid* (n 69).

<sup>83</sup> UK Ministry of Justice *Sixth periodic report to the ICESCR* (Ministry of Justice, 2014) <[www.gov.uk/government/publications/international-covenant-on-economic-social-and-cultural-rights-icescr-periodic-report](http://www.gov.uk/government/publications/international-covenant-on-economic-social-and-cultural-rights-icescr-periodic-report)> accessed 30 January 2018.

<sup>84</sup> Economic and Social Council 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (UNESCR E/C.12/GBR/CO/6, July 2016) <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GBR/CO/6&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GBR/CO/6&Lang=En)> accessed 30 January 2018.

social and cultural rights have full access to effective legal remedies. The Committee draws the attention of the State party to its General Comment N° 9 (1998) on the domestic application of the Covenant.<sup>85</sup>

Even though the UK claims to protect and fulfil ICESCR through administrative and policy-related measures, it must be said that such models of protection without the critical reinforcing mechanism of recourse to effective judicial remedies, just means that these SER related policies could potentially be withdrawn or amended by Parliament as was the case with the Welfare Reform Act 2012, Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO),<sup>86</sup> acts which in my opinion could potentially constitute retrogressive measures which the ICESCR frowns at.

The position of law in Nigeria with respect to SER is far from impressive. Despite far-reaching international and regional<sup>87</sup> commitments to take the necessary steps towards ensuring the protection and implementation of SER, the country continues to lag. For example, when it comes to the right to healthcare, the level of commitment we have seen from the review of the judicial and budgetary measures in place is far from impressive and what is more, the current poor state of healthcare in Nigeria is inexcusable. The blatant display of an inadequate level of commitment by the state to successive healthcare policies is one that must be improved upon if Nigeria is to meet its international obligations with regards to the right to healthcare. Similarly, the same level of improvement is required with regards to the rights to adequate housing, and work.

Concerning the role of the judiciary, the courts in Nigeria have as a general rule, declined to adjudicate on matters related to chapter two of the Nigerian constitution where SER are provided for, albeit vaguely. The danger in this kind of judicial attitude is that it hinders any meaningful debate and stifles the development of jurisprudence on the important aspects of the right to healthcare.<sup>88</sup> Also, those seeking to rely on the court as a last resort for challenging the

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<sup>85</sup> Ibid, paras 5 and 6.

<sup>86</sup> This legislation effectively reduced the scope of legal aid for individuals bringing claims in relation to housing and other social security issues.

<sup>87</sup> The African Charter to which Nigeria is a signatory makes all rights including SER immediately enforceable by member states, so that the progressive realisation standard of the ICESCR does not apply to the Charter the contents of which are applicable in Nigerian law since the African Charter has been ratified by Nigeria. See Chidi Odinkalu 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights' 2001 (23) 2 Human Rights Quarterly 349.

<sup>88</sup> Roberto Gargarella, 'Dialogic Justice in the Enforcement of Social Rights: Some Initial Arguments' in Alicia Yamin & Siri Gloppen (eds.) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, 2011) 232-243.

perceived violation of their SER would be unable to do so.<sup>89</sup> The courts should, therefore, have a rethink of this approach. As I have suggested below, a more purposive reading of laws like the African Charter (Ratification and Enforcement Act) and chapters 2 and 4 of the Nigerian constitution would see the gradual development of SER jurisprudence in support of the concept of a minimum core in Nigeria. The realisation of SER is increasingly becoming a central issue in human rights debates, in view of this development and the universal appeal of human rights, a more pivotal role for Nigerian courts in the implementation of the SER cannot be wished away. It is time the Nigerian courts were supported to perform these roles effectively. The courts should be willing to engage the other arms of government in some constitutional and democratic conversation with regards to the SER. The courts should not be marginalised or snagged by what seems to be outdated and insupportable theories premised on the idea of separation of powers, lack of institutional capacity and democratic legitimacy,<sup>90</sup> especially as (admittedly limited) studies<sup>91</sup> carried out so far, have highlighted the benefits of a constitutionally guaranteed SER, especially in a country like Nigeria, where the government is less politically sensitive to the will of the citizens.

Section 13 of the Nigerian constitution clearly creates a duty and responsibility on the part of the government to conform to, observe and apply the provisions of chapter two of the constitution. To put it simply, the unique nature of this relationship is that where there is a duty, there must be a corresponding right to demand the performance of such a duty, especially when viewed from the interest theory of rights perspective discussed in chapter three of this work.<sup>92</sup> The constitution cannot, therefore, create such duty without liability for some justiciability for SER, especially the rights considered in this work because of their instrumental value. Rights are what people possess because of their humanity,<sup>93</sup> they are not grants by the state and where there is a systemic failure to grant access to such rights, then the courts must be able to find ways of getting around these obstacles on the presumption that the legislature cannot legislate to oust the obligations into which a state has freely entered internationally. And one of the ways

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<sup>89</sup> Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing, 2011) 107-126.

<sup>90</sup> Geraldine Van Bueren, 'Including the excluded: the case for an economic, social and cultural Human Rights Act' (2000) Public Law 1.

<sup>91</sup> See Daniel Brinks & Varun Gauri 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in Varun Gauri and Daniel Brinks (eds.) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) 303 – 352; Siri Gloppen 'Litigating Health Rights: Framing the Analysis' in Alicia Yamin & Siri Gloppen (eds.) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011) 17–39.

<sup>92</sup> Pg 47 – 54.

<sup>93</sup> Bas de Gaay Fortman, 'Adventurous' Judgments: A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Development' (2006) 2(2) *Utrecht Law Review* 22-43. See also J Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18.

this could be achieved is giving a practical meaning to the concept of a minimum core of SER within the Nigerian human rights framework.

#### **7.4.2. A critical reflection on the minimum core approach and the reasonableness test in SER enforcement**

Given the wariness of UK and Nigeria courts to enforce SER under the ICESCR, I have suggested above that the minimum core approach could be one of the ways of stimulating judicial and executive engagement on SER especially in the case of Nigeria with a view to judicial enforcement. However, I am aware that there are potential areas of conflict, more so, as the minimum core approach suffers from some contradictions especially in the area of reaching a universal consensus of what the minimum core entails. Some of the areas where the nature of the minimum core approach appears to be unclear have already been critically analysed in chapter 4<sup>94</sup> in relation to the right to health care. These criticisms also apply to the functioning of the minimum core in relation to the rights to adequate housing and work covered in chapters 5 and 6 respectively. According to Lisa Forman et al,<sup>95</sup> debates over how the minimum core is intended to function in states coalesce around whether the minimum core is absolute or relative to considerations around national resources of the state. There is an apparent contradiction in the minimum core approach where the UNCESCR proposes a fixed set of outcomes by states fulfilling their minimum core obligations and yet subject these fixed outcomes to the maximum of their available resources. Viewed in this manner, the minimum core approach would lead to a misalignment between the concept of entitlement and duties under human rights practice.

Another area of contradiction is the different definition given to the nature of the minimum core approach by the UNESCR. In General Comment 3 which is the overarching amplification of the concept of minimum core obligations under SER practice, the UNCESCR expects states to provide minimum core content of SER which includes the provision of essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education, and these are to be provided within the resource constraints of the state involved. To demonstrate that it has used its best efforts in meeting the minimum core obligations, all that a state is required to do is to ‘demonstrate that every effort has been made to use all resources

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<sup>94</sup> Pg 66 - 70

<sup>95</sup> Lisa Forman, *et al* ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (2016) *The International Journal of Human Rights*, 1.

that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>96</sup> Therefore, the focus of the minimum core under General Comment 3 is on the conduct of states, not the result or outcomes of such conduct, which I think, is a problematic conceptualisation of the minimum core. However, in General Comment 14 on the right to the highest attainable standard of health, the UNCESCR apparently changed the standard of the minimum core to non-derogable core obligations which means that states are not able to plead their resource constraints as a reason for not fulfilling their minimum core obligation. Although it could be argued that this shift in the nature of the minimum core obligation applies only to the right to health care, I would, however, recommend that it be interpreted more progressively as the standard to be applied in all cases of determining the minimum core of all SER.<sup>97</sup>

There are still some unresolved questions as to the nature of the minimum core when it comes to state obligations. There are also potential areas of conflicts in the understanding of the relationship between the core content and core obligations of the various SER. In some of the General Comments,<sup>98</sup> and international law instruments, the lines between core content and core obligations are quite blurry so that at times it has been quite difficult to understand their functions in relation to the realisation of specific SER.

Given the contradictions in the minimum core approach, some of which I have identified above, I will now consider the reasonableness approach which has been adopted in preference to the minimum core approach by courts in South Africa where SER are justiciable<sup>99</sup>.

With regards to SER jurisprudence in South Africa, the principle of reasonableness was first stated by Yacoob J in the case of *South Africa v Grootboom*<sup>100</sup> which centred on the interpretation of section 26 (right of access to adequate housing) of the South African Constitution. According to him, reasonable measures on the part of the government 'must establish a coherent public housing programme directed towards the progressive realisation of

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<sup>96</sup> General Comment 3, para 3

<sup>97</sup>International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, para 9

<sup>98</sup> Pg 177 - 180

<sup>99</sup> *South Africa v Grootboom* 2001 (1) SA 46 (CC), para 33; Mrs Irene Grootboom and the other respondents were evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the High Court for an order requiring the state to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain reliefs. The state was ordered to provide them with shelter. The state appealed challenging the correctness of the order.

<sup>100</sup> (2001) (1) SA 46 (CC) para 41.

the right of access to adequate housing within the state's available means.'<sup>101</sup> He went on to claim that

[i]n any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.<sup>102</sup>

As is evident from the quote above, the test for reasonableness is subjective, depending on the circumstances of each case coming before the court with the end that the legal system is faced with an ever-changing standard of reasonableness in SER cases. Again, the standard of the reasonableness approach is derogable given the fact that the standard applied by the court is subject to the constraints of resource availability within the state at a given time. According to the court in the South African case of *Minister of Health v TAC*<sup>103</sup> 'the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them as the state is not is not obliged to go beyond available resources or to realise these rights immediately'.<sup>104</sup>

As is evident from the reasonableness approach, it is questionable from the attitude of the courts whether SER in South Africa are viewed as what they are – rights that give rise to duties and obligations on the part of the state. It does appear that SER are treated more as programmatic goals and aspirations since the fulfilment of basic rights is tied to the availability of resources. Whilst I admit the role of resource availability in meeting the obligations of states with regards to SER, I should add that some of the issues that come within the legal obligation to respect e.g. non-discriminatory access to SER may require fewer resources than the state spends on the fulfilment of some civil and political rights.

The flexibility of the reasonableness approach can be a useful feature as long as the courts are able to examine measures taken by the state in relation to the realisation of the basic aspects of each SER without recourse to the availability of resources because the expectation is that

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> [2002] AHRLR 189, para 34.

<sup>104</sup> Ibid.

states should be able to meet their minimum obligations in respect of the basic minimum aspects of each right. At the very least, the courts should be able to demand strong proof of the non-availability of resources as reasons by the state for not meeting its minimum obligations in respect of SER, as it is not in all cases of meeting minimum core obligations that require the availability of resources. Unfortunately, the South African Courts have maintained that they are ill-suited to make such an enquiry. They argue that the South African constitution ‘contemplates rather a restrained and focused role for them which does not include...rearranging budgets.’<sup>105</sup>

With the reasonableness approach by South African courts examined, I hold the considered view that having a non-derogable minimum core based on the work of Henry Shue, which I propose above, will be a more effective approach towards the full realisation of SER than the reasonableness approach. The minimum core approach, in general, like any other principle, suffers from some conceptual inconsistencies; but as Eide argues, different governments may find different approaches most suitable to deal with the vulnerability thus identified within the scope of the minimum core.<sup>106</sup> Adopting the minimum core approach provides a more assured way of assessing compliance at the international level compared to the reasonableness approach which, in my opinion, is subjective and inconsistent.

#### **7.4.3. Judicial Review - A case for the application of the minimum core approach in SER cases**

In the following part of this research, I explore how my idea of the minimum core can be practically applied in the UK and Nigeria using the existing legal remedies such as judicial review.

As has been mentioned earlier, the provisions of the ICESCR are not directly enforceable in the UK and Nigeria as both countries following their dualist legal systems are yet to incorporate the provisions of the ICESCR into their domestic laws.<sup>107</sup> Therefore, it is submitted that the

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<sup>105</sup> Ibid, para 39.

<sup>106</sup> Asbjørn Eide, ‘Realization of Social and Economic Rights and the Minimum Threshold Approach’, *Human Rights Law Journal* 10, no. 1–2 (1989): 35–51, at 46; see also, Brigit Toebes, *The Right to Health as a Human Right in International Law* (Intersentia/Hart, 1999.) 279.280.

<sup>107</sup> The UK has always argued that there is no specific requirement under the ICESCR to incorporate its provisions into domestic UK laws. The UK clearly prefers to implement its ICESCR obligations using administrative measures within existing legislation. See UK periodic report to the UN...para 11 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/398255/ICESCR-sixth-periodic-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398255/ICESCR-sixth-periodic-report.pdf)

most viable way through which the courts in both jurisdictions can potentially review the acts and policies of government is through judicial review of the actions or inactions of public authorities in relation to SER. It is submitted that when judicial review is applied in the right context, it will provide a normative content for the idea of a minimum core of SER in both jurisdictions. However, compared to Nigeria, courts in the UK can adjudicate on matters affecting SER by means of judicial review, although, UK courts have adopted what Waldron<sup>108</sup> has described as a ‘weak’ approach borne out of the argument that judges as unelected representatives lack the democratic legitimacy to make such decisions.<sup>109</sup> There is also the argument of a lack of institutional capacity because, as the argument goes, judges do not have the required expertise to oversee resource allocation decisions. There are varying opinions on these arguments which have been covered in chapter four of this research.<sup>110</sup> It is submitted that the involvement of the judiciary in this area should not be a problem as it engenders the principle of ‘checks and balances’. The main issue should be with setting the scope and limitation of such judicial intervention via means of a clear application of the minimum core approach. In my opinion, the ‘weak’ approach judicial review does not go far enough in addressing concerns having to do with the implementation of SER. In *R v Cambridge Health Authority, ex parte B*<sup>111</sup>, the court evidently took the ‘weak’ approach by refusing to interfere with the decision of the local Health Authority, since it considered itself incompetent to make such intervention, even though it could have on the basis of evidence put before it. As Ison puts it, ‘judicial review tends to enhance the problem of under-achievement, by adding another opportunity for obstruction by those against whom public power ought to be exercised.’<sup>112</sup> More recently, Lord Mance of the UK Supreme Court appears to reemphasise this point in a manner that seems to suggest that the courts are more competent to deal with issues involving civil and political rights than those affecting SER. According to him, ‘on issues of liberty, freedom of movement, speech or religion, courts can claim a special expertise. On issues about the use of public resources or economic judgment, the elected legislature or executive is better placed.’<sup>113</sup> With due respect, such line of thinking with regards to the implementation of SER is becoming increasingly unfounded and outdated. In today’s world where there is so much

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<sup>108</sup> Jeremy Waldron ‘The Core of the Case against Judicial Review’ (2006) 115 (6) Yale Law Journal 1358.

<sup>109</sup> Mark Tushnet *Weak Courts Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 24.

<sup>110</sup> Pg 82 -84.

<sup>111</sup> [1995] 2 All ER 129.

<sup>112</sup> Terence Ison, ‘The Sovereignty of the Judiciary’ (1985) 10 Adelaide Law Review 2.

<sup>113</sup> Lord Mance ‘The Role of Judges in a Representative Democracy’ (Lecture given during the Judicial Committee of the Privy Council’s Fourth Sitting in The Bahamas, February 2017) <[www.supremecourt.uk/docs/speech-170224.pdf](http://www.supremecourt.uk/docs/speech-170224.pdf)> accessed 30 January 2018.

information available on the policies and activities of government, courts should not be reluctant to review government policies even if they involve SER. The presence of the internet and other information sources now means that judges are more than ever before able to access issues on broad economic and social policies and where they are unsure, the relevant agency involved could be invited by the courts to provide the necessary clarification. Furthermore, the issues surrounding the allocation of resources are not always areas that require a certain level of expertise that the courts can claim not to have, most of the issues are more fact-sensitive than technical or forensic queries, one which the courts should be able to obtain advice on and consider, as it would in the case of civil and political rights. Although Lord Mance made the foregoing remarks extrajudicially, it arguably provides sufficient insight into what could be described as the underlying foundation to the judicial attitude in the UK with regards to SER. Incidentally, Lord Bingham who had earlier stated the underlying principle<sup>114</sup> that should guide the courts when handling cases involving SER had this to say some years later in 2004:

I do not, in particular, accept the distinction which he [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true ..... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.

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This apparent shift, no matter how insignificant, in the courts' approach to judicial review of executive actions in respect of human rights in general, appears to have been engendered by the jurisprudence emanating from the ECtHR and the coming into force of the HRA. Before the enactment of the HRA, it is doubtful whether any UK court would have disagreed with the Attorney General in such manner.<sup>116</sup>

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<sup>114</sup> *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129. (a court cannot give a judgement as to how limited state budget is to be allocated because it is not the place of the court to involve itself in a field of activity where it is not fitted to make any decision).

<sup>115</sup> *A (FC) v Secretary of State* [2004] UKHL 56.

<sup>116</sup> Lord Neuberger 'Has the identity of the English Common Law been eroded by EU Laws and the European Convention on Human Rights?' (Faculty of Law, National University of Singapore) <[www.supremecourt.uk/docs/speech-160818-01.pdf](http://www.supremecourt.uk/docs/speech-160818-01.pdf)> accessed 30 January 2018.

With regards to human rights, the development of judicial review from its traditional position in the UK to how it is applied currently has been attributed to the HRA. Before now, if there was no legal or procedural error and the decision was not irrational in nature, the court would not overturn such an executive decision, however, when the complaint involves the interference with a right provided in the ECHR, the court takes a more structured and nuanced approach and would not insist on the rigid application of the irrationality test.<sup>117</sup> It has been said that in human rights cases involving Convention rights, the nature of every case of judicial review now depends on the context<sup>118</sup> and would be dealt with on a case by case basis. Despite the progressive nature of these developments, and the flexible approach adopted in the judicial review of human rights, the application of the concept of judicial review in the UK is still limited and does not go far enough,<sup>119</sup> in contrast to Nigeria where the strong form of judicial review has been adopted, even though such a strong approach has not been applied to the enforcement of SER as opposed to civil and political rights. The Nigerian court under section 6(6)(b) of the Nigerian constitution can annul the decisions of administrative bodies and laws made by the executive and legislature if they are contrary to the constitution.<sup>120</sup> So, whereas the UK court can only make a declaration of incompatibility with the HRA, the courts in Nigeria can declare even Acts of the National Assembly void. In Nigeria, it seems from the case of *Fagbemi v Omonigbehin & Ors*<sup>121</sup> that the use of judicial review as an oversight mechanism is not restricted to the procedure used but also applies to the substance of the matter which is a major difference to the UK's approach. The differences in approach might be because, in Nigeria, the constitution is supreme as per section 4(8) of the Nigerian constitution, whereas, in the UK, it is the Parliament that is supreme. However, as already mentioned, in Nigeria despite the extensive powers held by the courts in respect of judicial review, it cannot be applied to the provisions of chapter two of the constitution (part of the constitution that has

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<sup>117</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 -commonly known as the 'Wednesbury irrationality test'.

<sup>118</sup> *Kennedy v Charity Commissioners* [2014] UKSC 20, para 51, cf the latter case of *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, where the court refused to support the proposition that traditional irrationality test should now be totally disregarded in judicial review and replace it with the more structured and nuanced proportionality test, so that human rights and common law judicial review are subject to the same judicial approach.

<sup>119</sup> For example, courts in the UK cannot repeal Acts of Parliament. Tushnet describes this as the weak type of judicial review; see also the counter argument to this line of thinking by Gearty who argues that although this is weak JR, it does put a lot of political pressure on Government to have such Acts amended following a declaration of incompatibility. (Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing, 2011) 143.)

<sup>120</sup> *Attorney General of Abia State & 35 Ors.* (2001) 11 NWLR 689; Grace Arowolo and J Anwo, 'Judicial Review of Legislation in Nigeria: A constitutional imperative' (2015) 2(1) JABU law journal 1.

<sup>121</sup> [2012] LPELR-15359.

a semblance of SER), as the provisions of this chapter are effectively excluded from the purview of Nigerian courts. If judicial review were to be applied to SER in Nigeria, it would open up the dialogue between the judiciary and the other arms of government in respect of the implementation of SER in Nigeria. It will, I believe, certainly, raise the debate on the implementation of SER and put the required pressure on the government to act and be held accountable. There is already a constitutional structure in place to provide the basis for developing such an approach in Nigeria, all the courts will need to do is give a nuanced and structured interpretation to the SER in the Nigerian constitution, validating them with the clear provisions of the African Charter that provides for SER and also makes them immediately enforceable.<sup>122</sup>

In the context of articles 6, 11 and 12 of the ICESCR, the strong and extensive use of judicial review will hugely prove to be instrumental in proffering substantive local judicial remedies anticipated in General Comment 9 (the domestic application of the ICESCR) to cure violations of SER. The application of minimum core obligations encapsulating the essential core of these rights through judicial review will have a beneficial impact on the realisation of SER especially in the UK where it has been used in matters with implications for SER. From a Nigerian perspective, the stage for the application of the minimum core of SER through the instrumentality of judicial review is already set.<sup>123</sup> It is now left for the judiciary to cause the executive and legislature to open a discourse on how best a normative concept of a minimum core standard of all SER can be developed and progressed further. Institutional comity and inter-arm dialogue in respect of SER should now replace judicial deference or near abstention from considering SER violations in both jurisdictions on the pretext of lack of democratic legitimacy and institutional capacity.<sup>124</sup> Flashes of this have been seen recently; the case of *UK v Miller*<sup>125</sup> goes to illustrate how effective the judiciary can be when it comes to checking excesses on the part of the UK government.

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<sup>122</sup> Chidi Odinkalu 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights' 2001 (23) 2 Human Rights Quarterly 349.

<sup>123</sup> The Nigerian judiciary has extensive powers as per the constitution of Nigeria. Section 6 and provides a good basis for the application of a strong judicial review.

<sup>124</sup> For a detailed discussion of this topic, see Jacobus Brand Courts, *Socio-economic rights and transformative politics* (Dissertation presented in partial fulfilment of the degree Doctor of Laws at Stellenbosch University) 614-638

<sup>125</sup> [2017] UKSC 5. In this case, the UK Supreme Court had to consider, among other issues, whether the referendum vote by the UK to leave the EU empowers the executive by the use of the royal prerogative to give notice to leave the EU, without the prior sanction of a Parliamentary statute. The court held by a majority of 8 to 3, that it remained for the UK Parliament to decide by statute whether the UK should leave the EU, since it was by an Act of Parliament that the UK joined the EU.

In the Canadian case of *Vriend v Alberta*<sup>126</sup>, Justice Iacobucci observed that ‘the concept of democracy is broader than the notion of majority rule, fundamental as that may be’;<sup>127</sup> the law does not only exist to protect the interest of majority or the elites, it also exists to protect the legitimate interests of other members of the society and striking the balance with the application of SER is one social function that a modern court should be familiar with. The ECHR coupled with the HRA, and the Nigerian constitution in both jurisdictions could provide sufficient guidelines for the application of a minimum core approach in SER cases. Specifically, on the model being proposed in this research for the courts’ involvement in defining and developing a minimum core for SER, the court must first be able to determine the irreducible elements of these SER with reference to the ICESCR particularly the General Comments in respect of each SER, not forgetting General Comment 3 which contains the overarching principle in respect of the minimum core, and then considering whether the actions or inactions of the government have *prima facie* caused a breach of the minimum core of such SER. This might prove to be challenging in individual cases, however, the court can make reference to the articles of the ICESCR and the relevant General Comments, and then relate these to the relevant existing domestic SER laws in both jurisdictions to ascertain the extent of the violation and whether such violation has sunk below the threshold of the minimum core of such a right. Thankfully, both the UK and Nigeria are common law jurisdictions, and the common law is renowned for its flexibility and practicality.<sup>128</sup> The courts should then be able to develop the minimum content of each SER through the instrumentality of the inherently flexible nature of common law as is the case with the civil and political rights in the HRA and the Nigeria constitution. Over time, this will result in a steady build-up of case law which will fundamentally entrench the minimum core of SER that will evolve and transform society. Of course, to effectuate this model in both jurisdictions will initially require extensive consultation between all the arms of government and other human rights actors in order to chart a common line of approach and manage expectations with all concerned working conscientiously. However, the foundation for this idealistic framework is based on the realisation that human rights, especially those of social and economic nature are instrumental in preserving the dignity of the human person which is the whole essence of the universal human rights movement. For this to become a reality, the law must play an essential role through the courts to improve the average living standards of all members of the society, for as the late professor Aikman once

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<sup>126</sup> [1998] 1 SCR 493.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] UKSC 31, [2015] 1 WLR 2628, para 49.

remarked, individual liberty is meaningless unless ‘it is related to the social and economic rights of the common man’,<sup>129</sup> and to this should be added that there is a greater need presently for more involvement of the court in the realisation of SER.

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<sup>129</sup> Colin Aikman ‘New Zealand and the Origins of the Universal Declaration’ (1999) 29 VUWLR 5.

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