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THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA: A CALL TO FOLLOW GLOBAL TRENDS

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ABSTRACT

Economic, Social and Cultural Rights (ESCR) are almost universally justiciable, owing to a plethora of international instruments and domestic laws in this regard. From South Africa to India, constitutions and courts have enforced these rights over the years. However, in many developing nations, ESCR still remain non-justiciable. In such countries, ESCR are viewed as being mere government aspirations. Chapter II of the Constitution of the Federal Republic of Nigeria, 1999, which relates to Fundamental Objectives and Directive Principles of State Policy, captures ESCR as non-justiciable. Despite the fact that Nigeria is a signatory to international instruments that are protective of ESCR, the Nigerian Courts are unwilling to enforce these rights because of the express constitutional provisions that they are generally non-justiciable. This paper examines the justiciability status of ESCR in Nigeria and a comparative discourse of the trends in South Africa, India and other similarly situated jurisdictions. The author canvasses for a constitution amendment in Nigeria wherein these rights, just like Civil and Political Rights, are made justiciable. The author further advocates a liberal-minded approach from the Nigerian Judiciary. It has also been canvassed that non-governmental organisations should wake up in their sensitisation obligations vis-à-vis the promotion of the rights under consideration.

Key Words: Constitution, Court, Justiciable, Enforceable, Right.

INTRODUCTION

There is no doubt that the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution) recognises the Economic, Social and Cultural Rights (ESCR) in its Chapter II, which provides for the Fundamental Objectives and Directive Principles of State Policy (Directive principles). However, in Section 6(6)(c), the same Constitution expressly provides that the judicial power of the courts does not extend to enquiry into whether or not the government or state actors have complied with the Directive Principles. This is akin to giving a child a gift with one hand and taking it back with the other.

With an estimated population of 170 million people, Nigeria has been touted as the most populous nation in Africa. Despite the natural resources with which God has blessed the nation, about 70% of its population still lives below the poverty line (Omoruyi and Odiaka, 2015, p. 208). To make matters worse, the citizens cannot enforce the rights to social justice which economic, social and cultural rights engender. This is owing to the non-justiciability posture of the Constitution and the attendant judicial pronouncement vis-à-vis the ESCR.

This paper interrogates the continuous non-justiciability status of the ESCR. The author examines the present constitutional and judicial position on justiciability of the ESCR and the regional and international legal and institutional framework for their enforcement, and draws a comparative analysis between the legal trends in South Africa/India and Nigeria. He advocates a paradigm shift in Nigeria by urging the nation to borrow a leaf from South Africa and India, where the ESCR have been constitutionally and judicially made enforceable. The writer concludes by urging the courts in Nigeria to be more liberal in interpreting the constitutional provisions that relate to the ESCR, while equally canvassing for a legislative intervention by way of a constitutional amendment to herald a justiciability platform for ESCR in Nigeria.

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CLASSIFICATION OF HUMAN RIGHTS

Human rights have been classified into three major types: first generation, second generation and third generation rights as per Vasak (1992). We shall now briefly examine these categories.

First Generation Rights

These are civil and political rights that gained recognition in the 17th century in Europe. They are rights that protect the liberty and fundamental freedoms of individuals. These rights are usually made justiciable under the respective constitutions of most nations. For example, Chapter IV of Nigeria's Constitution contains first generation rights, including the rights to life (section 33), the right to dignity of the human person (section 34), the right to personal liberty (section 35), the right to a fair hearing (section 36), the right to private and family life (section 37), the right to freedom of expression (section 38), the right to freedom of thought, conscience and religion (section 39), the right to peaceful assembly and association (section 40), the right to freedom of movement (section 41), the right to freedom from discrimination (section 42) and the right to acquire and own immovable property anywhere in Nigeria (section 43). These rights can also be found in Articles 2–21 of the UDHR and Articles 7–17 of the African Charter.

Second Generation Rights

These are economic, social and cultural rights that came about as by-products of the evolutionary struggles and socialist movements of the early 19th Century. These rights gained full prominence in the 20th century when nations like the US, Mexico and Germany began to include them into their constitutions (Dakars,1986–1990, p. 39). These rights include the right to work, the right to fair and just conditions of service, the right to form and belong to a trade union, the right to freedom from unemployment, the right to social welfare, the right to clothing, shelter, food and education, and the right to an adequate standard of living. The second generation rights are embodied in Chapter II of the Nigeria's constitution and are generally not justiciable. We shall return to this later. Articles 22–27 of the UDHR also contain second generation rights.

Third Generation Rights

These are also referred to as solidarity rights. Comparatively, they are the most recently acquired rights, and evolved as a result of the nationalistic struggles of developing and dependent nations to free themselves from western domination. These rights include the right to self-determination, the right to peace, the right to a balanced and safe environment, the right to humanitarian relief during disaster, and the right to development (Idigbe, 2003, p. 239).

However, it is pertinent to state here that all human rights, whether first, second or third generation, should be treated equally on the basis of the principles of universality, indivisibility and the interdependence of human rights. The principle of universality means that every person possesses human rights by virtue of their humanity, without reference to race or place of birth/residence. The principle of indivisibility means all rights are indivisible and one right cannot be said to be enjoyed in isolation from other rights. The principle of interdependence means that each human right depends on other rights, in other words that the enjoyment of any given human right is a function of the realisation of all or some of the other rights (Igwe and Ovat, 2010, p. 89-90).

THE LEGAL STATUS OF ESCR UNDER THE NIGERIAN CONSTITUTION

The Nigerian Constitution recognises ESCR, which are embodied under Chapter II as Directive Principles. Under Chapter II, the Constitution makes provision for the duty of the state and all its organs and authorities to conform, observe and apply the provisions relating to ESCR in Nigeria. For example, Section 13 of the Constitution provides that it shall be the duty and responsibility of all organs of government, and all authorities and persons who exercise legislative, executive and/or judicial powers in Nigeria, to conform to, observe and apply the

said Chapter II of the Constitution. However in another breath, Section 6(6)(c) of the same Constitution provides that none of the ESCR recognised in Chapter II of the Constitution are legally enforceable or justiciable. Hence, in *Archbishop Olubunmi Okogie (Trustee of the Roman Catholic School and Ors. V. Attorney-General of Lagos State* (1981)[2], the court stated that the right to education (one of the rights recognised under Chapter II of the Constitution) is inferior to the right recognised under Chapter IV of the Constitution, and that the right is not generally enforceable against the government unless and until there is a legislative framework or a statute that specifically recognises it as an enforceable or justiciable right. Thus, it has been held that the Government or any other person can enforce a right created by a statute, even if such a right is one of the non-justiciable rights under Chapter II of the Constitution (Igwe and Ovat, 2010, p. 89-90).

Quite apart from the constitutional but non-justiciable recognition of the ESCR under the Nigerian Constitution, the Nigerian Government has ratified or signed several regional and international human rights instruments that recognise and urge enforceability of these rights in member states. These include the ESCR, UDHR and the AC. For example, the preamble to the UDHR 1948 enjoins all member nations (including Nigeria) not only to give recognition to ESCR, but also to see that these rights are enforceable.

Similarly, Nigeria, as a signatory to the International Covenant on Economic, Social and Cultural Rights, is expected to see those rights as legal and enforceable rights in Nigeria. These rights are geared towards meeting the basic human needs of the average citizen, thereby using the law to reduce global poverty (Dankofa, 2010, p. 34). Dankofa (2010) is therefore of the view that any action or inaction of government that leads to global malnutrition, poverty, child mortality and lack of access to primary health and educational care amounts to a gross violation of human rights within the purview of Article 2(4) of the ICESCR 1966. As laudable as the provision of the ICESCR may be in engendering a framework to ensure the full physical and mental development and wellbeing of the citizens of the signatory states, it is argued to be inferior to the provisions of the Constitution. Hence, in Nigeria, except when a local statute expressly provides otherwise, all the ESCR embedded in Chapter II of the Constitution remain non-justiciable. We are worried that Nigeria might take a position of non-recognition of ESCR. This is despite the fact that the nation voluntarily agreed to abide by the provisions of the ICESCR without any noticeable reservation. The position of Nigeria and the Nigerian judiciary on the issue of non-justiciability of ESCR, especially in view of the high poverty level in the country, has formed the subject of scholarly admiration and criticism (Adekoya, 2011, p. 2).

Nigeria cannot feign ignorance of its obligations under the ICESCR. Article 2(1) of ICESCR urges the government to deploy maximum resources towards realising ESCR by appropriate means, including legislative measures. The Committee on Economic, Social and Cultural Rights (the Committee) had posited that every signatory to the ICESCR has the obligation to ensure that the ICESCR norms are recognised and enforced within its domestic or municipal legal order, and that remedial mechanisms should be put in place. According to Jeen-Bernard (2003, p. 257), state parties to the ICESCR are obligated to recognise, implement and enforce the ESCR within their jurisdictional conclave. Therefore, Article II of the ICESCR, which provides for the "right of everyone to any adequate standard of living for himself and his family including adequate food, clothing and housing and to the continuous improvement of living condition", as well as 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 his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness,

[2] (1981) 1 NCLR 218.

> disability, widowhood, old age or other lack of livelihood in circumstances beyond his control,

should have resulted in offering Nigerian citizens an enforceable solution to their desire for a better society and economic package since Nigeria acceded to the ICESCR on 29 July 1993. However, the Nigerian Courts have always interpreted these international instruments through the lens of the non-sustainability clause in Section 6(6)(c) regarding those rights. As seen in the *Archbishop Olubunmi Okojie case* (1981), the right to education is not justiciable in Nigeria, although it is a recognised right under international human right instruments (Oyajobi, 1993, p. 12).

The Nigerian posture is a radical departure from that of the international community on the enforceability of ESCR. For example, at its 22nd Session, the General Comment 14 and paragraph 1 of the General Comment provides that,

> Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realisation of the right to health may be pursued through numerous complementary approaches, … the right to health includes certain components which are legally enforceable.

Going by the above comment on ESCR, one tends to agree with Ortuanya (2012, p. 102) that "the right to health [and indeed all other ESCR] is a human right hence the right-holder is human being a human being in general. It is a right accruing to human beings irrespective of nationality, religion, sex, race, political affiliation or any other differences."

The closest enforceable recognition of ESCR in Nigeria was given under the African Charter (1981). The African Charter, the most potent document on ESCR in Nigeria, is a known rights instrument that serves as a tool to address African's political rights issues and provide for some modicum of enforceable ESCR with a view to protecting Africans from deprivation, poverty and other legal challenges peculiar to Africans. The African Charter thus seeks to combine African values with international norms in engendering a better rights package.

Commendably, the African Charter provides for ESCR such as the right to work under equitable and satisfactory conditions, the right to enjoy the best attainable state of physical and mental health, and the right to education (Articles 14, 15, 16, 17 and 22 of the African Charter). Nigeria as a nation has not only ratified it, but has also gone ahead to domesticate it by incorporating it into its corpus of law. This is by virtue of the African Charter on Human and Peoples Rights (Ratification and Enforcement) ACHPR (RandE) Act. Section 1 of the Act domesticates the African Charter and makes it enforceable in Nigeria. The Charter has thus been used to advance ESCR in Nigeria. In *Ogugu v. State* (1994)[3], the Supreme Court of Nigeria held, *inter alia*, that "*the human and people's rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules and practice of each court.*"

Similarly, in *Fawehinmi v. Abacha* (1996)[4], the Court of Appeal of Nigeria also held that, by enacting the African Charter into the Nigerian Organic Law, the tenor and intendment of the ACHPR (RandE) Act was to vest the Act with a greater vigour and strength than a mere Decree, that the Charter had been elevated onto a higher pedestal than the Constitution of Nigeria, and that its violability had become actionable in court. The court further observed that, in the realm of jurisprudence and the rights of citizens to seek remedy in cases of a violation of any right recognised under the Charter, it cannot be said that no remedy exists. However, when the matter proceeded to the apex appellate court, while agreeing that the ESCR and CP

[3] (1994) 9 NWLR, Pt. 366, 4.
[4] (1996) 9 NWLR pt.475, 710

rights under the African Charter are enforceable by virtue of the domestication Act, the Supreme Court held that the Court of Appeal was wrong to have held that the African Charter was superior to the Constitution of Nigeria because of its international flavour. According to the Supreme Court in *Abacha v. Fawehimi* ((2000)[5]:

> No doubts, Cap 10 (the ACHPR (RandE) Act) is a statute with international flavour. Being so, therefore I would think that it is presumed that the legislature does not intend to breach an international obligation. To this extent, I agree with the Lordships of the Court of Appeal below that the Charter possesses "a greater vigour and strength" than every other domestic statute. But that is not to say that the Charter is superior to the constitution, nor can its international flavour prevent the National Assembly … from removing it from our body of municipal laws by simply repealing Cap 10.

The implication of this position is that the African Charter provisions can only be used to activate and ventilate human rights cases to the extent permitted by the Constitution, which remains the supreme law in Nigeria. Thus, since ESCR are contained in Chapter II of the Constitution and Section 6(6)(C) of the Constitution provides that provisions in Chapter II are not justiciable, it follows that the ESCR under the African Charter cannot or are not enforceable beyond the measure of enforceability or justiciability accorded them by the Constitution. According to Fyanka (2009): *"by including social rights in its Chapter II, the 1999 Nigerian Constitution positively prohibits the justiciability of social rights in Nigeria thereby making litigation relating to these rights impossible"* (p. 59). In view of the Supreme Court decision in *Abacha v. Fawehinmi,* there is no doubt that earlier salutary decisions of the lower courts on justiciability of ESCR under the African Charter have been wasted. For example, in *Constitutional Rights Project v. The President* (Unreported Case of Lagos State High Court in Suits No. M/M/102/92 (May 1993)), Hon. Justice Onakaja of the Lagos State High Court held that "*the provisions of the African Charter on Human and Peoples Rights cannot be ousted by any domestic law*". This still remains the law, though, since the Supreme Court's decision only promotes the Constitution above the African Charter: that is, the Charter is still regarded as being higher than other domestic laws in Nigeria.

Likewise, in *Oronto Douglas v. Shell Petroleum Development Company Ltd* (1999)[6], the Court of Appeal of Nigeria was of the view that an action instituted pursuant to the ESCR provisions of Article 24 of the African Charter was justiciable before the Nigerian Courts. A similar position was taken by the court in *Gbemre v. Shell Petroleum Development Company Nigeria Ltd and 2 Ors*[7] to the effect that the right to life includes the right to a pollution-free environment, as provided for under Article 24 of the African Charter.

Another commendable feature of the African Charter is its position on a uniform or indivisible outcome on human rights. The Charter is the only human rights instrument that expressly provides for the normative principle of interrelatedness and indivisibility of human rights in Nigeria by making no ideological distinction between ESCR and civil and political rights (Fyanka, 2009, p. 68). It gives equal treatment and recognition to both categories of rights. Hence, in the exercise of its interpretative powers, the African Commission on Human Rights held in *The Social and Economic Rights Action Centre v. Nigeria*[8] that the right to food is inseparably linked to the right to dignity of the human person.

[5] (2000) 6 NWLR, Pt. 660, 228.
[6] (199) 2 NWLR, pt. 591, 466
[7] Unreported case of the Federal High Court sitting in Benin City in Suit No.FHC/B/CS/53/05.
[8] Communication 155/96, Fifteenth Annual Activity Report of the African Commission on Human and Peoples Rights 2001–2002.

LESSONS FROM OTHER JURISDICTIONS

It is pertinent to state here that the current global and regional trend is for nations to recognise ESCR as enforceable rights. While some nations have given a constitutional stamp to the justiciability of these rights, others have, through judicial activism, stretched the justiciability of the civil and political rights to ESCR. We shall now examine the positions in South Africa, Ghana and India.

South Africa

The current trend in South Africa is that the status of ESCR has been constitutionally clothed with justiciability. Flowing from the constitutional recognition accorded to those rights by the South African Constitution, the country's Constitutional Court has, commendably, given value to the rights by developing "a wealth of normative jurisprudence arising from challenges based on the social rights that have been guaranteed by that country's democratic Constitution" (Fyanka, 2009, p. 56).

The 1996 Constitution of the Republic of South Africa expressly provides for enforceable ESCR. We reproduce, below, the relevant portions of the Constitution.

Section 26

(1)Everyone has the right to have access to adequate housing; and
(2)The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

Section 27

(1) Everyone has the right to have access to
    (a) Health care services, including reproductive health care;
    (b) Sufficient food and water; and
    (c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance;
(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights; and
(3) No one may be refused emergency medical treatment.

Section 28

(1) Every child has the right
    (a)……
    (b)……
    (c) to basic nutrition, shelter, basic health care and services and social services.

Section 29

(1) Everyone has the right
    (a) To a basic education, including adult education; and
    (b) To further education, which the state, through reasonable measures, must make progressively available and accessible.

Other relevant sections include Section 23, which deals with the right to fair labour practices and the right to form and belong to trade unions; Section 24, which provides for the right to a pollution-free environment; Section 25, which creates the right to acquire and own property by providing that the state has the duty to implement measures aimed at achieving land re-distribution and equitable access to land; and Section 35(2), which protects the rights of prisoners to adequate accommodation, nutrition, reading materials and medical treatment.

Judicial Pronouncements on ESCR in South Africa

Although Section 7(2) of the South African Constitution enjoins the State to respect, protect and fulfil all rights through legislative intervention and executive policies, it is through judicial pronouncements that ESCR have found expression (Mubangizi, 2006, p. 5-6).

There have been some beautifully rendered decisions from the stable of the South African Judiciary. Andrew (2004) is of the view that the Constitutional Court, which was established to act as the court of last resort on constitutional matters, has handed down such progressive and "activistic" decisions that one can only posit that these decisions are a justification for the impressive profile of the legal minds that have been appointed to man the Court. We now examine some of these epochal cases.

***Thiagraj Soobramoney v. Minister of Health, Kwa Zulu-Natal* ((1998(1) SA 765 (CC); 1997(12) BCLR 1696)**

The *Soobramoney* case was, arguably, the first substantive ESCR case that the Constitutional Court adjudicated on. The case involved a terminally ill diabetic man who, owing to scarce hospital facilities, could not access the dialysis treatment that could have preserved his life for a longer period under a state health policy. The appellant filed an application for an order compelling the state hospital to provide him with dialysis treatment to prolong his life. He hinged his lawsuit on the provisions of the above Section 27(3) and Section 11, which provides for the right to life. His argument was that, having been left without treatment for some time and in view of the terminal nature of his illness, his case could be treated as a medical emergency under Section 27(3). The Court held, however, that the constitutional right to emergency medical treatment did not, by any stretch of imagination, extend to the right to life-prolonging treatment for terminally ill patients like the appellant. The Court however recognised the fact that there was a constitutional right to health.

As expected, the decision in the Soobramoney case generated an avalanche of criticisms in legal circles. The Court's position has been described as unprogressive and anti-liberal. In the opinion of Ngwena and Cook (2005, p.135-137), from the point of view of judicial opinions, the Soobramoney case did not contribute much to the understanding of socio-economic rights, nor did it "lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenise jurisprudence on socio-economic rights". We cannot agree less with these writers. To our mind, what the Court did in the Soobramoney case was to engage in needless prevarication on core issues that bordered on a highly sacred and valuable human life. One therefore questions the rationale behind the Court's decision, which sought to sever the right to care from the right to prolongation of life. The two rights are inseparably intertwined. Unarguably, a man who is terminally ill is in no less a position to seek and obtain medical care from the government than a man who suffers from a fever. We therefore submit that the case would have been conveniently entertained within the purview of Section 27 of the Constitution without doing any violence to the letter and spirit of the law. However, on the other side of the divide, the court decision is justifiable on the basis of the limitation clause embedded in Section 27(2) to the effect that the government was only to take measures "within its available resources", and there was evidence of the scanty financial status of the government hospital at that time. Christiansen (2007, p. 321) puts it differently by submitting that the proof of lack of adequate reasonable resources must have swayed the court in its decision. There is a need to balance the conflicting interests of scare state resources and the constitutional right to enjoy ESCR.

The good news, however, is that between the Soobramoney case and the present day, the Constitutional Court has departed from its "common law" position and has embraced liberal judicial activism in its espousal of the ESCR vis-à-vis government responsibility to provide for the needy in the society. This new spirit of the Court was demonstrated in the subsequent cases that came before it.

Government of the Republic of South Africa v. Irene Grootboom and Others **(2001 (1)SA 46 (CC))**

As a matter of preliminary point, the position taken by the Constitutional Court in this case was a radical departure from its earlier decision in the Soobramoney case. Though the facts of both cases were dissimilar, both cases addressed issues relating to the justiciability of ESCR.

In the Grootboom case, Irene Grootboom and hundreds of other adults and children were rendered homeless when their homes were destroyed and their personal effects burnt, owing to their eviction from their informal dwelling place by the government. They were compelled to leave a squatter settlement on private land, which the government had earmarked for the erection of state-sponsored low income housing. Consequently, Grootboom and the other victims of eviction filed a lawsuit for an order compelling the government to provide them with shelter, adequate basic nutrition and health care services, pursuant to the provisions of Sections 26 and 28 of the South African Constitution.

The Court held that the State was liable to live up to its constitutional responsibility of providing housing for its citizens, since housing was a "constitutional issue of fundamental importance to the development of South Africa's new constitutional order". The Court further held that the housing system that sought to render the applicants homeless amounted to unreasonable neglect as far as the issue of addressing the needs of poor and vulnerable persons was concerned. The conclusion the Court drew was that the housing programme did not meet up with the constitutional framework, as it failed to devise, fund, implement and supervise measures aimed at providing access to adequate housing within available resources. Hence, the court had no choice but to grant the relief sought, by compelling the state to remedy the situation and referring the matter to the independent Human Rights Commission to monitor compliance. The Court maintained the same commendable position in the case of *Minister of Health and Others v. Treatment Action Campaign* (2002)[9].

Minister of Health and Others v. Treatment Action Campaign

In this case, a group of non-governmental organisations led by the Treatment Action Campaign challenged government policy regarding the distribution of some retroviral drugs under the public health care system. It was particularly contended that one of the drugs (Nevirapine), which had the potential of drastically reducing the likelihood of mother-to-child HIV transmission, was being hoarded by government, which refused to ensure a widespread distribution of the drug. The government only made the drugs available to designated pilot sites, and the poor, who really needed them, could not access them. The NGOs urged the Court to compel the government to live up to its constitutional bidding as encapsulated in Sections 27 and 28, by lifting the ban on widespread distribution of the drugs.

The court held the government liable by stating that the government policy and measures to prevent mother-to-child HIV transmission fell under its constitutional duty, and it was thus directed to remedy the situation. According to the Court,

> The government policy was an inflexible one that denied mothers and their newborn children … a potentially lifesaving drug. … It could have been administered within the available resources of the state without any known harm to mother or child. … The policy of government …constitutes a breach of the state's obligations under section 27 … of the Constitution.

Khosa v. Minister of Social Development (2004(6) SA 505 (CC))

Here, the applicant successfully challenged a statute which sought to exclude non-citizen permanent residents in South Africa from access to social welfare assistance. The Court held

[9] (2002) 5 SA703 (CC).

that any legislation or executive policy that seeks to discriminate against non-citizen permanent residents was unconstitutional, and so could not stand in the face of Sections 27(1) and 9(3) of the South African Constitution, which guarantees the right to social security and freedom from discrimination.

Ghana

Just as in South Africa, the 1992 Constitution of Ghana also recognises some modicum of justiciability for ESCR. However, the point must be made that the South African constitutional model is more far-reaching and salutary as far as justiciability of ESCR is concerned. The relevant sections of the Ghanaian Constitution will now be briefly highlighted.

Section 20 provides for right to acquire and own private property and the concomitant right to compensation in the event of government compulsory acquisition. Article 22 makes provisions for the spousal right to inheritance, while Article 24 espouses the right to employment and safe working conditions. Article 25 states that everyone has a right to equal educational opportunities and facilities, including the availability and accessibility of basic, secondary and higher education. Article 33(5) makes an omnibus provisions for all rights by stating that the mention of the rights, duties and declarations relating to fundamental human rights and freedoms expressly mentioned in the Constitution does not mean the exclusion of those rights and freedoms not specifically mentioned, but which are considered to be inherent to a democracy and intended to secure the freedom and dignity of humankind. Under this omnibus provision, ESCR such as the rights to health care and shelter, though not expressly constitutionally provided for, can arguably be accommodated under the Ghanaian Constitution.

Pertaining judicial disposition to ESCR in Ghana, although Ghana does not have the luxury of a special court like the South African Constitutional Court, its Supreme Court and other regular courts have had to exercise their judicial *vires* to adjudicate on rights issues being ventilated before them (by virtue of Article 130 (1) of the Ghanaian Constitution). Thus, in *New Patriotic Party v. Attorney-General* (1996–1997)[10], the Ghanaian Supreme Court held, among others, that there are certain circumstances that could make the otherwise non-justiciable Directive Principles of State Policy judicially enforceable, and such situations would include where the Principles are read together with the justiciable fundamental rights provisions of the Constitution.

Apart from the judiciary, the Ghana Commission on Human Rights and Administrative Justice plays a key role in the determination of human rights cases. The Constitution vests a modicum of quasi-judicial powers in the Commission to investigate human rights violations and take appropriate steps to remedy any observed abuses (Articles 216–218). In the exercise of these constitutional powers, the Commission has had to entertain and decide human rights cases like the *Parent-Teacher Association of Ghana International School v. Attorney-General and Alpha Beta Educational Complex v. Ghana Education Service.* In the realm of workers' rights, the Commission has held in *Gabor v. Ghana Reinsurance Co. Ltd* that an employer does not have the right to suspend an employee, unless this right has been expressly donated by the contract of employment or statute.

India

Constitutionally speaking, India is on the same page with Nigeria as regards the justiciability of ESCR. By the import of Section 37 of the Indian Constitution, ESCR contained in the Directive Principles of State Policy are not enforceable by the Court. However, the point of divergence between Nigeria and India is that the Indian Judiciary has been liberal-minded enough to clothe the otherwise non-justiciable rights with the garment of justiciability. The Indian courts tend to give a community reading and interpretation to the Constitution in such a

[10] SCGLR 729 at 788.

way as to make the enforceable rights inseparably and indivisibly intertwined with the non-enforceable ESCR. It is therefore germane to quickly examine some of the pronouncements of the courts in this regard.

In the case of *Francis Coralie Mullin v. The Administrator, Union of Territory of Delhi and Others* (1981)[11], which dealt with the rights to clothing, shelter and nutrition, the Indian Court held that

> The question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more? We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In the subsequent case of *Olga Tellis and Others v. Bombay Municipal Corporation and Others* (1985)[12], the issue was whether the forcible eviction of pavement and slum dwellers and the removal of their belongings under the Bombay Municipal Corporation Act amounted to the deprivation of their means of livelihood, and (if so) whether such a deprivation amounted to a violation of the right to life. The Court held that

> The question which we have to consider is whether the right to life includes the right to livelihood…. It does. The sweep of the right to life conferred by Article 21 is wide and far reaching…. An equally important facet of that right is the right to livelihood, because, no person can live without the means of living….That, which alone makes it possible to live…must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.

Similarly, in *Indian Council of Enviro Legal Action v. Union of India* (1996)[13], the Indian Supreme Court upheld the ESCR to clean environment as part of the right to life. According to the Court:

> When certain industries by their discharge of acid producing plants cause environmental pollution, that amounts to violation of right to life in Article 21 of the Indian Constitution. … The respondents are absolutely liable to compensation for harm caused.

CONCLUSION AND RECOMMENDATIONS

In this paper, we have appraised the justiciability status of Economic, Social and Cultural Rights in Nigeria and other selected jurisdictions. In doing so, we have had recourse to the provisions of the constitutions of the affected nations, as well as to the International Covenant on Economic, Social and Cultural Rights 1966 and the African Charter (to which Nigeria is a signatory). Our findings have revealed that the Nigerian domestic *cum* constitutional jurisprudence does not tilt in favour of making ESCR justiciable. We further found that the Nigerian Judiciary has not been broad-minded enough to give life to ESCR in Nigeria. However, our comparative analysis between the present position in Nigeria and that of South Africa, Ghana and India reveals that Nigeria is lagging behind as far as enforcing ESCR is concerned. These other nations have since either given a wholesale constitutional stamp to the enforceability of these rights, or their courts have (through judicial activism) interpreted the ESCR provisions in such a way as to make them justiciable.

We recommend as follows:

[11] (1981) 2 SCR 516.
[12] (1985) 2 Supp SCR 51.
[13] (1996) All Indian Law Report (AIR) SC 1446

1. There should be a constitutional amendment in Nigeria, wherein the provisions relating to ESCR (currently housed in the non-justiciable Chapter II of the Constitution) can be merged with or moved into the justiciable civil and political rights in Chapter IV of the Constitution, thereby making them constitutionally justiciable. Alternatively, Section 6(6)(c) of the Constitution, which makes Chapter II non-justiciable, should be struck down. After all, Nigeria is a signatory to the African Charter, which in no unclear terms provides that all rights should be treated as indivisible and inter-related. Further, Nigeria is a signatory to the ICESCR, and therefore has an international legal obligation to recognise ESCR and to make sure no domestic laws, including the Constitution, contradict its obligation to respect, protect, promote and fulfil the ESCR provisions under international instruments. It goes without saying that Nigeria is blessed with the wherewithal to engender the enforcement of ESCR, even if in a progressive or graduated manner.
2. The Nigerian Courts should borrow a leaf from their Indian and South African counterparts by being boldly liberal-minded in interpreting the rights provisions of the Constitution. There should be judicial activism and community reading and interpretation of laws in Nigeria. We thus urge the Nigerian Judiciary to carry out their interpretative functions in such a way as to advance, not to defeat, the laudable rights provisions in domestic and international instruments with a view to protecting the common individual. It is trite international law that courts must avoid decisions that would put their States in direct breach of their international obligations, such as the obligation to enforce ESCR (Alston and Quinn, 1987, p. 171).
3. There should be a mass sensitisation or awareness programme for members of the public. NGOs and other publicly orientated bodies should enlighten the public on their rights and the procedure for enforcing them under the Fundamental Rights (Enforcement Procedure) Rules of 2009 and other regular court rules. Happily, the 2009 Rules have heralded a highly simplified procedure and far reaching innovations in the law and practice of human rights in Nigeria, by removing the requirement for *Locus Standi,* leave to apply for enforcement and the statute bar. Citizens should take advantage of these laudable rules and assert their rights in court.
4. The National Human Rights Commission should be more alive to its responsibility by investigating and exposing all manner of rights abuses in Nigeria. The Commission should be legislatively given some quasi-judicial powers to determine human rights cases, just as these are obtainable under the Ghanaian Commission of Human Rights and Administrative Justice. Further, the decisions of the African Court of Justice and the African Commission should be made legally binding on all signatories to the African Charter. The present position of viewing the decisions as recommendations only does not augur well for human rights protection in Africa.

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