FEATURE

Some Recent Developments on Justiciability of Economic, Social and Cultural Rights

Stanley Ibe

I read with interest the thoughtful piece by Ayemere Okojie and Peace O. Folorunsho entitled, 'Some recent developments on justiciability of economic, social and cultural rights' in ESR Review (2017). It traces the origin and development of the concept of justiciability in the context of the seeming rivalry between civil and political rights (C&P rights) and economic, social and cultural rights (ESC rights). In the course of this, it cites various arguments against the justiciability of ESC rights, including that they are vague and framed as obligations rather than as rights. The article concludes, nonetheless, that these arguments apply equally to C&P rights and that ESC rights therefore ought to be justiciable to the extent that states have the capacity apply 'political will' across the two generations of rights.
It is not clear to me what applying 'political will' entails, but I can glean from the concluding remarks that the authors probably want states to 'enact laws that make ESCR justiciable'. They also recommend 'judicial activism' after the manner of South African and Indian courts. As important as these recommendations are, I suspect that, to enhance the standard of living of the poor, we need to do more than transform ESCR into justiciable rights and encourage judges to be activist.

Nigeria's UBE story

In an earlier article (Ibe 2007: 230), I referred to an illuminating discussion of justiciability by two great authors, Jill Cottrel and Yash Ghai, who in 2004 co-edited a collection of essays on ESC rights in practice. In one of the essays, they identify two aspects of the justiciability debate: first, the assumption that courts are inherently incapable of adjudicating because they lack the wherewithal to make decisions about implementation and often are unable to supervise their decisions to ensure compliance; and, secondly, the exclusion of the subject by policy-makers and constitutional drafters.

In the context of Nigeria – the focus of the article under review – it would appear that although the law-makers create a dichotomy between C&P and ESC rights by referring to the latter as 'fundamental objectives and directive principles of state policy' (1999 Constitution: chapter 2), they leave a door open for anyone who might be interested in incrementally realising ESC rights. Specifically, item 60(a) of the Exclusive Legislative List gives the federal parliament the powers to make laws for the promotion and observance of

ESC rights. Indeed, the Supreme Court of Nigeria affirmed these powers in ***Attorney General of Ondo State v Attorney General of the Federation***.

Okojie and Folorunsho point to how the Government of Nigeria took advantage of this door to give legislative effect to the right to education through the Universal Basic Education (UBE) Act of 2004. The same door was exploited to enact the Independent Corrupt Practices & Other Related Offences Commission Act of 2000 (Ibe 2010:202). It is ironic, however, that 14 years after the UBE Act, its objectives have yet to be fully realised.

The UBE story convinces me more than anything else that transforming ESC rights into justiciable rights in Nigeria will not necessarily deliver the goods. We need to do more.

The UBE and anti-corruption legislation were to an extent the products of a judicial decision – ***Archbishop Anthony Okogie & Others v Attorney General of Lagos*** (1981) – wherein the Court of Appeal resolved that the 'National Assembly has the duty to establish authorities which shall have the power to promote and enforce the observance of chapter two of this constitution'. In the light of this, I would like to think that advocacy groups can engage the parliament in a conversation about what other aspects of Chapter II containing ESC rights deserve similar treatment.

One idea worth exploring is providing a framework within which the executive could report to the legislature, and by extension Nigerians, on its progressive realisation of rights established under Chapter II. This could be framed as an annual reflection on the state of ESC rights in Nigeria.

Learning the lessons of the UBE Act

To return to the question of why the UBE Act has failed to deliver the goods, I suspect there are a number of reasons. Clearly, policy inconsistency is one huge challenge. Successive governments do not necessarily align their educational goals with policies they met on assumption of office.

> **One way to address the challenge is to examine the budgeting process**

This presents a serious problem when progress towards an identified goal ought to be measured periodically.

Nigeria's federal structure, and the dissimilarity in commitments and orientation towards education, is another challenge. As I demonstrate below, states respond in very different ways to their obligations to provide counterpart funding for the purpose of implementing the UBE.

While some prioritise making those contributions, others do not. Given that the states hold the key to the success of the programme, it is easy to see that the UBE Act will continue to underperform unless states take their obligations seriously. One of the most significant drawbacks to realising universal basic education is corruption (Bolaji 2014: 181) and its consequences, which include poor infrastructure, demotivated teachers, and escalating tensions between school management and policy-makers.

As much as states can argue about insufficient resources to provide the required access to education, I would like to think they can do more. One way to begin addressing the challenge is to examine the budgeting process – specifically resource allocation and prioritisation. States are mandated under the UBE law to provide counterpart funding to be able to access the resources provided by the federal government of Nigeria. Regrettably, most states have not done so.

In an April 2017 report, the International Centre for Investigative Reporting bemoaned the failure by 10 states – Abia, Benue, Cross River, Ekiti, Enugu, Nasarawa, Niger, Ogun, Osun and Oyo – to access the equivalent of USD 3.3 million each over five

years (2011–2016) because they did not provide counterpart funding.

This is unfortunate, given that schools in the states mentioned could fare better with improved infrastructure and personnel. It would seem that improved quality of education is not a priority. Sometimes, even the meagre resources earmarked for education are frittered away by unscrupulous individuals in and outside of government. I am not sure how justiciability could change this.

> **While the decision in SERAP provides a clear basis to challenge the myth of non-justiciability of ESC rights in Nigeria, it also demonstrates that the Courts may not always have the answers**

Perhaps citizens' demands for accountability and project monitoring will achieve more. The greater the attention citizens give to budget-tracking, the more likely they are to discover how government de-prioritises their interests and then to take appropriate action. As Vivek Ramkumah observes in his highly regarded ***Our Money, Our Responsibility*** (2008: 3), '[B]y tracking budgets throughout their implementation, civil society groups can hold public officials accountable by assessing whether public resources are being spent as they are supposed to be.' I should note that the process of taking action could in fact include litigation. However, litigation alone is inadequate to the task of transforming the lives of millions of disempowered citizens across Nigeria.

The famous case of ***Registered Trustees of Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*** (ECOWAS Court 2010) illustrates the role – and limits – of litigation in realising ESC rights.

The case arose out of an audit of funds allocated for basic education in the 36 states of Nigeria. Led by the Independent Corrupt Practices & Other Related Offences Commission (ICPC) in 2005/6, the audit identified cases of mismanagement in 10 states. SERAP contended that the audit report demonstrated a pattern of corruption and theft of public resources that was prevalent but largely unaddressed by the federal government. As a result of the mismanagement of resources and impunity with which it was treated, about 5 million Nigerian children could not access basic primary education. Among other measures of relief, SERAP sought an order directing the defendants (the Government of Nigeria and UBEC) to make 'adequate provisions for the compulsory and free education of every child forthwith'.

In its judgment, the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) rejected the position that high-level corruption in the educational sector resulted in the denial of right to education; it suggested instead that the theft of state resources ought to be treated as a crime for which perpetrators should face the full wrath of the law. As to Nigeria's claim that while there was a right to free and compulsory primary education, its constitution made this right non-justiciable, the Court decided that the right was justiciable on the strength of the African Charter on Human and Peoples' Rights, which had been domesticated into Nigerian law.

While the decision in SERAP provides a clear basis to challenge the myth of non-justiciability of ESC rights in Nigeria, it also demonstrates that the Courts may not always have the answers. Seven years after the decision, UNICEF reported that Nigeria still had about 10.5 million children out of school – 60 per cent of them from northern Nigeria, the epicentre of the Boko

Haram insurgency) (UNICEF 2017). Sadly, the northeast of Nigeria dramatises how conflicts can roll back the very limited gains of UBE.

South Africa's Grootboom story

The second of Okogie and Folorunso's recommendations – judicial activism – is laudable, but this is almost always the product of demand. Citizens have to make demands of their government by every legal means possible; if these demands fail to be met with favourable responses, then the necessary follow-up action can be undertaken.

With the relaxation of the rules governing ***locus standi***, it is now easier to institute suits compelling government to perform a public function. The 2009 Fundamental Rights Enforcement Procedure Rules enjoin courts to 'encourage and welcome public interest litigation in the human rights field'. It also specifically declares that 'no human rights case may be dismissed or struck out for want of ***locus standi***'. Consequently, there is little obstacle to parties interested in instituting public interest litigation, but, as I suggested earlier, it is important to combine litigation with other interventions.

Unlike Okogie and Folorunso, I do not think that putting ESC rights on the same pedestal as C&P rights will necessarily change the current state of affairs. South Africa is a fine example of why transforming what Paul Farmer refers to as the 'rights of the poor' (ESC rights) into justiciable rights may not be enough.

In a piece I wrote for the State of the Union (SOTU) (Ibe 2016: 6), I referred to the housing crisis in Cape Town and how, in the ***Grootboom*** case, Justice Yacoob of South Africa's Constitutional Court admonished South Africa to look beyond justiciability and enforce the right to access to housing guaranteed under section 26 of the Constitution.

Regrettably, that admonition, along with subsequent decisions on specific ESC rights

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– including ***Port Elizabeth Municipality v Various Occupiers*** (the right to housing, particularly the right not to be evicted from one's home without an order of court); ***Bon Vista Mansions v Southern Metropolitan Local Council*** (the right to water and health); and ***Minister of Health & Others v Treatment Action Campaign & Others*** (the right to health and food for HIV-positive citizens) – has not proven sufficient to translate justiciable ESC rights to better living standards for majority of South Africa's poor (Ibe 2016: 6 n20).

Self-evidently, translating good decisions on ESC rights into concrete outcomes requires the collaboration of the different arms of government (ICJ 2008:85) as well as civil society. That collaboration helps to establish the standards by which implementation can be measured, since there is no use in creating standards that end up being completely out of sync with current realities.

To this extent, litigation for ESC rights ought to be accompanied by negotiation with the relevant institutions of government and civil society for a sound implementation plan that makes specific demands of various institutions and creates an accountability mechanism that sets timelines for them to be met as well as raising red flags when they are not. In this respect, community mobilisation and legal empowerment are critical.

According to the United Nations Commission on the Legal Empowerment of the Poor, legal empowerment is 'the process through which the poor become protected and are enabled to use the law to advance their rights and their interests' (UN

2008: 26). In the context of the ESC rights debate, it is imperative for the poor to own their struggles and provide a blueprint for how their issues might be addressed. Even the UN Commission realises that identity and voice are critical elements in the quest for legal empowerment – so, getting the poor to self-organise for change is important.

Conclusion

As much as the movement towards transforming 'non-justiciable' ESC rights into justiciable ones is legitimate, I do not think it is necessarily a challenge for Nigeria: as I have demonstrated in this piece, there is scope for overcoming that hurdle. Nevertheless, many poor Nigerians do not enjoy the full benefit of rights recognised under the ESC rights regime. It is therefore fairly clear that transforming ESC rights into justiciable rights may not necessarily solve the problem.

The path to changing the status quo must necessarily include some of the steps identified earlier – strengthening the budgetary process through improved citizen participation; promoting demand for accountable leadership at all levels; and, crucially, ensuring legal empowerment of the poor so that they are in a position to make these demands and expect answers. These steps will take some time, but they are worthwhile and ought to be prioritised by all who care about the rights of the poor.

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