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## 2 SOME RECENT DEVELOPMENTS ON JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS by **Eric AyemereOkojie and Peace O. Folorunsho**

### Introduction

On 16 November 1966, the United Nations General Assembly adopted as well as opened for signature, ratification, and accession, via Resolution 2200A (XXI), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its sister covenant, the International Covenant Civil and Political Rights (ICCPR). The ICESCR entered into force on 3 January 1976 in accordance with Article 27.

Whilst the ICESCR deals with economic, social and cultural rights (ESCR) such as work, health, education, social security and social insurance, and an adequate standard of living including adequate food, clothing and housing and the continuous improvement of the standard of living, the ICCPR is concerned with civil and political rights. Among these are the right to life, the right to liberty and security of person, the right to marry and found a family with the full consent of both parties, the right to fair trial, the right to privacy, and the prohibition of slavery and servitude, torture or cruel, inhuman or degrading treatment or punishment.

A good number of these rights (ESCR and civil and political rights) have been incorporated into the constitutions of countries that are state parties to these covenants, including Nigeria (a focus of this paper). According to Trispiotis (2010: 1), these two sets of rights were developed after the 1950s during the Cold War. It should be noted that it was at the time of the adoption of the two covenants that ESCR started playing second fiddle to civil and political rights, a status they have retained into the present day.

Historically, issues pertaining to food, health, education, shelter, and work have troubled the human race (Udu: 28).

The aforesaid have been argued to have been responsible for the Tonghat Peasant Revolution in Korea in 1894, in which, in response to exploitation by local magistrates, peasants occupied the county office, seized weapons and distributed illegally collected tax rice to the poor (Abelmann: 27).

In China, peasants also resisted taxes which they perceived as inequitable (Hanagana, Moch, and Blake: 158). The issue of food, particularly bread, was the major cause of the French Revolution of 1789 in which the monarch was deposed. According to Udu (28), those who experienced the greatest violation of ESCR were slaves, who suffered from hunger, lived in miserable conditions, had ill-health resulting from poor food and lack of medical care, and had little or no access to formal education.

The establishment of the United Nations (UN) in 1945 after the end of the Second World War was a turning point in the international concern for the protection human rights generally (both civil and political rights as well as ESCR). Article 55 of the UN Charter states amongst others that the UN shall promote a higher standard of living, full employment, and conditions of economic and social progress and development.

It is worth noting that the rights above have been part of the language of international human rights since the adoption of the Universal Declaration on Human Rights (UDHR) 1948 (International Commission of Jurists: 2). These rights are replicated in Articles 22-27 of the UDHR. It should be noted that the UDHR was a non-binding instrument: it was a mere declaration that had a no legal force whatsoever in holding states accountable for the non-implementation of those rights.

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The non-justiciability of ESCR has to do with the relatively less attention accorded to them than to civil and political rights: This anomaly has significantly affected human rights. The treatment accorded ESCR came to the fore at the World Conference in Vienna in 1993, where the Economic, Social and Cultural Rights Committee of the UN reiterated the unsatisfactory role that ESCR has played in political and societal awareness since their codification, arguing that violations of civil and political rights continued to enjoy a special status denied to ESCR (Steiner, Alston and Goodman: 264).

To underscore the importance of ESCR to society, President Roosevelt, in his State of the Union Address to Congress in 1941, identified four freedoms, of which freedom from want is one. He stated that making freedom from want a reality essentially 'means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world' (Roosevelt, 1941). On 11 January 1944, President Roosevelt in a speech to Congress entitled 'Economic Bill of Rights' further stated that as a people we must do everything to ensure that the general standard of living of the people is taking as a priority so as to achieve individual freedom which will be as a result of economic security; the political rights having proved inadequate in that regard.

From the foregoing it can be inferred that the special status continually accorded to civil and political rights can never result in a happy society. The views expressed by President Roosevelt more than 70 years ago remain relevant in our contemporary world. It can be inferred, furthermore, that our failure to pay heed to those warning that there cannot be true individual freedom where economic security and independence are lacking has resulted in a state of uncertainty. Thus, it cannot be overemphasised that the insecurity experienced in the world today is a result of the relegation of ESCR to the background.

### Justiciability

It has been argued that the justiciability and non-justiciability of civil and political rights and ESCR stem from the ICCPR and ICESCR themselves, given the way in which article 2 of both of the covenants was codified (Albrecht, 2012). Under the ICCPR, state parties are obliged to 'respect and ensure' the rights and to 'provide effective remedies' in case of violations, whereas under the ICESCR they are required to 'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] 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 measures' (art. 2, ICESCR).

A number of arguments have been made as to the reason why ESCR are not justiciable. There is the argument that the non-justiciability of ESCR has to do with their vagueness and indeterminacy.

According to Scott and Macklem (1992: 69), 'social rights suffer from a painful lack of precision', and as such cannot be judicially enforced. Trispiotis (2010: 1) states that opponents of the justiciability of ESCR argue that the cost involved in the implementation of ESCR, as well as the judiciary's incompetence to take decisions with economic implications that would substantially affect the budget of a state, account for the non-justiciability of ESCR.

According to Trispiotis (2010: 1), this argument is based on the assumption that judges find it easy to adjudicate on matters dealing on civil and political rights as doing so does not impact on the state's economy. Trispiotis argues otherwise and stated that it is not true as Article 2 of the ECHR puts States under obligation to investigate killings, to build an efficient framework regulating the use of force, etc.

Another argument adduced to justify the non-enforceability of ESCR in terms of article 2 of the ICESCR is that the ICESCR is generally framed in a way that its provisions are expressed as state obligations rather than individual rights (Verna 2005: 9). However, the Committee on ESCR has continued to reject the argument that article 2 is responsible for the non-enforceability of ESCR (Human Rights Features, 58th Session of the CHR 20032). The Human Rights Committee, in its General Comment 6 (Right to life, Human Rights Committee General Comment 6, para 5, 1982), states that the inherent right to life cannot be understood in a narrow interpretation and its protection requires States to adopt positive measures to that effect.

It can be gleaned from the above that the various arguments against the non-justiciability of ESCR also affect civil and political rights, yet they are justiciable. Thus, ESCR can be enforceable in the same way as civil and political rights are. All that the state needs is to have the same political will with regard to ESCR as to civil and political rights. According to Tushnet (2004: 1895), 'a purported right without an accompanying judicially enforceable obligation is, almost literally, toothless'.

In Nigeria, ESCR are provided in Chapter Two of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Entitled 'Fundamental Objectives and Directive Principles of State Policy', this entire chapter of the Constitution is non-justiciable. The ESCR enumerated in the chapter include equal pay for work without discrimination on the ground of sex or any other ground whatsoever; adequate medical and health facilities for all persons; protection of children against neglect; protection and safeguarding of the health, safety and welfare of persons in employment; and the provision of free education at all levels. For instance, section 18 of the Constitution provides for free education for citizens at primary, secondary and university levels of education; by virtue of subsection (3), though, this is only 'as and when practicable'.

However, the government has taken steps to give legislative effect to certain of the ESCR. In 2004, the National Assembly of Nigeria enacted the Universal Basic Education (UBE) Act, 2004. The UBE Act states that every government in Nigeria shall provide free, compulsory and universal basic education for every person of primary and junior secondary school age. The implication of this provision is that if any of the different levels of government fails to so provide, then action can be brought against it. Therefore, the non-justiciability and non-enforceability of ESCR highlight the government's lack of seriousness in waking up to its responsibility.

The South African Constitution of 1996 has enumerated social welfare rights as directly justiciable (Trispiotis, 2010: 4). ESCR are provided in sections 26(1) (the right of access to adequate housing) and 27(1) (the right to health care, food, water, social security and so on). Subsection (2) of sections 26 and 27 enjoin the state to take legislative and other measures within its available resources to progressively realise these rights. To underscore the importance of ESCR, section 184(3) provides that the Human Rights Commission must ensure that relevant organs of government furnished it with information concerning measures that have been taken to realise the rights in the Bill of Rights.

The courts in South Africa have held in a number of cases that ESCR are justiciable and enforceable. They (the courts) have been at the forefront of ensuring that ESCR are given judicial review (Verna, 2005: 42). In *Government of RSA and others v. Grootboom and others* (2001) 1 SA CC, a case on the right to housing, the Constitutional Court held that '[t]he State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing'. The Court also held that it is the obligation of the state to provide access to housing, health care, sufficient food and water, and social security to those unable to support themselves and their dependants.

Furthermore, it held that the Constitution obliges the state to give effect to ESCR and that in appropriate circumstances the courts must enforce ESCR. In *Bon Vista Mansions v. Southern Metropolitan Local Council* (2002) 6 BCLR 625, the Court held that the Constitution required the state to ensure access to sufficient water when a local council disconnected the water supply to a block of residences. In *Khosa Others v. Minister of Social Development and Others* (2004) 6 BCLR 569, the Constitutional Court ruled that the exclusion of permanent residents from social security was unreasonable and inconsistent with section 27 of the Constitution.

According to Verna (2005: 16), the Supreme Court of India has held that where there is a conflict between fundamental rights and directive principles of state policy, fundamental rights are paramount and directive principles are not enforceable in the court of law; as such, citizens cannot complain of violation in order to seek for relief against the state. This was the decision of the Indian Supreme Court in *State of Madras v. Champakan Dorairajan* (1951) AIR SC 525. However, in later cases, such as *State of Kerala v. N.M. Thomas* (1976) 2 SCC 310, the Supreme Court held that 'in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to the directive principles'. The Supreme Court has also held in *Francis Coralie Mulin v. Administrator* that the right to life encompasses the right to adequate housing, shelter and livelihood.

Similarly, the Indian Supreme Court observed in *Olga Tellis v. Bombay Municipal Corporation (BMC)* (1985) 3 SCC 545: that the right to life is hinged upon the right to livelihood and as such should be treated as a constitutional right so as to guarantee every person the right to life.

### Recommendations and conclusion

For society to be a better place, ESCR cannot continue to languish in the shadow of civil and political rights: instead they must be on par with each other. To this end, state parties to the ICESCR must do the necessary by enacting laws that make ESCR justiciable. The enforceability of ESCR depends largely on the courts, as the cases in South Africa and India have shown. We therefore recommend that the judicial activism demonstrated by courts in South Africa and India should be replicated in Nigeria.

There cannot be a right to life when there are no means of livelihood for citizens, nor can there be a right to life when citizens are denied medical health care. The non-justiciability and non-enforceability of ESCR are tantamount to a deniable able to realise the SDGs.

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## 3 UPDATES

### Developments at the United Nations

#### **The report of the Special Representative of the United Nations Secretary-General on Migration Mr. Peter Sutherland, 2017**

In February 2017, the Special Representative of the United Nations Secretary-General on Migration, Mr. Peter Sutherland presented his report to the United Nations General Assembly. The report was developed over the course of nearly two years and is enriched by the ideas of numerous experts.

By making recommendations for the better management of migration through international cooperation, the report aims to show that migration need not be a source of fear and conflict, within nations or between them. The report makes practical suggestions on how willing coalitions of States, working with other stakeholders, can begin to tackle these priorities and gradually broaden the consensus on what a functioning international architecture for migration should look like in 2018 and beyond.

The report is divided into three major sections. The introduction section begins with an acknowledgement that societies worldwide would never have achieved their current level of development without migrants. The report acknowledges that migrants make an important contribution to their new homeland by doing jobs that are needed, paying taxes and often bring new ideas, which make for a more diverse and dynamic society. Through remittances, migrants also contribute to their countries of origin. Remittances have a critical role to play in ending poverty in all its forms everywhere (first Goal of the 2030 Agenda).

In conclusion, the report proposes ways of strengthening the engagement of the United

Nations on migration offers 16 recommendations for improving the management of migration through international cooperation. The report lays out 16 recommendations and He recommends among others, the Develop global guiding principles on migrants in vulnerable situations, including migrant children; Expand legal pathways for people fleeing countries in crisis; Building opportunities for labour and skills mobility by reduce recruitment costs and abuses of migrant workers; Strengthen the architecture to govern labour mobility For more see: <https://undocs.org/A/71/728>

### Developments in the African Region

#### **Statement by the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights (the African Commission), Commissioner Maya Sahli Fadel on the occasion of International Migrants Day 18 December 2017.**

Taking into account the large and increasing number of migrants in the world, International migration day is observed annually on 18 December since the year 2000. On this day, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa of the African Commission on Human and Peoples' Rights (the African Commission), Commissioner Maya Sahli Fadel acknowledged that migration is an inherent feature of the human condition and despite efforts aimed at dissuading or putting an end to this phenomenon, it will persist so long as factors such as violence, poverty, discrimination, inequality, climate change, natural and other disasters continue to prevail.

Thousands of refugees and migrants die or are killed every year in the migration and flight routes that stretch from West Africa through Niger to Libya; from the Horn of Africa through the Sudan into Libya. In a report "Behind the Numbers, (2013)" the International Organization for Migration admits that determining how many die or are killed is "a great challenge", and that, at a minimum, 46,000 migrants have lost their lives or have gone missing worldwide since 2006. Smugglers and traffickers are an integral component of this movement; without them, refugees and migrants are generally unable to navigate the barriers many States erect to deter entry. Efforts should especially be deployed to address the root causes of migration and prevent the occurrence of tragedies such as the loss of human lives in the Mediterranean and the Sahara Desert.

As a way forward, she reiterated that African States which have adopted and ratified the African Charter on Human and Peoples' Rights (the African Charter) must provide effective protection to their migrant populations in accordance with Article 5 which guarantees the right of every individual to the respect of the dignity inherent in a human being and protects the individual from all forms of exploitation and degradation of man particularly slavery, slave trade, physical or mental torture. The Special Rapporteur calls on all stakeholders to treat migrants with the dignity that all human beings deserve, as enshrined in the African Charter and rooted in African values.

Statement by Commissioner Maya Sahli Fadel, Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa. See: <http://www.achpr.org/press/2017/12/d382/<>