

# Towards Justiciability of Economic, Social, and Cultural Rights in Nigeria: A Role for Canadian-Nigerian Cooperation?

Halima Doma Kutigi

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/thr>

 Part of the [Human Rights Law Commons](#)

---

## Citation Information

Kutigi, Halima Doma. "Towards Justiciability of Economic, Social, and Cultural Rights in Nigeria: A Role for Canadian-Nigerian Cooperation?" *The Transnational Human Rights Review* 4. (2017):  
<http://digitalcommons.osgoode.yorku.ca/thr/vol4/iss1/7>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Transnational Human Rights Review by an authorized editor of Osgoode Digital Commons.

# TOWARDS JUSTICIABILITY OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN NIGERIA: A ROLE FOR CANADIAN-NIGERIAN COOPERATION?

HALIMA DOMA KUTIGI\*

## Abstract

On the broad level, this article discusses ESC rights in Nigeria in the context of the international human rights architecture, and in the context of the reality and play of global affairs. In these contexts, bilateral as well as other international agreements maintain a vital role in fostering transnational cooperation in the field of human rights. It is within this framework that Canadian-Nigerian engagement in the fulfilment of ESC rights is considered. The article also considers the theoretical aspects of ESC rights juxtaposed against CP rights, thereby expounding interdependence of these categories of rights. In the course of the discussion, judicial interpretation of the constitution and other provisions relating to ESC rights in Nigeria are examined, with the objective of making a case for the justiciability of ESC rights in Nigeria. In the end, the article concludes that Canadian-Nigerian human rights cooperation has a role to play in enhancing the legal and judicial implementation of these rights in Nigeria.

**1.THE REALITY OF GLOBAL AFFAIRS**, with the instrumentality of bilateral and other international agreements, plays a vital role in fostering transnational cooperation in the field of human rights. Accordingly, by sharing values such as multiculturalism and institutions such as federalism and commonwealth membership, Canada has always collaborated with Anglophone African countries in the areas of politics, trade, security, and development.<sup>1</sup>

Having established diplomatic relations in 1962,<sup>2</sup> the Canada-Nigeria Bi-National Commission (BNC) serves as a pivot for bilateral exchanges in politics, trade, development, and security<sup>3</sup>. Over the years, this established cooperation between the two countries has achieved tremendous success in many areas including human rights. An assessment of the literature documenting the nature, attainments, problems, and prospects of Canada's cooperation with Nigeria in the area of Economic Social and Cultural (ESC) Rights reveals

---

\* Lecturer, Nasarawa State University, Keffi, Nigeria; email: halimsi@yahoo.com.

<sup>1</sup> Government of Canada, *High Commission of Canada in Nigeria*, online: <[http://www.canadainternational.gc.ca/nigeria/bilateral\\_relations\\_bilaterales/canada\\_nigeria.aspx](http://www.canadainternational.gc.ca/nigeria/bilateral_relations_bilaterales/canada_nigeria.aspx)>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

that Canada has implemented a number of projects in that respect.<sup>4</sup> For instance, through the provision of \$60 million in financial aid from 2009-2010 through the *Muskoka Initiative*, the Canadian government has supported Nigeria improving maternal, new born, and child health. Canada has also intervened in other thematic areas of education, food, and housing. Another significant engagement is in the area of peace and security which was achieved through initiatives such as the Counter Terrorism Capacity Building (CTCB), The Global Partnership Program (GPP), Peace and Security Operations (PSOP), and Regional Technical Assistance (RTA), which are all aimed at establishing a nexus between law enforcement, security, and international human rights standards as well as ethno-religious tolerance in the parts of the country.<sup>5</sup> Presently, Canada is involved in monitoring and assisting victims who are displaced as a result of the Boko Haram insurgency, contributing over \$7 million to the International Committee of the Red Cross (ICRC) and the United Nations High Commission for Refugees (UNHCR) to cater to the needs of refugees and internally displaced persons.<sup>6</sup>

Human rights are the rights held by all persons by virtue of their common humanity to live a life of freedom and dignity. These rights are universal and everyone, regardless of sex, race, nationality, and economic background, shares them equally. They are inalienable (*i.e.* they can neither be taken away nor given up), and they are indivisible (*i.e.* no right can be suppressed in order to promote another right).<sup>7</sup> Accordingly, The United Nations Charter affirms that “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction” is essential.

---

<sup>4</sup> Jake Okechukwu Effoduh and Saratu Bissallah-Alao *Canadian-Nigerian Human Rights Cooperation in the area of Economic and Social Rights*, Second Osgoode/Nials/Censoj Partnership Development Program Workshop (2015) (Unpublished paper).

<sup>5</sup> Government of Canada, *High Commission of Canada in Nigeria*, *supra* note 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> See UNDP, *Human Rights and the Millennium Development Goals Making the Link* (Oslo, Norway: Oslo Governance Centre, 2007) at 8, online: <[www.undp.org/content/undp/en/home/librarypage/environment-energy/water\\_governance/human-rights-and-the-millennium-development-goals-making-the-link.html](http://www.undp.org/content/undp/en/home/librarypage/environment-energy/water_governance/human-rights-and-the-millennium-development-goals-making-the-link.html)>.

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

Across the centuries, conflicting political traditions have elaborated different components of human rights or disagreed over which elements have priority. Thus, human rights are generally divided into three categories known as “generations of rights”. The first generation are civil and political rights (CP rights), which are normally described as civil liberties or fundamental rights. They consist of the bundle of rights that make the human condition tolerable. Such rights include the right to life, right to freedom of opinion, the right to fair trial, and right to protection from torture, slavery, and violence. The second generation constitutes economic, social and cultural rights (ESC rights). ESC rights reflect the higher aspirations of human beings for their quality of life, justifying the suspension of other personal liberties by handing over control to the state with respect to the regulation of coercive force and the power to make laws. ESC rights are provided under Articles 20-23 of the United Nations Declaration on Human Rights (UNDH),<sup>8</sup> which proclaims that every member of society is entitled to the enjoyment of certain ESC rights (including the right to social security) and is entitled to the realization of those rights through both national efforts and international cooperation. These ESC rights include the right to education, right to social protection, right to employment, right to healthcare, etc. The third generation of human rights, some of which are still contested, are rooted in the work of the law and development movement, which has dominated human rights debates in recent times.<sup>9</sup> This group of rights includes the right to peace and security, the right to economic autonomy, and the right to development itself.

---

<sup>8</sup> Adopted by the General Assembly of the UN on 10 December 1948.

<sup>9</sup> The movement to establish development rights alongside the first and second generations of human rights remains strong and continues to grow. See “Improving the Civil Rights of People With Disabilities Through International Law, in *Law, Rights, and Disability*, Jeremy Cooper, ed (London: Jessica Kingsley, 2000) at 61.

The classification of rights enumerated above has influenced global perceptions regarding the nature of human rights.<sup>10</sup> It has also influenced the global view on whether certain rights are immediately or progressively achievable and subject to resources.<sup>11</sup> Thus, in litigation, lawsuits pass through three stages. First the court determines justiciability. If the lawsuit is justiciable, the court rules on the merits. If the plaintiff prevails, then the court determines the remedy. Whereas lawsuits involving CP rights easily pass through these stages, this is not the case with ESC rights, particularly when the relevant constitution has cast these rights as non-justiciable.

This article discusses ESC rights in Nigeria within the context of the international human rights architecture and in the context of the reality and play of global affairs. The article also considers the theoretical aspects of ESC rights juxtaposed against CP rights, thereby expounding interdependence of these categories of rights. In the course of the discussion, judicial interpretation of the constitution and other provisions relating to ESC rights in Nigeria are examined with the objective of making a case for the justiciability of ESC rights in Nigeria. In the end, the question of whether or not there is a significant role for Canadian-Nigerian human rights cooperation in enhancing the legal and judicial implementation of these rights in Nigeria is considered. This last discussion concludes the article.

## II. WHAT ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

As a prelude to the enunciation of the rights guaranteed by the text of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),<sup>12</sup> the preamble to the

---

<sup>10</sup> Angelo Dube, *Disability Rights Protection Under the African Human Rights System: In Light of the Convention on Persons Living With Disabilities* (Berlin: Lambert Academic Publishing, 2007) at 20.

<sup>11</sup> *Ibid.*

<sup>12</sup> *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

covenant provides a definite affirmation of the principles proclaimed in the *United Nations Charter* and the *Universal Declaration on Human Rights*. It provides thus:

The states parties to the Covenant, considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

Recognizing that, in accordance with the universal declaration of human rights the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social, and cultural rights as well as his civil and political rights.

Considering the obligation of states under the Charter of the United Nations to promote universal respect for and observance of human rights and freedom. Realizing that the individual, having duties to other individuals and to the community which he belongs is under a responsibility to strive for the promotion and observance of the rights recognized in the present covenant.

ESC rights therefore refer to those rights that protect the necessities of life or that provide for the foundations of an adequate quality of life. The necessities of life encompass, at a minimum, the rights to adequate nutrition, housing, health, and education.<sup>13</sup> All of these rights provide foundations upon which human development can occur and human freedom can flourish.<sup>14</sup>

Although ESC rights can have “positive” as well as “negative” claim dimensions, this category of rights may be viewed in their “positive claim” context as claims against the state to have certain basic social and economic needs satisfied.<sup>15</sup> These kinds of social claims have been defined by Amartya Sen as basic entitlements – the reason being that, people are entitled in the prevailing system of institutional rights to adequate means for their survival.<sup>16</sup> He further argues that entitlements are the totality of things a person can have by virtue of his

---

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> LM Keller, “The Indivisibility of Economic and Social Rights,” Book Review of *Development as Freedom* by Amartya Sen, 1:3 Hum Rts & Hum Welfare, Online:< [www.du.edu/korbel/hrhw/volumes/2001/1-3/keller-sen.pdf](http://www.du.edu/korbel/hrhw/volumes/2001/1-3/keller-sen.pdf)>.

<sup>16</sup> Amartya Sen, *Development as Freedom* (New York: Knopf, 1999) at 30.

rights, which in turn depends on the legitimized process of acquiring goods under the relevant system.<sup>17</sup>

### **III. ECONOMIC, SOCIAL AND CULTURAL RIGHTS VS CIVIL AND POLITICAL RIGHTS: GENESIS OF THE DICHOTOMY**

The emphasis on CP rights as opposed to ESC rights has been even more evident since the end of the Cold War, thereby reinforcing the former and marginalizing the latter. It is important to note that prior to the adoption of *International Covenant on Civil and Political Rights* (ICCPR),<sup>18</sup> and the ICESCR, a single instrument containing the whole cluster of rights was envisioned. Indeed, the *Universal Declaration of Human Rights*, on which these two covenants are based, contains both CP and ESC rights. However, the drafters and the states, which would eventually ratify the agree-upon instrument, were divided in their views and this influenced both the decision to adopt two separate covenants and the wording of the two instruments. As a result, Article 2(1) of the ICCPR and Article 2 (1) of the ICESCR<sup>19</sup> (which specify the general obligations of State Parties in relation to each of the substantive rights protected in the relevant instrument) are formulated differently to reflect the drafters' perception regarding the nature of the rights contained in each treaty and their sense as to the ways and means of implementing these two sets of rights. The perception was that CP rights are capable of immediate implementation by any state regardless of its economic strength, since – as they imagined – these rights do not cost the state anything to implement. The prevalent sense was that the only thing required of the state in regards to CP rights is a willingness to abstain from interfering in the enjoyment of those rights and to enact

---

<sup>17</sup> *Ibid.*

<sup>18</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

<sup>19</sup> Both Articles are contained in Part II of each Covenant which provides for the general obligations applicable to all the rights contained in Part III of each Covenant (Articles 6-27 of the ICCPR, and Articles 6-15 CESCR).

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

legislation and adopt administrative measures to effectuate this non-interference.<sup>20</sup> ESC rights, on the other hand, were thought to require economic resources for their enjoyment and, by implication, must be gradually implemented.

It is argued that, as has become widely recognized in the literature,<sup>21</sup> the dichotomized view of these two sets of rights is problematic. As aptly opined by Professor Osita Eze, “to the extent that socio-economic rights are not guaranteed, then to that extent will civil and political rights remain palliatives for the masses”.<sup>22</sup> Justice Bhagwati further emphasizes the relevance of socio-economic rights in his notable pronouncement to the effect that:

...to a large majority of people who are living in almost subhuman existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty, though representing some of the cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them [is] to remake the material conditions and usher in a new social order where socio-economic justice [will] inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.<sup>23</sup>

Both sets of rights therefore go hand in hand and establishing a dichotomy between them undermines the full enjoyment of human rights. For vulnerable persons such as the poor, considering their history of marginalization, it becomes clear that this would, in practice, hinder them from enjoying even the most basic rights and freedoms. It has thus been argued, and rightfully so, that States have a duty to provide for the enjoyment of ESC rights

---

<sup>20</sup>See ICCPR Committee, *General Comment No 31[80]: The Nature of General Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> Sess, UN Doc CPPR/C/21/Rev.1/Add.13 (26 May 2004) at para 14. The Committee states that the requirement under Article 2(2) to take steps to give effect to rights under the Covenant is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural, or economic considerations within the state.

<sup>21</sup> Dakas CJ Dakas, “A Panoramic Survey of the Jurisprudence of Indian and Nigerian Courts on the Justiciability of Fundamental Objectives and Directive Principles of State Policy” in Epiphany Azinge & Bolaji Owasanoye, eds, *Justiciability and Constitutionalism: An Economic Analysis of Law* (Lagos: Nigerian Institute of Advanced Legal Studies Press, 2010) 262.

<sup>22</sup> Osita Eze, “Human Rights Issues and Violations: The African Experience”, in George W Shepherd Jnr & Mark OC Anikpo, eds, *Emerging Human Rights: The African Political Economy Context* (Westport, Connecticut: Greenwood Press, 1990) 87 at 102.

<sup>23</sup> *Minerva Mills v Union of India*, 1980 AIR 1789, 1981SCR (1) 206 at 1843.

when individuals or groups are unable, for reasons beyond their control, to realise these rights themselves by the means at their disposal<sup>24</sup>.

#### IV. THE CONCEPT OF JUSTICIABILITY

Closely linked to the dichotomy debate is the question of justiciability of ESC rights. To understand the nature of this link, the concept of justiciability will now be analyzed. The term “justiciability” refers to the ability or otherwise of people who claim to be victims of rights violations to file a complaint before an independent and impartial *judicial* body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have the applicable remedies enforced.<sup>25</sup>

The justiciability of ESC rights has been the topic of much academic and institutional debate. Without reciting in full the analysis contained within such publications, it is important to point out that the objections to the justiciability of ESC rights have for a long time effectively precluded many judicial institutions from playing their role in the protection of ESC rights and in ensuring that victims of all human rights violations are guaranteed access to effective remedies. The prejudices and misconceptions about ESC rights that have long discouraged judicial and quasi-judicial bodies from playing an active role in the protection of this category of rights in cases of violations relate both to the nature of these rights (and the nature of the corresponding State obligations) and to the ability and legitimacy of judicial and quasi-judicial bodies to adjudicate them.<sup>26</sup>

The first such argument, which contends that ESC rights are excessively vague, has

---

<sup>24</sup>Wouter Vandenhoele, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerpen/Oxford: Intersentia, 2005) at 237, quoted in Dube, *supra* note 10.

<sup>25</sup>International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No 2 (ICJ, 2008) at 1.

<sup>26</sup>International Commission of Jurists, “2.1 Progress towards a global recognition of the justiciability of ESC Rights” in ICJ, *Guide: ESCR Litigation*, online: <[www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-quasi-judicial-bodies-2/2-1-progress-towards-a-global-recognition-of-the-justiciability-of-esc-rights/](http://www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-quasi-judicial-bodies-2/2-1-progress-towards-a-global-recognition-of-the-justiciability-of-esc-rights/)>.

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

been largely defeated by developments in the interpretation of international and national human rights standards.<sup>27</sup> It is now clear to almost all reasonable commentators on this subject that the substance of ESC rights is not necessarily different from that of CP rights, since the general character of the provisions guaranteeing rights in international treaties and in domestic constitutions and law is not restricted to just ESC rights. It is also clear that, for all kinds of rights, statutory and regulatory elaboration, as well as interpretation by the appropriate monitoring or adjudicative bodies, is needed to specify their content. The situation is not different in the case of the content of ESC rights.<sup>28</sup>

Other arguments against the justiciability of ESC rights are basically political and procedural. These include the assumptions that in reviewing certain social policies and laws and in making decisions that have resource implications, the judiciary would exceed its powers and encroach on the decision-making power of the executive and legislative branches of government in a democratic regime. Another such assumption is that judicial or quasi-judicial bodies are not equipped procedurally and technically to deal with complex cases concerning social and economic policies. However, in many jurisdictions, judicial and quasi-judicial bodies have found their way around such purported obstacles to the justiciability of ESC rights, hence proving that such bodies can play an important role in the realization of ESC rights.<sup>29</sup>

## V. ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA

The *Constitution of the Federal Republic of Nigeria 1999* creates a bifurcated regime of human rights. On one hand, Chapter IV of the Constitution provides for “Fundamental Rights” (which embody civil and political rights) and expressly makes this category of rights

---

<sup>27</sup> International Commission of Jurists, *A Guide for the litigation of Economic, Social and Cultural Rights in Zimbabwe* (Geneva: ICJ, 2015) at 10, online: <[www.icj.org/wp-content/uploads/2016/09/Zimbabwe-Guide-ESCR-web-Publications-Thematic-Report-2015-ENG.pdf](http://www.icj.org/wp-content/uploads/2016/09/Zimbabwe-Guide-ESCR-web-Publications-Thematic-Report-2015-ENG.pdf)>.

<sup>28</sup> *Ibid*

<sup>29</sup> *Ibid*.

justiciable.<sup>30</sup> This class of rights is mainly liberal in its pedigree and forms the core of the so-called first generation rights. These include the rights to life, dignity, personal liberty, fair hearing, private and family life, freedom of thought, conscience and religion, freedom of expression and the press, peaceful assembly and association, freedom of movement, freedom from discrimination, and to acquire and own immovable property anywhere in Nigeria.<sup>31</sup>

On the other hand, Chapter II of the Nigerian Constitution provides for “Fundamental Objectives and Directive Principles of State Policy” and section 13 imposes a “duty and responsibility” on “all organs of government, and...all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply” the provisions of Chapter II. Accordingly, Section 14(2)(a) proclaims that “sovereignty belongs to the people of Nigeria from whom government through...[the] Constitution derives all its powers and authority”. Furthermore Sections 16 and 17 of the Constitution, which specifically deal with economic and social objectives, require the State to steer its policy towards ensuring that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group. It aims to ensure that all citizens should have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment under just and humane conditions. Other such obligations include: suitable and adequate shelter, suitable and adequate food, reasonable national minimum wage, sick benefits and the welfare of the disabled, etc.<sup>32</sup> In summary, the fundamental objectives which address ESC rights issues as mentioned in Chapter II of the CFRN 1999 are: political objectives, economic objectives, educational objectives, foreign policy, and environmental objectives.

---

<sup>30</sup> See Constitution of the Federal Republic of Nigeria, 1999, s 46 [1999 *CFRN*], online: <[www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm](http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm)>.

<sup>31</sup> *Ibid.* See generally ss 33- 43.

<sup>32</sup> *Ibid.*, ss 16-17.

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

It is instructive to note that, in spite of the recognition given to these issues in the Constitution (and the establishment of certain public institutions and laws to ensure that socio-economic rights enshrined in welfare laws are enforced), the same constitution does not accord these ESC rights the status of fundamental human rights, while at the same time doing so in the case of the CP rights guaranteed in its Chapter IV.

What is more, the effect of Section 6(6)(c) of the CFRN 1999 is that issues contained in Chapter II are not justiciable in the courts, except to the extent that they are rendered justiciable in statutes. As such, the non-justiciability of Chapter II is only to the extent provided for Section 6(6)(c) of the Constitution. This point was emphasized by the Supreme Court of Nigeria in *AG Ondo State v AG of the Federation*.<sup>33</sup> In this case, the court was of the opinion that where an Act of the National Assembly (Nigeria's federal legislature) has been passed into law pursuant to the directive principles of state policy, such an Act can be enforced in a court of law.

In part because of her colonial heritage, Nigeria adopted fundamental human rights provisions that were almost entirely civil and political in nature, rather than socio-economic.<sup>34</sup> Thus, almost all judicial, scholarly, and other legal attention has been paid to the promotion and protection of CP rights while comparatively little attention has been focused on the legal realization of ESC rights. Many reasons have been offered to explain this, including the recommendations of the Willink Commission on Minorities<sup>35</sup> and the demands by early nationalists.<sup>36</sup> Professor Osita Eze attempted to provide a reason for the absence of socio-economic rights in the constitutions of most African states when he stated that:

---

<sup>33</sup> (2002) 9 NWLR (Pt 772) 222.

<sup>34</sup> Osita Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs & Macmillan Publishers, 1984) at 3.

<sup>35</sup> Akin Olowale Oluwadayisi, "Economic and Socio-Cultural Rights in the Democratic Governance of Nigeria: Enforcement Mechanisms Beyond Justiciability" (2014) 5 Nnamdi Azikiwe University UJ International & Jur 105.

<sup>36</sup> Abiola Ojo "Fundamental Human Rights in Nigeria: The 1963 and 1979 Constitutional Provisions" (1977-80) Nig J Contemporary L 118.

The reason for the marked absence of socio economic rights in African constitutions is often based on the fact that unlike political and civil rights which attempt to limit the encroachment of states and its [sic]instruments on human rights they require states to provide material means for their enjoyment...since African countries are undeveloped, it will be futile to encourage litigation on the infraction of socio economic rights.<sup>37</sup>

## **VI. THE DOMESTIC APPLICATION OF REGIONAL AND INTERNATIONAL ECONOMIC, SOCIAL, AND CULTURAL RIGHTS NORMS IN NIGERIA**

Nigeria's ratification of the ICESCR in 1993 guarantees its citizenry the rights outlined in the Covenant. The ICESCR imposes direct obligations on states to implement strategies and policies that would lead to the full realization of ESC rights of all persons. Thus, Nigeria is obliged to take steps to the maximum of her available resources progressively to achieve the full realization of the rights recognized in the Covenant.<sup>38</sup>

At the regional level, Nigeria signed, ratified, and domesticated the *African Charter on Human and Peoples' Rights* (ACHPR) in 1983, thereby making it part of its domestic laws.<sup>39</sup> Under the African Charter, ESC rights were accorded the status of basic rights and this marked an important beginning for the recognition of ESC rights as basic rights in Nigeria. The ACHPR recognises, with no dichotomy as such, the following ESC and CP rights as fundamental rights: freedom from discrimination, equality before the law, right to life, dignity of human person, liberty, fair hearing, religion, freedom of information, freedom of expression, freedom of association, freedom of movement, participation in governance, right to property, right to work, right to health, right to education, right to existence, right to dispose of wealth and natural resources, right to economic, social and cultural development,

---

<sup>37</sup> Osita Eze, *supra* note 34, p 31.

<sup>38</sup> ICESCR, *supra* note 18, art 2(1).

<sup>39</sup> *African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act*, Laws of the Federation 1990, Chapter A9 (Nigeria).

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

right to national and international peace and security, and right to have a general satisfactory environment favorable for development.<sup>40</sup>

In regard to the provisions of the ACHPR, The Supreme Court of Nigeria held in *Ogugu v State* that:<sup>41</sup>

Although the African Charter on Human and People's Rights has not made a special provision like Section 42 of the 1979 Constitution for the enforcement of its human and people's rights within a domestic jurisdiction there is no lacuna in our laws for the enforcement of its provisions...<sup>42</sup>

It is important to state here that the domestic application of regional and international human rights norms in Nigeria is guided by the provisions of Section 12 of the Constitution, which clearly states that no treaty between Nigeria and any other State shall have the force of law unless it is domesticated into its body of laws. Although, in *Abacha v Fawehinmi*,<sup>43</sup> the Supreme Court of Nigeria further held that a domesticated treaty is subordinate to the Nigerian Constitution. In the words of Ogundare, JSC (who delivered the lead judgment):

No doubt Cap. 10 [the African Charter on Human and Peoples' Rights as domesticated by Cap. 10] is a statute with international flavor. 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. To this extent I agree with their Lordships of the court below that the Charter possesses "a greater vigor and strength" than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by ... learned counsel for the respondent. Nor can its international flavor prevent the National Assembly, or the Federal Military Government before it [from] remove (sic) it from our body of municipal laws by simply repealing Cap. 10.<sup>44</sup>

Thus, in spite of the Supreme Court's subordination of domesticated regional and international human rights instruments to the Nigerian Constitution, as Ogundare JSC himself points out these instruments, given their regional and international flavor, are superior to conventional Acts of the National Assembly in the hierarchy of norms in the Nigerian legal

---

<sup>40</sup> See generally *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 arts 2-23 (entered into force 21 October 1986).

<sup>41</sup> (1994) 9 NWLR Pt 366 at 1.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Abacha & Others v Fawehinmi*, (2000) 6 NWLR 660 at 228.

<sup>44</sup> *Ibid* at 289.

system.<sup>45</sup> Furthermore, scholars<sup>46</sup> have underscored the fact that a State cannot rely upon or plead the provisions of its domestic law or the deficiencies in that law before an international judicial, arbitral, or similar body in answer to a claim against it for an alleged breach of its obligations under international law.<sup>47</sup> Accordingly, a domestic court, which defers to domestic law, notwithstanding an inconsistent rule of international law itself, acts in breach of international law and will, as an organ of the State, engage the international responsibility of that State. Hence, before an international tribunal, a respondent State cannot plead that its domestic law (not even its constitution) contains rules which conflict with international law. It cannot also plead the absence of any legislative provision or of a rule of its internal law as a defense to a charge that it has broken international law.<sup>48</sup>

It is instructive to note that in addition to domestication and the corresponding resort to the local courts, there are other mechanisms at the regional and sub-regional levels for enforcing ECS rights.<sup>49</sup> These include the African Commission on Human and People's Rights,<sup>50</sup> the Economic Community of West African States (ECOWAS) Court of Justice,<sup>51</sup>

---

<sup>45</sup>Dakas CJ Dakas, "Activism, Ignorance or Playing to the Gallery? Untying the Knots of the Jurisprudence of Nigerian Courts on the Domestic Application of International Human Rights Norms", in Ignatius Ihekumere Gabriel, ed, *New Vistas in Law* (Jos: New World Publishers, 2000) 398.

<sup>46</sup>Dakas CJ Dakas, "Judicial Reform of the Legal Framework for Human Rights Litigation in Nigeria: Novelties and Perplexities" in Epiphany Azinge & Dakas CJ Dakas, eds, *Judicial Reform and Transformation in Nigeria: A Tribute to Hon Justice Dahiru Musdapher, GCON, FNIALS, Chief Justice of Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 2012) 182.

<sup>47</sup>Under Article 27 of the Vienna Convention on the Law of Treaties, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". However, this rule is without prejudice to Article 46 of the Convention which is to the effect that "a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance". A violation is said to be manifest "if it would be objectively evident to any State conducting itself in the manner in accordance with normal practice and in good faith," *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331(entered into force 27 January 1980).

<sup>48</sup> Dakas CJ Dakas, *supra*, note 39.

<sup>49</sup> Danwood Mzikenge Chirwa, "Toward Revitalizing Economic, Social, and Cultural Rights in Africa" (2002) 10:1 Hum Rts Brief 14.

<sup>50</sup> Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (OAU), the African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent.

<sup>51</sup> The ECOWAS Court of Justice is the judicial organ of the Economic Community of West African States (ECOWAS). Founded on May 28, 1975, the Court was created pursuant to the Revised Treaty of the Economic Community of West African States of 1993, and is headquartered in Abuja, Nigeria. In addition to providing

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

and the African Court of Justice.<sup>52</sup> Thus, at its ordinary session held on October 13-27, 2001, the African Commission on Human and Peoples' Rights delivered a landmark decision involving the direct application of a range of ESC rights entrenched in the African Charter on Human and Peoples' Rights (African Charter).<sup>53</sup> The judgment handed down by the Commission in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*<sup>54</sup> marked the first decision that directly addresses the enforcement of ESC rights since the Commission became operational in November 1987. The significance of this case is that, in its decision, the Commission clearly mapped out the negative and positive obligations imposed on states by Articles 16, 24, and 21 as well as the implied rights to food and housing/shelter. Furthermore, the Commission stated that governments have a duty to protect their citizens from destructive actions that may be committed by private parties and that this duty calls for positive action on the part of governments. An accompanying progressive aspect of the decision was the Commission's recognition that the rights expressly set out in the Charter are not exhaustive of the rights protected by it. Some rights are implied by the protection of other rights. Thus, in another landmark judgment that sustained the application of fundamental human rights to an environmental case, the Federal High Court Benin City of Nigeria in *Jonah Gbemre v Shell PDC Ltd and Ors*<sup>55</sup> granted leave to the applicant to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in the Delta State of Nigeria. The applicant was also granted leave to apply for

---

advisory opinions on the meaning of Community law, the Court is charged with resolving disputes related to the Community's treaty, protocols and conventions. The Court of also has competence to hear individual complaints of alleged human rights violations.

<sup>52</sup> The African Court of Justice and Human Rights is the primary judicial agency of the African Union. It was founded in 2004 by a merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union. The Court is based in Arusha, Tanzania.

<sup>53</sup> The African Charter is currently the only regional human rights instrument that incorporates economic, social, and cultural rights as well as civil and political rights and subjects all of these rights to a complaint procedure.

<sup>54</sup> *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*, [2001] African Commission on Human and Peoples' Rights, Comm No 155/96, online: ACHPR <[www.achpr.org/files/sessions/30th/communications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf)>.

<sup>55</sup> (2005) Suit No FHC/B/CS/53/05

an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity, as provided by sections 33 (1) and 34(1) of the 1999 Constitution of Nigeria, and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples' Right.<sup>56</sup> The Court held that these constitutionally guaranteed rights inevitably include the rights to a clean and poison and pollution-free healthy environment. The Judge further declared that the actions of the respondents (Shell PDC and NNPC) in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community constituted a violation of their fundamental rights. Furthermore, the judge ruled that the failure of the companies to carry out an Environmental Impact Assessment (EIA) in the community concerning the effects of their gas flaring activities is a clear violation of the EIA Act and has contributed to a further violation of the said environmental rights. The judge's order restrained the respondents from further gas flaring and required them to take immediate steps to stop the further flaring of gas in the community. That the Attorney General should ensure the speedy amendment, after due consultation with the Federal Executive Council, the Associated Gas Re-Injection Act to be line with Chapter 4 of the Constitution on Fundamental Human Rights. But the Judge made no award of damages, costs, or compensation whatsoever.

From the foregoing, it is deduced that the *African Charter on Human and Peoples' Rights* is a special domestic law in Nigeria<sup>57</sup> which provides for civil, political, economic, social, cultural, environmental, developmental, and peoples' rights to self-determination, equality, control of their natural resources and to national and international peace and security. Thus, in the absence of express guarantee or declaration by the Nigerian Constitution on any of the above rights, the African Charter as a domestic law fills in the gaps. Accordingly, the innovative interpretation of the African Charter, together with other

---

<sup>56</sup> *African Charter on Human and Peoples Rights* Cap. A9 Vol. 1, LFN 2004.

<sup>57</sup> *African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act*, *supra* note 39.

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

domestic legislation, is imperative to the justiciability, enforcement, and realization of ESC rights.

### **VII. JUDICIAL INTERPRETATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA**

Section 6 of the CFRN 1999 provides that the judicial powers of the Federation shall be vested in the courts to which this section relates, *i.e.* courts established for the Federation.<sup>58</sup>

As a consequence of Section 6, it has been held by the courts that “judicial power” denotes the power of a competent court to interpret the law, decide, and pronounce judgement, and carry it into effect between persons before it. The responsibilities captured here are enormous, as it involves ensuring that citizens enjoy the rights and freedoms guaranteed under the Constitution through the resolution of disputes involving social and moral questions that are often of profound importance to society.

The judiciary is thus the arm of the government which is constitutionally empowered to interpret the law. It therefore has a significant role to play in ensuring that citizens enjoy the rights and freedoms guaranteed in the Constitution. As such, a timid and weak judiciary could therefore be fatal to the enjoyment of human rights. Thankfully, in recent times (perhaps taking a clue from the regional courts) the Nigerian courts have risen to the occasion and have awarded judgements in favor of certain socio-economic claims.<sup>59</sup> What is more is that Nigerian courts are now incorporating the ACHPR as directed under the fundamental rights enforcement procedure rules.<sup>60</sup>

---

<sup>58</sup> The Constitution also sets out the hierarchy of the courts and their respective jurisdictions. These courts are: The Supreme Court of Nigeria, The Court of Appeal, The Federal High Court, The National Industrial Court, The High Court of the FCT Abuja, The High Court of the States, The Customary Courts of Appeal of the States and the FCT, The Shariah Courts of Appeal of the States and the FCT; such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.

<sup>59</sup> Femi Falana, “Chapter II and Socio-Economic Rights” *This Day Live* (3 May 2016), online: <[www.thisdaylive.com/index.php/2016/05/03/chapter-ii-and-socio-economic-rights/](http://www.thisdaylive.com/index.php/2016/05/03/chapter-ii-and-socio-economic-rights/)>.

<sup>60</sup> Fundamental Rights (Enforcement Procedure) Rules, 2009.

Regarding the role that the courts have played in interpreting the principle of non-justiciability of ESC rights under the Nigerian Constitution, courts have predominantly made the point that these rights are non-justiciable. This was the case in *Archbishop Anthony Olubunmi Okogie & Ors v Attorney General of Lagos State*.<sup>61</sup> In that case, the Lagos State Government, by a circular dated 26 March 1980, purportedly abolished all private primary educational institutions (which were fee-paying) in the state. This was done to ensure that there are equal and adequate educational opportunities at all levels as provided under Section 18 of the 1979 Constitution, a non-justiciable provision. The plaintiffs challenged the government policy on the ground that it was unconstitutional,<sup>62</sup> and applied for a reference of the matter to the Court of Appeal. The Court of Appeal proceeded on the general note that Chapter II is not justiciable and that “the arbiter for any breach of the Objectives and the Directive Principles of State policy is the legislature or the electorate”. The Court further held that the implementation of Chapter II could not be done in such a way as to infringe on fundamental rights enunciated in Chapter IV of the Constitution – *i.e.* in the instance case, the freedom to hold opinion, receive and impart ideas. However, the court refused to declare any policy or legislation as invalid unless it infringes on constitutionally guaranteed fundamental rights.<sup>63</sup> Overall, the court found in favor of the plaintiffs on the basis that hindering them from establishing private schools would amount to a violation of their fundamental right under Section 36 – *i.e.* the freedom to hold, receive, and impart ideas.

By contrast, a scenario under which the courts have favored the justiciability of ESC rights in Nigeria is where statutes enacted to actualize Chapter II provisions are challenged.

---

<sup>61</sup> (1981) 2 NCLR 337. See also *AO Adewole & Ors v Alhaji Jakande & Ors*, (1981) 1 NCLR 262.

<sup>62</sup> It violated their rights to participate in sectors of the economy other than the major sectors of the economy (s. 16(1)(c), a ‘non-justiciable’ section of the of the 1979 Constitution); the responsibility of the Government to provide equal and adequate educational opportunities at all levels is restricted to government but does not preclude the plaintiffs (*i.e.* private sector) from providing educational services (s. 18 of the 1979 Constitution); It violated their constitutionally guaranteed fundamental right to hold opinions, receive and impart ideas without interference (s. 36(1) of the 1979 Constitution, an expressly identified justiciable section of the Constitution).

<sup>63</sup> See AO Popoola, “Fundamental Objectives and Directive Principles of State Policy: Executive Responsibility and the Justiciability Dilemma” in Azinge & Owasanoye, *supra* note 21 at 324.

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

In addition to the earlier discussed international and regional human rights instruments that have recognized the socio-economic rights of citizens and which have been ratified by Nigeria, the National Assembly has enacted into statutory law certain provisions of Chapter II of the Constitution. Such enactments include the Nigerian Education Bank Act, the Child's Right Act 2003, the Compulsory, Free, Universal Basic Education Act 2004, the Independent Corrupt Practices and Other Related Offences Commission Act, 2000, the Freedom of Information Act 2011, etc. Thus, in *Attorney General of Ondo State v Attorney General of the Federation & Ors*<sup>64</sup>, the Ondo State Government challenged the constitutionality of the enactment of the Corrupt Practices and Other Related Offences Act under which the Independent Corrupt Practices and Other Related Offences Commission (ICPC) was established to fight corruption throughout the country, including through the prosecution of alleged offenders. The Supreme Court, per Uwaifo JSC, justified the enactment of the Act on the basis of the Fundamental Objectives and Directive Principles of State Policy. Borrowing from Indian jurisprudence, he declared as follows:

[Every] effort is made from the Indian perspective to ensure that the Directive Principles are not a dead letter. What is necessary is to see that they are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together, to give expression to any one of them through appropriate enactment as occasion may demand.

Similarly, in *AG Lagos State v AG Federation*,<sup>65</sup> the Supreme Court held that the National Assembly was competent to enact the Federal Environmental Protection Agency Act<sup>66</sup> for the protection of the environment in furtherance of Chapter II. These last two cases represent an alternative route via which Chapter II could be judicially enforced.

---

<sup>64</sup> (2002) 9 NWLR (Pt 772) 2.

<sup>65</sup> (2003) 15 NWLR (Pt 842) 113, 175.

<sup>66</sup> Federal Environmental Protection Agency (Amendment) Act 1992.

## VIII. CONCLUSION

It is a general principle of law that an effective remedy must accompany every right so that in case of its violation, the victimized person has a measure of redress. The right to an effective remedy must be guaranteed and should be available in cases of the violation of ESC rights. In view of this necessity, there is a growing global acceptance of the justiciability of ESC rights. This has begun to translate into concrete progress in making domestic remedies more accessible and effective for rights-holders who want to claim their ESC rights and seek protection from the violation of such rights.

In Nigeria, vast proportions of the citizenry accept that it is a basic responsibility of the Government to promote, protect, and help realize their socio-economic rights, regardless of what the Constitution or other law provide. Ideally, the attitude of the courts towards the enforceability of socio-economic rights would be ordinarily positively influenced by the societal norm. Regrettably, despite the modest progress that is being recorded in the enforcement of socio-economic rights in Nigeria discussed in this article, many judges and lawyers (including even human rights advocates) are not familiar with this new trend in human rights jurisprudence. Hence, there is the urgent need to challenge the popular belief among judges, lawyers, and even human rights activists that socio-economic rights are not justiciable in Nigeria. This can be achieved with adequate advocacy and capacity building among all the stakeholders involved.

In light of the foregoing, there is a strong need for a research agenda in the area of the “Strengthening of Economic, Social and Cultural Rights in Nigeria Through Litigation.” In this regard, there is some role, however modest, for Canadian-Nigerian human rights engagement. Canada and Nigeria can replicate the significantly successful Canada–South

## A ROLE FOR CANADIAN-NIGERIAN COOPERATION

Africa Constitutional Litigation and Legal Development Project,<sup>67</sup> through which Canada helped strengthen the availability of the relevant technical legal skills and capacity within relevant institutions in South Africa. Thanks, in part to this project, significant litigation has been successfully undertaken before the South African Constitutional Court, leading to landmark decisions that have entrenched extensive rights in South Africa including the right to shelter, the right to privacy, equality of women, and the abolition of the death penalty.

---

<sup>67</sup> Canada Bar Association International Initiatives, *Southern Africa*, online: Our Projects <[www.cba.org/CBA-International-Initiatives/Our-Projects/Past-Projects/Southern-Africa](http://www.cba.org/CBA-International-Initiatives/Our-Projects/Past-Projects/Southern-Africa)>.