



ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA

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ABSTRACT

Characterisation of Economic, Social and Cultural rights, under chapter II of the 1999 Constitution of the Federal Republic of Nigeria (as amended) as non-justiciable by S. 6(6)(c) of the same Constitution and its implication for state accountability and good governance informed the need for this article. The rights covered under Chapter II of the Constitution and rendered non-justiciable include the rights to education, health care, employment and housing. The performance of government, especially in developing countries is usually assessed by activities in these areas of need since they have direct bearing on the wellbeing of citizens. By rendering these rights unenforceable, S. 6(6)(c) of the Constitution effectively shields political leaders in government from being accountable to the mass majority in the provision of infrastructures and services that they required for a descent life. The same Nigerian Constitution under S. 46 renders enforceable Civil and Political rights in its Chapter IV – the rights to life, liberty, freedom of movement, freedom of Association and religion etc. This article sees the nexus between ECOSOC rights and Civil and Political rights as a justification for the enforcement of ECOSOC rights. This is because you cannot fully enjoy the right to life for example without good health, employment and housing. This paper therefore, recommended amongst others, the enforcement of ECOSOC rights, by expunging S. 6(6)(c) provision from the Constitution and replacing it with a clause that stipulates a minimum percentage of budgets of states and national governments that must be expended annually on ECOSOC related infrastructures and services. This will ensure accountability at all levels of government and actionable in court. The domestication by Nigeria of the African Charter on Human and Peoples' Rights endorses the enforcement of ECOSOC rights and further strengthens this process.

Key Words: Enforcement, Economic, social and cultural rights, Human rights, Non-justiciable, Nigeria

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INTRODUCTION

The reference to Economic, Social and Cultural (ECOSOC) rights provisions of Chapter II of the 1999 Constitution (as amended) as fundamental objectives and the directive principles of state policy, while characterising them at the same time under S. 6 (6)(c) of the same constitution as non – justiciable have been of concern to well-meaning observers of the governance process in the Nigerian state. By rendering such fundamental objectives and directive principles of state policy non-justiciable, it means that provisions of ECOSOC rights such as the rights to housing, education, employment and health by citizens cannot be enforced in any court of law in Nigeria. This has implications for state accountability and good governance. The situation is not even helped by the fact that the same constitution in Chapter IV renders Civil and Political rights such as the right to life, liberty, freedom of movement; the right to own property, the right to the dignity of the human person, the right to vote and be voted for and the right to freedom of association and worship as constitutionally guaranteed rights, making them justiciable rights under its S. 46 provision. In enforcing these rights, Section 46 of the 1999 Constitution enjoins any person who alleges that any provisions of this chapter has been violated, or is being or likely to be violated in any state in relation to himself, to apply to a High Court in that state, for redress. The non-justiciable ECOSOC rights provisions of the Constitution and their consignment to the level of serving merely as barometers for assessing state performance by writers of our Constitution, with no yardsticks whatsoever attached for evaluation could have been informed by the very limited nature of resources available to deliver on them. It is however, the position in this article that one needs to attain a reasonable level of economic, social and cultural rights before laying claims to civil and political rights. One cannot lay claims to the right to life for instance, without a means of livelihood (right to employment). Effort will be made in this article to explore and suggest ways of enforcing ECOSOC rights. This is expected to address the problem of under-performance of the political class in governance; as they will subsequently be held accountable for the provision of those basic needs of citizens to make life a lot more meaningful for Nigerians, especially those subsisting and struggling within the low income brackets

THE CONCEPT OF RIGHT

The term “Right” has over time evolved to mean that which the Law directs, approves or supports, for the protection and advantage of an individual or group. Ikhariale (1995) describes “right” as a liberty or power of possessing something, the disturbance or infringement for which there is a legal consequence. Perhaps we can achieve a better understanding of rights when we compare it with privilege. Whereas privilege is a liberty or permit that can be withdrawn at the discretion of one granting it, the same cannot be said for right. This is because a right cannot be withdrawn. It is especially so when it is conferred by statute, requiring that one does or refrains from doing a particular thing. Oputa (1988) sees right as that capacity residing in one man or group of persons, controlling the actions of others, with the assent and support of the state. It is

to be noted that 'rights' as variously explained above imposes a duty. Thus, according to the Hohfeldian analysis of rights (Heidi et al, 2018), the right of 'A' imposes a duty on 'B' to respect it and failing which 'A' can enforce compliance. 'A' can also initiate legal proceedings that can compel 'B' to comply. In such a situation, 'B' is said to have a duty to do the act. There cannot, according to Hohfeld, be a duty without a right (Heidi et al, 2018). A right must therefore, be a claim addressed to specific individuals or a class of persons. It is the duty of the state to enforce the rights of its citizens, especially where it is recognised and deemed to inhere in them for being human. Other characteristics of rights, according to Hohfeld, worthy of mention include that right should have a scope to which it duly applies and a justification in terms of values and interests that it seeks to protect (Heidi et al, 2018). There are however, limitations to such rights (Onyekpere, 1995) as no right is totally absolute in itself.

HUMAN RIGHT

When the characterisation of 'Right' changes to 'Human Right' we refer to that specie of right as that right which inheres in man. It is a right which is natural to man and by that token can neither be granted by an individual or the state nor even be conferred by statute. Eso (1985) describes Human Right as that right that stands above the ordinary laws of the land and which in fact is antecedent to the political society itself since it is a primary condition in a civilised existence. For Kayode Eso, what our constitution has been doing since independence is to have human rights enshrined in it as immutable, to the extent that the constitution itself is immutable. It is because human right is reckoned above municipal law that it has become a subject of international law and can be enforced through relevant charters and covenants to which state parties such as Nigeria are signatories, especially where existing municipal laws are considered incompetent. Human right became a subject of international concern during the Second World War, following the extermination of six million Jews by Nazi Germany. This led to the emergence of the United Nations Charter (1945) with Articles 55 and 62 of this instrument committed to human rights issues. This was closely followed by the Universal Declaration of Human Rights (UDHR. 1948) as a separate instrument which touched on all aspects of Human Rights. Being a declaration however, its provisions were not binding on state parties. This led to the emergence of its ideologically polarised versions in 1966 in the form of binding Covenants (i) The International Covenant On Civil and Political Rights (The ICCPR), the variant of which is made justiciable under S.46 of our constitution and (ii) The International Covenant on Economic, Social and Cultural Rights (The ICESCR), the variant of which is listed in chapter II of our constitution, under Fundamental Objectives and Directive Principles of State Policies but rendered non justiciable subsequently by the provisions of S 6.(6) (c) of our constitution. Both the ICCPR and the ICESCR are commonly referred to as the International Bill of Rights. Regions of the world saw the need subsequently to have their own human rights versions that reflect their circumstances. The African region for example, came up with the African Charter on Human and Peoples Right (ACHPR) otherwise known as the Banjul Charter in 1981. The

emerging evolutionary process on Human Rights also saw the coming on the International stage of treaty based rights that were directed at specific abuses. Examples of such International Treaties include the Convention for the Elimination of Discrimination Against Women (CEDAW), adopted by the United Nations in 1979 and the Convention on the Rights of the Child (UNCRC), adopted by the United Nations in 1989, which domestication we are still grappling with to achieve the required two third assents of our thirty six State Assemblies, for it to become a Municipal Law.

HUMAN RIGHTS AND THE ANTECEDENTS

What we now know and refer to as human rights have not always been there as features of man as a member of society. Our understanding today of human rights as being inherent in man and therefore inalienable and inviolable are in fact concessions arising from bitter struggles over the ages between peoples and their rulers (Ikhariale 1995). It also derived from ideas and intellectual traditions, some of which will be briefly examined shortly. It should also be noted that in resolving social conflicts and contradictions, man always perceived himself in relation with God, his creator. He considers God as the Transcendental and the source of natural law and himself as a member of society. Ancient Greek Philosophers saw in natural law the basis for human rights. Man, according to Socrates (Morton Donner et al. ed. 1967), is a creation capable of reasoning, for according to him, “when we are permitted to work through our natural faculties, then, let us by all means apply them. But in things that are hidden, let us seek to gain knowledge from above by divination, for the gods grant signs to those to whom they will be gracious”. Plato (2021) on the other hand, sees man as a rational being who should be guided by reason in the running of the affairs of the state on the principle of specialisation or division of labour as dictated by nature. Aristotle (Morton et al, 1967) considers the law of God as synonymous with the highest good that the state or political community should aspire for. St Augustine (Morton et al, 1961) preaches the equality of men. For him, man was made upright such that he could either continue in that uprightness or become perverted by his own choice. Thomas Aquinas (Morton et al, 1967) sees man as a reasonable being who should apply divine law to human affairs. Man, according to him, should be able to discern the divine law and allow it to govern his affairs. Hugo Grotius (Powell, 2000) sees natural law as superior to civil law and should therefore take precedence over the command of any authority.

The 17th and 18th centuries’ age of Enlightenment in Europe also had its own contributions to the emergence of Human Rights as we know them today. While Montesquieu (1748) in ‘The spirit of the Law’ propounded the principle of separation of powers as a solution to state absolutism, Jean Jacques Rousseau (1762) presented in a social contract a philosophical basis for the relationship between the individual and the state. Rousseau, in the opening sentence of his book ‘The Social Contract (1762), made this famous statement that “man is born free and is everywhere in chains. Those who think themselves the masters of others are indeed greater slaves than they”. Thomas Hobbes (1651) in his work entitled ‘Leviathan’ tells man that the only

way to have peace and escape the state of nature is by forming an organised society ruled by law and order. Man, in this situation, according to Hobbes, is to refrain from doing what he has the natural right to do in a state of nature. John Locke (1689) in his Treatise on Civil Government emphasised responsible governance. For him, the law of nature is the highest law because it is a divine law and the voice of God in man. It is therefore superior to all state laws and no government has the powers to dispense anybody from its obligation. The English Bill of Rights (1689) which derived essentially from John Locke's social contract, based on the natural rights doctrine, made statements on the rights of citizens while the American Declaration of Independence of 1776 asserts the freedom of its people derived not as a gift of their government but from the laws of nature. There was also the French Bill of Rights of 1789 (Claude, 1989) in which it was declared amongst others that the end of all political associations is the preservation of the natural and imprescriptible rights of man. It is to be stated as already noted earlier that all these declarations were preceded by one form of social upheaval or the other, leading to their enactment to guarantee the rights of the oppressed people.

PROVISIONS IN THE NIGERIAN CONSTITUTION ON ECOSOC RIGHTS

The Nigerian Constitution in its Chapter II as have already been observed, lists ECOSOC rights as Fundamental Objectives and Directive Principles that are meant to guide and direct state policy on governance issues. This is to say that the state should provide for example adequate health and medical facilities for all persons; direct its policy towards ensuring that suitable and adequate shelter is provided to enable citizens exercise the right to live in peace and dignity; provide suitable and adequate food, reasonable minimum living wage, old age care and pension. It also makes provisions under S. 16(2)(d) for unemployment and sick benefits and welfare for the disabled. The significance of these provisions lies mainly in the voluntary nature of their obligation since governments of Nigeria are not bound by them. It only serves as basis for directing government actions and decisions in these areas. On the right to employment for example, this chapter provides that all citizens without discrimination whatsoever should have the opportunity to secure adequate means of livelihood as well as adequate opportunity to secure suitable employment (S.17(3)(a)). It goes further to state that conditions of work are to be just and humane and that adequate facilities for leisure and social, religious and cultural life are provided S.17(3)(c). It provides for equal pay for equal work without discrimination on account of sex or other grounds whatsoever (S.17(3)(e)). It also made provision for the sanctity of the human person, requiring that human dignity should be maintained and enhanced (S. 17(3)(b)). Note as already been stated severally that the non-justiciable nature of these provisions meant that they cannot be enforced in the court of law. It is no surprise therefore, that various Nigerian governments have over time paid lip service to providing employment opportunities including the enabling environment for collective bargaining. And these are in reality matters that are fundamental to the existence of workers. On the right to education, the Constitution provides under its Fundamental Objectives and Directive Principles of state policy that government should

direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels (S. 18)(1)) and promote Science and Technology (S. 18)(2) and strive to eradicate illiteracy; and government should, as and when practicable provide free compulsory and universal education, free secondary education, free university education and free adult literacy programme (S. 18)(3). The limiting provisions of S. 6(6)(c) of the Constitution also render these provisions mere expressions on paper. The poor level of funding of federal and state tertiary Institutions and the continuous and endless strike actions being embarked upon by academic and non-teaching staff of state and federal universities, the proliferation of private tertiary institutions are all bound to compromise and lower standards. The National Policy on Education (1998) which sees education as pivotal in the realisation of a free and democratic society, a just and egalitarian society, a united strong and self-reliant nation, a great and dynamic economy and a land full of bright opportunities for all citizens can only remain a pipe dream until and unless serious attention is given to this sector.

POSSIBLE JUSTIFICATIONS FOR NON-JUSTICIABILITY OF ECOSOC RIGHTS

It has already been suggested that the limited nature of available resources may justify the relegation of ECOSOC rights to mere compass for guiding state policy and possibly serving as barometers for assessing the performance of the governance process, even when no discernable scale is provided nor ever contemplated by the constitution in this regard. Perhaps we may seek explanations in the very nature and features of ECOSOC rights as are suggested below vis-à-vis the enforceable Civil and Political Rights provisions of the Constitution without necessarily conceding to them.

- i. ECOSOC rights are resource intensive as have been severally alluded to whereas Civil and Political rights are said to be resource effective.
Free Education at all levels for instance, could be cost intensive, so also is the provision of free and quality health care and shelter; whereas provision of court facilities and personnel for the enforcement of Civil and Political rights may not be that expensive.
- ii. It could also be said that whereas ECOSOC rights are subject to being realised progressively, Civil and Political rights are rights that can be immediately implemented and realised. The right to education, health and housing for instance, require long term policy, planning and deployment of huge resources.
- iii. It may also be said that even the language of the ECOSOC covenants acknowledges for example, that economic and social rights cannot be realised overnight. The United Nations' General Assembly resolution 2200A(XXI) of 16th December, 1996 provides that each state party undertakes to maximise available resources with a view to achieving progressively the full realisation of the rights recognised in this covenant. This by implication means that government will make laws in order to realise these rights; and this will be subject to the availability of funds. Civil and Political rights, on the other

hand, impose certain obligations on state parties requiring the application of these rights without exception.

- iv. While Civil and Political rights tend to be precise in their drafting, ECOSOC rights tend to be vague. The right to education under the African Charter for Human and Peoples' Right (ACHPR) for example, does not say the type of education and at what level and persons for whom it is guaranteed (ACHPR. Art 17). The same can be said for the right to clean environment where it is stated in the Charter that all people will have satisfactory environment for their development (ACHPR. Art 24). The word 'satisfactory' should certainly raise problems of clarity.
- v. It may also be reasoned that if ECOSOC rights are made enforceable, it will lead to constraint and confrontation between the executive and legislative arms of government and draw the judiciary into making political value judgements.

CONCLUSION

From a brief review of concept of rights already undertaken, it was established that man possesses guaranteed rights as a member of society; rights that are characterised as inherent in him, inalienable, indivisible and inviolable. These rights of his as a citizen are expected to be protected by the civil authority in a social contract with the state. The citizen in return performs his civil duties, amongst which are defending the state if and when called upon to do so and paying his tax. The consequences of rendering ECOSOC rights non justiciable have been dire, the earlier supposed justifications notwithstanding. This is because there is no transparent basis for holding the ruling political authorities to account in the provision of ECOSOC rights related infrastructures and services. The ECOSOC infrastructures and services referred to here are those related to the provision of housing, health care, food and security, education, employment opportunities and clean environment. The only option left with the citizens apparently in the given circumstances is to wait and vote out non performing governments at the end of their terms in office, i.e., if their votes will ever count. This should not be so. The link between the enforcement of ECOSOC rights and the realisation of the Social and Political rights, which are already constitutionally guaranteed rights have been established in this paper. A well informed electorate should effectively also monitor the overall progress being made in the provision of ECOSOC rights related services and infrastructures. These are necessary if both ECOSOC rights and Civil and Political rights in our Constitution are to be progressively realised simultaneously for good governance in the overall interest of citizens.

RECOMMENDATIONS

While not in any way conceding to any of those possible justifications for ECOSOC rights being rendered non justiciable as earlier stated, the following recommendations are hereby suggested in the light of the above concluding observations:

- Section 6(6)(c) of the constitution rendering ECOSOC rights non – justiciable to be expunged through a Constitutional amendment and replaced with clause(s) spelling out yardsticks for periodic budgetary performance assessment in the areas of ECOSOC rights and requiring that national and sub national Governments and their establishments spend not less than the stated minimum percentages of their approved budgetary provisions yearly on verifiable and ascertainable ECOSOC infrastructures and services. This will allow for transparency and accountability since any performance falling short of these constitutionally guaranteed minimum can be actionable in court.
- A more radical approach to be adopted by the Bar and the Bench to our case law development as applicable to the practices in jurisdictions such as India and South Africa having similar rights exclusion clauses in their Constitutions. These jurisdictions (India and South Africa) have fared a lot better because of their effective use of case laws in establishing the nexus between ECOSOC rights to housing, employment, health on the one hand and the right to life on the other.
- Upholding and implementing articles of the domesticated African Charter on Human and Peoples’ Right (ACHPR) making it part of Nigerian municipal laws. Nigeria has a duty to implement and should uphold the letters and spirit of the charter which endorses the enforcement of ECOSOC rights by state parties to the instrument. The charter also requires state parties – Nigeria inclusive – ‘... to guarantee the independence of the courts and allow for the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the charter’ (ACHPR. Art.26). The least that can be done in implementing this provision is to attach a measure on the performance of the ECOSOC services and infrastructure such as earlier suggested in order to serve as effective instruments in the performance of legislative oversights on these areas of rights. The ACHPR, being an international legal instrument creates an obligation on Nigeria under international law.
- Interpreting the right to life by our courts as being also subject to economic and social rights without which right to life and other civil and political rights will be meaningless.
- Citizens whose rights to health and housing, labour (employment) and education have been breached being able to seek redress under the provisions of the ACHPR now part of our municipal laws. In specific terms, the state should not be seen to be pursuing such policies and programmes that deny citizens of these rights if they cannot provide them. Mass retrenchment of workers for example, under the guise of right sizing can be challenged and successfully too within this context. Poor management of health care can also be challenged. The same goes for housing, especially where peoples’ houses are demolished without compensation as is presently the case within the Trademore Estate at the Federal Capital Territory in Abuja.
- The states (national and sub nationals alike) to sponsor and pass bills into laws as earlier recommended, progressively enforcing some measures of ECOSOC rights to health,

education, housing and Labour rights, based on predetermined carrying capacities of their annual budgets for ECOSOC related services and infrastructure. This in a practical way actualises the provisions of the ACHPR. It is not acceptable that ECOSOC rights provisions should continue to be left in the realm of being non-justiciable when relevant provisions of the ACHPR state otherwise.

- Mass Civic Education on Human Rights in general and the indivisibility of ECOSOC rights from Civil and Political rights in particular be undertaken to increase the level of awareness and knowledge of citizens on their ECOSOC rights. This will be in fulfilment of the duties of State Parties as required by the African Charter. Nigerians will be better informed and empowered to make the right input in the relevant legislative process.
- Finally, Lawyers at the Bar and the Bench to be in the vanguard and fight for the enforcement of ECOSOC rights through case laws development and passage of appropriate parliamentary bills into laws at both the national and sub national levels of government for the enthronement of accountability and good government at all levels.

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