ENFORCING THE RIGHT TO HEALTH AND FOOD IN NIGERIA: PROSPECTS AND CHALLENGES.

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BACKGROUND OF THE STUDY

This paper is on Human Rights are vis a vis Economic rights to food and health. It has been said that Human Rights are moral principles or norms that describe certain standards of human behavior, and are regularly protected as legal rights in municipal and international law. Therefore, human rights are commonly understood as being those rights which are inherent in the mere fact of being human. The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination. Human rights differ from other rights in two respects. Firstly, they are characterized by being: Inherent in all human beings by virtue of their humanity alone. This means that human rights do not have to be purchased or to be granted; Human Rights are also inalienable within qualified legal boundaries. This is not to say that Inalienability means that rights are absolute or can never be overridden by other considerations. Rather it means that its holder cannot lose it temporarily or permanently except by bad conduct after the due legal process has been followed; Human Rights are also equally

applicable to all. Secondly, the main duties deriving from human rights fall on states and their authorities or agents, not on individuals.[1]

One important implication of these characteristics is that human rights must themselves be protected by law ('the rule of law'). Furthermore, any disputes about these rights should be submitted for adjudication through a competent, impartial and independent tribunal, applying procedures which ensure full equality and fairness to all the parties, and determining the question in accordance with clear, specific and pre-existing laws, known to the public and openly declared. The idea of basic rights originated from the need to protect the individual against the (arbitrary) use of state power. Attention was therefore initially focused on those rights which oblige governments to refrain from certain actions. Human rights in this category are generally referred to as 'fundamental freedoms'.[2]

As human rights are viewed as a pre-condition for leading a dignified human existence, they serve as a guide and touchstone for legislation. The specific nature of human rights, as an essential precondition for human development, implies that they can have a bearing on relations both between the individual and the state, and between individuals themselves. All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others. [3]

Human rights entail both rights and obligations. States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights which should include not only Civil and Political rights but also

[1] Howard, R., 1987. "The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights?"
[2] ibid
[3] Beetham, D., 1995. "What Future for Economic and Social Rights?", Political Studies, 43: 41–60.

Economic and Social rights. At the individual level, while we are entitled our human rights, we should also respect the human rights of others.[4]

The Universal Declaration included social (or "welfare") rights that address matters such as food, and health. The inclusion of Economic and Social rights in domestic laws especially in Africa and Nigeria in particular has been the source of much controversy. The Nigerian 1999 constitution (as amended) provided for the Ecosoc rights in chapter 11 of the said 1999 constitution.[5] However, the rights have been said to be non-justiciable even from the letters and concept of the said chapter. Social rights are often alleged to be statements of desirable goals but not really rights. The European Convention did not include them. Opponents of social rights often deny them the status of human rights, restricting that standing to civil and political rights. Familiar objections to social rights include the following: (1) they do not serve truly fundamental interests; (2) they are too burdensome on governments and taxpayers; and (3) they are not feasible in less-developed countries.

Unfortunately, the non-justiciability of the Ecosoc rights under the Nigerian constitution makes the mockery of the rights to health and food. The chapter only encourages the government to ensure its provision.[6]

INTRODUCTION

By virtue of birth, everyone has the right to health and food. It is one of the most fundamental and enabling human right. Without food, no one can function, thrive or live. Hunger dulls the intellect, thwarts productivity and hinders growth and development. It prevents societies from realizing their potential and is responsible for more deaths globally than AIDS, malaria and tuberculosis combined likewise the absence of quality health care is tantamount to infringement of the fundamental right to life. Basic and Primary health care, at least, is paramount to protecting and sustaining the right to life. This further buttresses the fact that both civil, political, economic and social are inter-related and inter-woven and one cannot be divulged from the other.

[4] Human Rights Quarterly, 5: 467–90.
[5] Sections 18 – 21 of the 1999 constitution (as amended)
[6] Section 13 of the 1999 constitution provides that it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this constitution.

Since the beginning of 2008, world food crises has attracted global attention because international prices of all major food commodities have increased by about 100 percent in the last two years. Several causes of this crises, such as low levels of world stocks, crop failures in major producing countries, growing demand for the production of agro-fuels and increasing consumption in China and India have been adduced but these clues about the world food crises only offer partial explanation. Worse still, they disregard the true causes of the world food crises and proffer solutions to this major human challenge.

The world food and health crisis is a human rights-related crisis and the solutions that have already been applied to the crisis, such as, expansion of market-led globalization and promotion of intensive mono-culture based agriculture and international health organizations alike have failed to adequately address the problem and have even resulted in producing an alarming number of chronically hungry and sick people around the globe.

The real reason for the crises are the national and international policies that fail to take into account the human rights obligations of states and inter-governmental organizations. The world food crisis is a clear demonstration of systemic violations of right to food as enshrined in the international human rights law. Adequate monitoring of right to food means going beyond merely monitoring the efficiency and effectiveness of government action with regards to food security. Truly comprehensive monitoring should be based on human rights and should be directed at reviewing states' reaction to hunger and malnutrition.

Over 950 million people across the globe go hungry everyday despite the fact that there is more than enough food in the world to feed everyone. Every day, almost 16,000 children die from hunger related caused which is one child every five second.

On 10 December 2008, the United Nations General Assembly adopted by consensus the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, paving the way for individual complaints of economic, social and cultural rights against States Parties. It now seems to be an appropriate time to reflect on why it has taken so long for these developments to occur. The Protocol will open for ratification by States Parties on 24 September 2009. Before any high expectations are placed on the Optional Protocol for the delivery of better implementation of economic, social and cultural rights, there is a need to temper that expectation with reference to some realities of the past. At the same time there is tremendous optimism that

economic, social and cultural rights obligations can no longer be ignored or wished away by many States.

The discussion on this paper focuses on what are Economic rights, Right to food and health, the domestic enforcement through justifiability is also skewed in favour of the cases from States which have begun to protect economic, social and cultural rights. I have taken essentially a chronological approach from the international and Nigeria's domestication of the right with a view to illustrate how an initial false categorization has been utilized to create tiers in the protection of human rights.

DEFINITION OF TERMS

CIVIL RIGHTS:[7]

The term 'civil rights' is often used with reference to the rights set out in the first eighteen articles of the Universal Declaration on Human Rights, almost all of which are also set out as binding treaty norms in the ICCPR[8]. From this group, a further set of 'physical integrity rights' has been identified, which concern the right to life, liberty and security of the person, and which offer protection from physical violence against the person, torture and inhuman treatment, arbitrary arrest, detention, exile, slavery and servitude, interference with one's privacy and right of ownership, restriction of one's freedom of movement, and the freedom of thought, conscience and religion.[9]

1.1 ECONOMIC AND SOCIAL RIGHTS:

The economic and social rights are listed in Articles 22 to 26 UDHR,[10] and further developed and set out as binding treaty norms in the ICESCR. These rights provide the conditions necessary for prosperity and wellbeing. Economic rights refer, for example, to the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, the right to food ,a reasonable limitation of working hours, and trade union rights. Social rights are those rights

[7] Civil and Political rights are protected under Sections 33 – 43 of the Nigeria 1999 constitution
[8] International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on10th December, 1966.
[9] http://www.humanrights.is/en/humanrights- education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/definitionsand-classifications on 7th October, 2019.
[10] The rights are also domesticated under Sections 16 – 21 of the 1999 constitution.

necessary for an adequate standard of living, including rights to health, shelter, food, social care, and the right to education (see Articles 6 to 14 (ICESCR).

1.2 STATEMENT OF PROBLEM

The non – justifiability of Chapter two of the 1999 Constitution of the Federal Republic of Nigeria; the prospects and challenges of the Rights to food and Health.

1.3 OBJECTIVES

The objective of this paper is to identify the rights as contained in International and Regional human rights Instruments and chapter two of the 1999 Constitution. The judicial attitude these rights.

1.4 METHODOLOGY

This paper utilizes data for this study obtained by a study of the 1999 Constitution of the Federal Republic of Nigeria (as amended), from Court Pronouncements, journals, books and internet resources.

2.1 HISTORICAL DEVELOPMENTS OF RIGHTS

There are a number of States who, despite ratifying the International Covenant on Economic, Social and Cultural Rights do not treat the rights contained therein as real human rights but rights to be realized. To understand why there is a neglect of this obligation and a relegation of these rights, an examination of the historical development of human rights provides a few markers. While the Cold War had a role to play in the development of social, economic and cultural rights it was Franklin D. Roosevelt who in 1941 articulated the Four Freedoms 3 in which the freedom from want was one which, "translated into universal terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants-everywhere in the world."

No doubt that freedom found its way to the United Nations Commission on Human Rights which was originally tasked with the duty in 1947, in parallel with the drafting of the Universal Declaration of Human Rights (hereinafter UDHR), to draft the international Covenant. This Covenant and the Declaration were to be presented to the United Nations General Assembly simultaneously. However, the polarization of the world over the Cold War had a major influence. It resulted in the drafting of the Covenant being difficult as the United Nations

Commission on Human Rights prepared a text that paralleled the UDHR. In 1952 the General Assembly instructed the Commission on Human Rights to prepare two covenants as they gave in to the pressure of the western liberal Member States of the United Nations.

The result was that the human rights provisions were bifurcated into the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), even though the original intention was to have a single one. These two Covenants and the UDHR are often referred to as the International Bill of Rights.

The lengthy drafting and ratifying processes are indicative of the reluctance of States to permit their sovereign powers to be curtailed by human rights obligations. The Human Rights Commission submitted the two draft Covenants to the United Nations General Assembly in 1954. The Third Committee took more than a decade to review these draft texts and the final versions were adopted by the General Assembly in 1966, 19 years after drafting had begun. It was another decade before the Covenants come into force in 1976. The whole process of establishing the International Bill of Rights lasted nearly 30 years in total before completion. In addition, it took another 33 years to afford State Parties the opportunity to ratify an optional protocol which permits individual complaints to be submitted for adjudication at the international level.

Apart from the time taken in the process of drafting the content of the International Bill of Rights, the comparisons between the two Covenants have led to a steady drift over the years in the full understanding of the protection of all human rights.

Civil and political rights have been unfortunately referred to as the ‘first generation’ of human rights while economic, social and cultural rights are the so-called ‘second generation’. The so-called ‘third generation’ refers to collective rights such as the right to development. This nomenclature is unfortunate because it has the effect of prioritizing rights, one right over the other and which is detrimental to all human rights. The language has been attributed to Karel Vasak and two commentators have been critical of these conclusions when they analyzed the history of human rights:

The history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages. Efforts to do so would in any

case make it necessary to distinguish also between civil and political rights, since the political rights were accepted as human rights much later than some of the civil rights, in some countries even later than economic and social rights.

2.2 RIGHT TO FOOD AND HEALTH IN INTERNATIONAL LAW

There is a dearth of jurisprudence in respect of right to food at the domestic level. This is because right to food is not widely protected in domestic legal system. In some systems, it is recognised indirectly through interpretation of other rights or application of broader legal norms. In Germany, the courts have upheld price control regulations in overcoming the constitutional challenge of freedom of competition because the stat, in terms of the ‘’social state’’ principle was seen as been under obligation to combat high food prices . In India, right to basic nutrition has been read into right to life.

While nations offered limited provisions for right to food, international law remains a useful source of interpreting and developing the content of this right because right to food is widely recognized in international law. First some international and regional human rights documents of general scope proclaim the right, explicitly.

At the international level, the most important of these instruments are the Universal Declaration of Human Rights, 1945, which proclaims a right of everyone to a ‘’standard of living adequate for the health and well being of himself and his family including food…’’ the International Covenant on Economic Social and Cultural Rights, 1066 (ICESCR) which proclaims both right to adequate food and right to freedom from hunger. and the Universal Declaration on the Eradication of Hunger and Malnutrition. 1974 (UDEHM).

In addition, right to food has been read into human rights document of general scope, where it is not explicitly proclaimed. For instance, the Human Rights Committee, in its General Comment No 6. Has interpreted Article 6, has interpreted Article 6 (that is, relating to right to life) of the International Covenant on Civil and Political Rights (ICCPR) as imposing a duty on state parties to take measures to ‘’reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

At the regional level, right to food is not explicitly protected. Neither the European Convention on Human Rights nor the European Social Charter nor the African Charter on Human and Peoples’ Right explicitly guarantees this right. Only the Additional Protocol to the American

Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador) provides that everyone has the right to ‘’adequate nutrition which guarantees the possibility of enjoying the highest level of physical, intellectual and emotional development’’. However, right to food has been read into the African Charter. In Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Right vs Nigeria the ACPHR interpreted the Rights to life, health and development, respectively in the African Charter as meaning an obligation on state parties not to interfere with access to food , both by state parties and powerful third parties.

2.3 ADEQUACY AND SUSTAINABILITY OF FOOD

The concept of ‘’adequacy’’ is particularly significant in relation to right to food since it serves to underline a number of factors which must be taken into account in determining whether particular food or diet that are accessible can be considered the most appropriate under given circumstances for the purpose of Article 11 of (ICESCR). The notion of sustainability is intrinsically linked to the notion of adequate food must be accessible to both present and future generation. The precise meaning of adequacy is to a large extent, determined by prevailing social, economic, social, economic, cultural, climatic, ecological and other conditions, while sustainability incorporates the notion of long term accessibility and availability.

2.4 AVAILABILITY

Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well function distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

2.5 ACCESSIBILITY

Accessibility encompasses both economic and physical accessibility. Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised

Physical Accessibility implies that adequate food must be accessible to everyone including physically vulnerable individuals, such as infants and young children, elderly people, the

physically challenged, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster's prone areas and other specially dis-advantahed groups may need special attention and sometimes priority consideration with frespect to accessibility of food.

3.0 RIGHT TO HEALTH AND FOOD IN NIGERIA

Right to health and food is not justiciable in Nigeria. The right is protected under Chapter 11[11] of the 1999 Constitution which deals with Fundamental Objectives and Directive Principles of State Policy. Fundamental Objectives are the directive principles laid down by the policies which are expected to be pursued in the efforts of the nation to realize the national ideals. The reason for this innovation is that governments in developing countries have tended to be pre-occupied with power and its material pre-requisites with scant regard for political ideals as to how society can be organized and ruled to the best advantage of all.

The constitution provides that the primary duty of government shall be providing welfare and security to the people[12]. Section 16 of the same 1999 constitution (as amended) provides for the Economic Objectives. Section !6(2)d provides that the state shall direct its policy towards ensuring that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sick, benefits are provided for all citizens.

With this Chapter 11, government promises to direct its policy towards the provision of adequate food for all. Unfortunately, this provision is not justiciable, so government cannot be held accountable. Nigeria is not yet a welfare-state in the Western European sense. As all the economic rights provided for in sections 16 to 26 of the constitution.

At present, there is no food and health security in Nigeria. Every individual is providing these amenities by themselves. It is unfortunate that even if government cannot provide for right to food and wants the citizens to do that

3.1 ENFORCING THE RIGHT TO HEALTH AND FOOD IN NIGERIA: PROSPECTS AND CHALLENGES.

[11] Sections 16 (2) d, 17 (3) a, c & d
[12] Section 14(2)b

The constitutional provisions of the rights to health and food in Nigeria under chapter 11[13] though non-justiciable, still points to the fact that these rights are recognized and protected. Also the state is enjoined to make it a duty to all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this constitution.[14]

While the Committee on Economic, Social and Cultural Rights have clarified that State Parties may not rely on the lack of funds as an excuse for doing nothing to protect economic, social and cultural rights, most States take the approach that these are not really rights as they not justiciable. This feeds into the contention that these are so-called 'second generation' rights. The question of justifiability[15] will be addressed below.

One argument for non-justifiability is based on the doctrine of the separation of powers in a democratic State where the courts are not empowered to encroach into the legislative arena which makes policy for the State. In this line of argument, where a court of law decides which policy is more appropriate or how much more money should be allocated to a state programme, that would violate the separation of powers doctrine it is said. According to this reasoning, the court is ill-suited, and perhaps not trained, to perform this function. The argument continues that courts are better suited to protect civil and political rights where States have a negative duty like permitting the freedom of speech or the right to demonstrate. In any case, the democratically elected persons in the legislature are responsible for state policy, not the judges who are appointed to their positions, the proponents hold. In an economic, social and cultural right the State has a positive duty to act and such action is likely to be costly.

In addressing these lines of argument, it is important to note that the State has some duty to act positively, and not always negatively, in civil and political cases when it protects the right of a detained person, for example. In such Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[13] Sections 16(2)d, 17(3) a,c and d

[14] Section 13 of 1999 constitution

[15] Section 6(6)c , it states that the judicial powers vested in accordance with the fore-going provisions of this section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principle of State Policy set out in Chapter 11 of this constitution

On the issue of the competence of the judges, there are many instances where the lack of knowledge on substantive issue before the court are attended to by the presence of expert witnesses, from finance to space technology, and that does not handicap the administration of justice. The function of courts is dispute resolution and disputes around economic, social and cultural rights should not be exempt from adjudication simply because the issue before a court does not form part of the syllabus for the training of a judge.

To leave economic, social and cultural disputes to democratic self-correction, as we do when we vote out the government we dislike at the end of a four or five year terms under our political rights, is to relegate the plight of the disadvantaged, marginalized and vulnerable as being trivial and not as relevant. These rights also have urgencies which demand that they be attended to in a timely manner. Finally, on the question of elections as part of representative democracy, many States do not elect their judges but follow a set appointments procedure, it is true. Whatever the nature of that appointment procedure, once completed it attributes legitimacy to judges. The political representative and the judge each have different competencies but both are public servants, albeit one is more independent than the other. Each has a different role, however appointed, and if those elected fail to take appropriate action, the dispute resolution system envisaged through the courts may be used to break the deadlock.

. . . If the judiciary arrogate to themselves, or have arrogated to them, the resolution of social and economic issues, then the democratic process is usurped, as is the legislature and the executive. One must also consider the fact that they are not examined as to the content of their social and economic opinions when appointed, judges who then trespass on the proper sphere of the legislature or the executive do so without a mandate. It is a trespass on the entitlement of the people, in the last analysis, to determine social and economic issues in accordance with their view of the common good as expressed through the ballot box.

It must be conceded that active economic, social and cultural rights protection will cost more money because so small a percentage is being spent currently on them by so many State Parties to the ICESCR. In some cases there are many people to whom that right might have to be granted. The current priority or urgency may not be present to deal with this in the public interest. When they are mooted by civil society organizations in those States for example, the spectre of higher taxes is raised. Yet recent examples of the usage of tax payer's funds to shore up reckless private corporations financially indicate that where there is the political will, State

Parties will use all the tax-payers resources to justify public interest, yet continue to ignore basic economic, social and cultural rights.

A summary of the main differences between the protections in both Covenants is that, it is said, the ICCPR norms create respect for these rights usually under sanction of the law. They are sometimes described as 'absolute' or immediate. They are justiciable in the courts of State Parties and as they are negative rights, they do not cost much, it is articulated. A significant feature of the ICCPR is that the Optional Protocol permitting individual complaints from States Parties was opened for signature some 43 years ago and came into force 33 years ago.

On the other hand, the differences between the covenants include the rights protected under ICESCR are to be fulfilled through a gradual realization over a period of time. The justification continues that these are not really rights but are more political or social objectives and therefore are not justiciable. They are likely to be more costly as positive obligations on the State and are best left to charity or welfare organizations who are specialists in dealing with these issues.In this instance, the State may well provide some funds to such organizations to front the provision of that service, as an act of generosity, they might add.

4.0 DUTIES IMPOSED ON STATE PARTIES

The nature of the legal obligations of state parties are set out In Article 2 of ICESCR and has been dealt with in the committee's General Comment No 3 (1990). The principal obligation is to take steps to achieve ''progressively the full realization of the right to adequate food. This imposes an obligation to move, as expeditiously as possible, towards that goal. Every state is under obligation to ensure that everyone under its jurisdiction has access to the minimum essential food which is sufficient, nutritionally adequate and safe so as to ensure his freedom from hunger.

Right to adequate food, like any other human right imposes three types of obligations on states parties, namely: the obligation to respect, the obligation to protect and the obligation to fulfil which incorporates obligation to facilitate and obligation to provide.

Discrimination in access to food, as well as in means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion , political or other opinion, national or social right origin, property, birth or other status, with the purpose or effect of nullifying or impairing

the equal enjoyment or exercise of economic, social and cultural rights constitutes violation of ICESCR.

4.1 ON JUSTICIABILITY: AN EXAMPLE OF THE PROTECTION OF ESC RIGHTS IN A REGION

The regional protection of economic, social and cultural rights with civil and political rights in one convention is best illustrated in the example of the African Charter on Human and Peoples' Rights which is the youngest regional system and came into force in 1986. In this document there is no bifurcation of rights into civil and political on the one hand and economic, social and cultural on the other. The right to dignity is a cross-cutting right which makes all rights inter-connected and seamless. There is also protection for groups such as "all peoples" and the family for example, that is collective rights, together with the rights of the individual. The African Commission on Human Rights, in exercising its interpretive role on the provisions of the African Charter, has pronounced its clear intention to enforce all the rights contained in the African

Charter including economic, social and cultural rights, as it expressed in the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* case. The case arose from the environmental degradation as a result of the oil industry in Ogoniland granted by the President Abacha where the Commission said:

> ,,,The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter…

When the African Court on Human and Peoples' Rights begins to hear cases in the not too distant future, it is likely that its judgments on these types of cases will be path-breaking given the wide range of rights protected by the African Charter.

4.2 ON JUSTICIABILITY: DOMESTIC ENFORCEMENT

When the normative principles of the international protection of all human rights, including economic, social, and cultural rights, are included in the constitution of a country then the proponents of justiciability of economic social and cultural rights have an effective mechanism. Examples from two countries mainly are discussed here: one where there was constitutional space, another where the space for litigation was created. Since South Africa became a constitutional state it protects economic, social and cultural rights together with civil and political rights. The International Covenant on Economic, Social and Cultural Rights has been signed but South Africa is not yet one of the 160 State Parties.

The approach of the Constitutional Court to the economic, social and cultural rights has been classified into three main categories by one commentator.

The first would be 'basic' rights unqualified by references to resource constraints or notions of progressive realization and would include children's socio-economic rights, the right to basic education and the rights of the detained and prisoners' socio-economic rights. The second category includes 'access rights' or the right of everyone to have access to adequate housing, health care, food, water and social security. The duty of the State is limited to taking "reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights." The third category imposes a prohibition on the State with regard to the right to shelter in that no eviction may be made without an order of court and the right not to be refused emergency health care.

The jurisprudence of the South African Constitutional Court with regard to social and economic rights has been set out initially in the well-known trio of "reasonableness review" cases of *Soobramoney v. Minister of Health, KwaZulu- Natal*,[16] (CC), *Government of the Republic of South Africa v. Grootboom*, [17]and *Minister of Health v. Treatment Action Campaign*,[18]The central issue that appears to pre-occupy the Constitutional Court in these types of cases is whether the policy chosen by the organs of state can reasonably be expected to deliver the rights in question. From a cautious start, with some deference paid to the executive and legislature

in Soobramoney, the Constitutional Court became quickly aware of the framework of its inquiry into the reasonableness of state policy. As a result of limited funds being available for dialysis

[16] 1998 (1) SA 765
[17] 2001 SA 46
[18] 2002 (5) SA 721 (CC).

treatment, which the Constitutional Court found did not fall within the ambit of the "right to emergency treatment", Mr Soobramoney was denied the right to that treatment. It said:

A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.

In yet another eviction case, President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd,[19] private landowners were unable to secure a conviction order granted against 40,000 occupiers on his land. When they approached the sheriff 's office they were asked to deposit R1.8 million, more than the value of the land, to engage a private security company. In an appeal against the High Court decision for the land owner, the Constitutional Court held that the State had failed to take reasonable steps to assist the property owner. The Court found that in these circumstances it is unrea-+sonable of the State to stand by and do nothing. It found this to be a violation of the principle of the rule of law as well as the right of access to the courts. The Court held that the State compensate the landowners for the unlawful occupation of their property. In addition, the occupiers were to continue living there until alternative accommodation was found by the State.

In the Grootboom case, Mrs Grootboom, her children and number of similarly affected neighbors, moved from their home which had flooded during the winter rains onto land earmarked for low-cost housing. They were evicted from this land when the matter went before the High Court who found in their favor. The State appealed to the Constitutional Court which explained the ambit of the Court's inquiry within the standard of reasonableness of the state policy in the context of the separation of powers doctrine:

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met. As the highest court in the land, it

∗[1919] 2005 (8) BCLR 786 (CC)

reiterated that it had the power to adjudicate on socio-economic rights because the Constitution gave them that power.

It also said that, within the debate around the separation of powers, it was entitled to examine this issue even if it had a financial implication. It repeated that if it ordered legal aid to an accused individual, as a civil right, that too would have a financial implication. That would appear to be an adequate answer to those who maintain that the enforcement of civil and political rights, as a negative duty on the State, does not have cost implications, as discussed earlier. One commentator sees the political dimension of this debate clearly as privileging negative liberty and the existing economic status quo.

In Grootboom, the Constitutional Court stated that reasonableness can be evaluated at the level of legislative programming and its implementation:

Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programme implemented by the executive. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

The Constitutional Court also explained the meaning of reasonableness by linking it to the three democratic values of human dignity, equality and freedom in the South African constitution: Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic needs. A society must seek to ensure that the bare necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the rights. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

The usual thinking on social policy matters is that they are solely legislative and executive functions and the courts have a limited or no role to play there. In the Treatment Action Campaign case, the Constitutional Court said that: . . . although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are preeminently within the domain of one or other arms of government and not others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

Indeed the issues before the Constitutional Court were not about whether economic and social rights are justiciable or not, but how they can be enforced. In the Treatment Action Campaign case the government's policy of failing to provide Nevaripine, an anti-retroviral drug used in reducing mother to child transmission of HIV/Aids at all state health facilities, was under scrutiny under the rights of children to medical care. The government appealed against the decision of the High Court. The Constitutional Court found in favor of Treatment Action Campaign when it held that the government's programme to prevent mother to child transmission was unreasonable.

The Constitutional Court, in this case, was mindful of its role in adjudicating upon socio-economic rights in the context of the separation of powers doctrine when it said: Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role of the court, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate balance.

The development of the domestic jurisprudence in South Africa based on the review of the reasonableness of state policy has resonance in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights where under the provisions for the Examinations of Communications it is stated:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party. . . . In doing so the Committee shall bear in

mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

In India, the Directive Principles of State Policy in the Constitution appeared to bar the courts from reviewing state action on economic, social and cultural rights. However, the Indian Supreme Court has held that those Principles are of essential importance in interpreting the content of fundamental rights. It has used the civil right to life to interpret economic, social and cultural rights. *In Keshavananda Bharati v. State of Kerala* the Supreme Court said:

> Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV [which contain the Directive Principles of State Policy].

In Tellis v. Bombay Municipal Corporation, a case about pavement dwellers,the right not to be deprived of life was included to include the right to livelihood. In a similar way, the right to life included the right to basic; necessities of life such as adequate clothing and reading facilities in the case of *Francis Coralie Mullin v. Administrator, Union nutrition, The Territory of Delhi*. *In Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* the right to life included the right to health. In *Paschim Banga Khet Mazdoor Samity v. State of Bengal* the right to life included the right to health and in *Mohini Jain v.State of Karnataka* the right to life included the right to education.

5.0 . Conclusion

While the historical analysis does indicate a clear division on ideological lines between the western liberal States and the socialist States on the nature and protection of human rights, for States to continue that way is not only futile but also irresponsible. One reason for the growth in this area of study is the impact of non-implementation of economic, social and cultural rights is more discernable, and the United Nations has responded to the extent that its Member States have permitted it to.

That response has been through the Millennium Development goals, which are laudable in their objective, but which in fact dilute the responsibility of States Parties to ICESCR which contain international human rights obligations that States parties have ratified and are obliged to uphold. In attempting to reach the Millennium goals, the failure of certain States to meet their obligations must not be excused. The other reason for the growth is that the study of economic, social and cultural rights must be an inter-disciplinary one in which law would be but a component. Many other branches, other than law, continue to make major contributions. Therefore the whole discussion on justiciability must be seen as one vehicle for the delivery of human rights but not the only one. An understanding of economic principles is necessary for a complete comprehension on how to deal with these rights. Our law-makers need to be educated in the better ways to introduce these rights through law reform. The democratic process requires vigilance by civil society on issues of governmental accountability, including the ways in which budgets are devised and prioritized.

In the introduction I alluded to the Optional Protocol which will eventually permit individual and group petitions to Committee on Economic, Social and Cultural Rights which, when it comes into force, will track the path of the Optional Protocol on the International Covenant on Civil and Political Rights some 33 years later. This does raise the question about whether or not all best efforts in economic, social and cultural rights are being placed in creating parity with civil and political rights. Or is the central issue still pivoting around the enforcement of all human rights? Perhaps, it is time that economic, social and cultural rights shed the yoke of history and claimed their legitimate place as human rights in the legal systems of the world. To do otherwise would be to pay homage to an anachronistic State practice that has outlived its value or purpose.