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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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TABLE OF CONTENTS

INVASION OF UKRAINE: INTERROGATING THE CRIMINAL LAIBILITY OF RUSSIA UNDER INTERNATIONAL LAW	
IFEOLU JOHN KONI, Ph.D.....	1
CLIMATE CHANGE, HUMAN RIGHTS AND THE RESPONSE OF THE AFRICAN HUMAN RIGHTS SYSTEM: FOCUS ON THE AFRICAN COMMISSION AND THE COURT ON HUMAN AND PEOPLES' RIGHTS	
KELESE GEORGE NSHOM & GIDEON FOSOH NGWOME.....	23
LEGAL MECHANISMS TO COUNTER TAX AVOIDANCE IN NIGERIA	
ISAU OLATUNJI AHMED, Ph.D.....	46
STATE AND INDIVIDUAL RESPONSIBILITIES FOR CRIME OF AGGRESSION UNDER THE ROME STATUTE: WHAT PROSPECT FOR INTERNATIONAL CRIMINAL JUSTICE	
FON FIELDING FORSUH ,Ph.D.....	63
GENDER DISCRIMINATION AND THE INTERNATIONAL DIVISION OF LABOUR: A LEGAL APPRAISAL	
O. F. OLUDURO& Y. F. OLUWAJOBI.....	86
EROSION OF THE PHILOSOPHY OF POSITIVISM THROUGH JUDICIAL ACTIVISM: EMERGING TREND IN THE PRINCIPLE OF JUDICIAL PRECEDENT IN NIGERIA	
IGBONOH A JOSHUA, PhD.....	113
THE IMPACT OF INTERNATIONAL LAW ON DOMESTIC CORPUS: A REVIEW OF ATTORNEY-GENERAL, CROSS RIVER STATE V ATTORNEY-GENERAL OF THE FEDERATION	
YAHYA DURO U. HAMBALI, Ph.D & JOSEPHINE N EGEMONU, LLM.....	130
RESISTANCE AGAINST RAPE AND KIDNAPPING IN NIGERIA: JUSTIFYING LETHAL SELF DEFENCE AGAINST VIOLENT CRIMES	
ATERO AKUJOBI, Ph.D.....	141
JUDICIAL IMPARTIALITY AND INDEPENDENCE IN NIGERIA: A REALITY OR A FAÇADE?	
DORCAS A AKINPELU, LLM & ADEOLA O. AGBOOLA, LLM..	156

**THE STATUTE OF EXTRAORDINARY AFRICAN CHAMBERS: AN END
TO IMPUNITY IN AFRICA?**

JOEL A ADEYEYE, Ph.D.....170

**EXPLORING THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND
CULTURAL RIGHTS IN NIGERIA**

DR. AMADE ROBERTS AMANA & DR. SOLOMON A. IENLANYE
..... 194

**REFLECTIONS ON THE CLEAVAGES OF IDENTITY AND
INDIVIDUALITY OF WOMEN IN CAMEROON**

NCHOTU VERALINE N. MINANG Ph.D.....207

EXPLORING THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA

DR. AMADE ROBERTS AMANA* & DR. SOLOMON A.
IENLANYE**

Abstract

This paper examines the position of the Economic, Social and Cultural Rights (ESCRs) in the Constitution of the Federal Republic of Nigeria. ESCRs are textualized in Chapter II of the Constitution under the title, Fundamental Objectives and Directive Principles of State Policy. Despite their interconnectedness with the first generation rights in another part of the Constitution, the justiciability and enforcement of ESCRs have remained a mirage. In consequence, it is difficult to hold government accountable for failing to safeguard second generation rights. The paper considers various approaches to secure their enforcement.

Keywords: Constitution, justiciability, Second Generation Rights, Nigeria

Introduction

The constitution of the Federal Republic of Nigeria (CFRN) 1999 classified human rights into fundamental rights and fundamental objectives and directive principles of State policy. The second chapter of the constitution provides for the Fundamental Objectives and Directive Principles of State Policy, which roughly correspond to economic, social and cultural rights.¹ In the same chapter, the Constitution declares that the security and welfare of the people shall be the primary purpose of government.² Halima Kutigi has said that ESCRs protect the necessities of life or provide the bases for an acceptable quality of life.³ Human rights enshrined in the constitution of a State are known as fundamental rights.

According to Stephen Marks, human rights are ‘a set of norms governing the treatment of individuals and groups by states and non-state actors on the basis of

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¹ Chapter II (Fundamental Objectives and Directive Principles of State Policy); Sections 13 – 24, Constitution of the Federal Republic of Nigeria, 1999.

² S. 14 (2) (b), CFRN 1999.

³ Kutigi, H. D. (2017). ‘Towards Justiciability of Economic, Social, and Cultural Rights in Nigeria: A

Role

for Canadian-Nigerian Cooperation.’ Vol. 4. Transnational Human Rights Review; 125.

ethical principles regarding what society considers fundamental to a decent life. These norms are incorporated into national and international legal systems, which specify mechanisms and procedures to hold the duty-bearers accountable and provide redress for alleged victims of human rights violations.’⁴ Economic, social and cultural rights provide a yardstick for assessing the attainment of the purpose of government and good governance because the actualization of the rights promotes higher standards of living, full employment; economic, social and cultural advancements. In other words, they accelerate the realization of basic human needs.⁵ In consequence, the attitude of modern governments towards ESCRs can fundamentally impact upon the ability of individuals to lead meaningful and dignified lives.⁶ Echoing this view, Akin Oluwadayisi has postulated that the ‘Fundamental Objectives and Directive Principles of State Policy define the focus of Nigeria as a state.’⁷ However, despite their constitutionalization over the years, the enjoyment of ESCRs has remained elusive because government activity on the guarantees in chapter two of the constitution are not subject to judicial inquiry.⁸ This provision operates as an ouster clause precluding the competence of courts to question the implementation of ESCRs.

However, there is a growing legal trend around the globe for greater recognition and enforceability of ESCRs. This trend is shifting attention away from justiciability to dismantling the remaining obstacles to access to justice and the exercise of the right to an effective remedy by victims of violations of ESCRs.⁹ This idea is reflected by the United Nations Declaration on the Right to Development which enjoins all States to give equal attention and urgent consideration to the implementation, promotion and protection of civil, political, economic, social and cultural rights, and to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.¹⁰ It further reinforces the realization that all human rights are interlinked. Thus, the Banjul

⁴ Stephen P. Marks (2016), ‘Human Rights: A Brief Introduction’. Harvard University FXB Centre for Health and Human Rights; P.1.

⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR), UNTS, 993, entered into force 3 January, 1976.

⁶ Shedrack C. Agbakwa (2002) ‘Reclaiming Humanity: Economic, Social and Cultural Rights as cornerstone of African Human Rights’ Vol. 5 Yale Human Rights and Development Law Journal. Available at <https://digitalcommons.law.yale.edu/jhrl7/vol5/1551/5> accessed on 1 July 2022.

⁷ Akin Olawale Oluwadayisi (2014). ‘Economic and Socio-cultural Rights in the Democratic Governance of Nigeria: Enforcement Mechanisms beyond Justiciability.’ Vol. 5. Nnamdi Azikiwe University Journal of International Law and Jurisprudence; 105-117.

⁸ Section 6(6)(c), CFRN 1999

⁹ Judicial Enforcement of Economic, Social and Cultural Rights, Geneva Forum Series No. 2, International

Commission of Jurists, July, 2015.

¹⁰ Article 6, Declaration on the Right to Development. A/Res/41/128, adopted at the 97th plenary meeting, 4 December 1986.

Charter is based upon the conviction that it is ‘essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.’¹¹ ESCRs serve as legal, political, and moral yardsticks to measure government policies which entrench poverty and social inequities, so that the State can be held accountable for a lack of basic amenities.¹²

This article is organized into six sections. The first section provides the background to the article. In the second section, the article discusses the classification of human rights into several generations. It situates ESCRs as well as the indivisibility of human rights, within this dichotomy. The third section of the article examines the evolution of ESCRs. It pays due regard to the early history of ESCRs and the influence of watershed legal developments like the Magna Carta of 1215, and the French Revolution of 1789. Section four discusses the nature of ESCRs textualized in the constitution. In section five, the article undertakes an analysis of the jurisprudence of enforcement of ESCRs, by examining different approaches adopted by courts, while section six serves as the concluding part of the paper.

The Generations of Human Rights

Beginning from the 1970s, a trend emerged within the human rights scholarship classifying human rights into several generations.¹³ Despite the severe criticisms it drew from its first day, the generational classification of human rights by Karel Vasak has enjoyed widespread use on account of its simplicity, practicality, and comprehensiveness.¹⁴ Carl Wellman has said that by this classification, first generation rights are generally perceived as those found in the International Covenant on Civil and Political Rights.¹⁵ The first generation rights trace their distinguished ancestry to historical events promoting the liberty of man, like the Magna Carta of 1215; the English Bill of Rights of 1689; the United States Bill of Rights (1789); and the Declaration of the Rights of Man and of the Citizen (1789). First generation rights are representative of traditional human rights like the rights to life, liberty, privacy and family life, freedom of thought, and freedom from slavery and freedom from retroactive criminal legislations.

¹¹ Paragraph 7 of the Preamble to the African Charter on Human and People’s Rights, 1981.

¹² “Historical Background of ESCR” Available at https://www.cesr.org/sites/default/files/2021/Historical_background_of_ESCR.pdf accessed on 27 July 2022.

¹³ It began with Karel Vasak’s ‘Human rights: A thirty year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights.’ UNESCO Courier, 30:11.

¹⁴ Spasimir Domaradzki, Margaryta Khvostova and David Pupovac (2019) “Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse” Vol. 20. Human Rights Review: 424

¹⁵ Carl Wellman, (2000) ‘Solidarity, the Individual and Human Rights’ Vol. 22. No. 3. Human Rights Quarterly; 639 – 657. See also the International Covenant on Civil and Political Rights, 16 December 1966.

Second generation rights require significant efforts by the State to ensure their enjoyment. Although these rights have emerged from positive law and international law, they do not boast of as much coverage as the first generation rights.¹⁶ In contrast to first generation rights which are individualized, second generation rights are held by a group or collection of people, hence they are often regarded as group rights or collective rights.¹⁷ Second generation rights are preoccupied with the collective livelihood, employment conditions and the basic necessities that make living worthwhile. These rights developed around the precepts of egalitarianism, and access to basic socio-economic facilities and opportunities. Their evolution was strongly influenced by the advent of industrialization and the emergence of a class of workers.¹⁸

First generation rights have been described as negative rights and second generation rights as positive rights. But Richard J. Goldstone has argued that the distinction is not convincing. It is posited that while it is possible to implement laws on negative rights, which offer protection to the individual against arbitrary government actions, positive rights, like ESCRs restrict the policy spaces of the executive and legislature, because they involve the reallocation of public expenditure, and as a result, cannot be enforced.¹⁹ On the opposing side of the debate, the South African Constitutional Court has held in *Government of the Republic of South Africa v. Irene Grootboom* that ‘many of the civil and political rights entrenched in the constitution...will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.’²⁰

Third generation or solidarity rights drew inspiration from the ideas of ‘freedom, equality and brotherhood’ espoused in the French Revolution of 1789.²¹

¹⁶ Adrian Vasile Cornescu (2009) Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition. Brno : Masaryk University. Available at https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/tvorba_prava/Cornescu_Adrian_Vasile.pdf accessed on 14 July 2022.

¹⁷ Oliver C. Ruppel (2008) ‘Third-generation Human Rights and the Protection of the Environment in Namibia.’ Human rights and the rule of law in Namibia. (Windhoek: Macmillan Education Namibia) pp.101-120.

¹⁸ ‘The Evolution of Human Rights’ Council of Europe: Compass Manual for Human Rights Education for Young with Young People. Available at <https://www.coe.int/en/web/compass/the-evolution-of-human-rights> accessed on 21 July 2022.

¹⁹ Richard J. Goldstone (2006) ‘A South African Perspective on Social and Economic Rights’, Vol. 13. No. 2. Human Rights Brief: 4-7.

²⁰ Government of the Republic of South Africa v. Irene Grootboom. Case CCT/00 4 October 2000

²¹ Majorleine Y. A. Zieck (1992) ‘The Concept of ‘Generations’ of Human Rights and the Right to

Mohammed Abdul Hannan has pointed out that third generation human rights consist of complex composite rights such as the right to development, the right to peace, and the right to a clean environment, which have not yet been embedded in universal human rights instruments.²² Criticisms leveled against Karel Vasak's classification include the tendency to shift attention away from the existing normative obligations of States; the tendency to promote without much benefit, the agenda of a third generation of rights; and as well, fragmentize human rights. Or as Steven L. B Jensen succinctly puts it, 'it has given an ideological basis to the idea of the existence of a historical gap and substantive dichotomy between civil and political rights on one side and social and economic rights on the other.'²³ The broad scope of the Universal Declaration of Human Rights (1948) in establishing both first and second generations of human rights is regarded as an affirmation of the indivisibility of human rights.

The Evolution of Economic, Social and Cultural Rights

International human rights law developed with celerity in the post-war era. The first instrument on human rights; the UDHR of 1948, protected a blend of first and second generation rights: the right to life;²⁴ freedom from slavery;²⁵ freedom from torture;²⁶ right to privacy and family life;²⁷ freedom of movement;²⁸ freedom of thought, conscience and religion;²⁹ freedom of expression;³⁰ and freedom of assembly.³¹ The second generation rights in the UDHR included the right to social security;³² right to work;³³ right to a good standing of living;³⁴ right to education;³⁵ and the right of participation in the cultural life of the community.³⁶

However, the legal regime for the protection of the rights of workers predates the UDHR. The Preamble of the Constitution of the International Labour Organization

²² Benefit from the Common Heritage of Mankind with Reference to Extraterritorial Realms,' Vol. 25. No. 2 (2 Quartal) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*; 161-198. Mohammed Abdul Hannan (2010), 'Third Generation Human Rights and the Good Governance' Vol. 2. No. 5. *OIDA International Journal of Sustainable Development*: 41-50.

²³ Steven L.B Jensen (2017) 'Putting to Rest the Three Generations Theory of Human Rights' *Open Global Rights*. 15 November. Available at <https://www.openglobalrights.org/putting-to-rest-the-three-generations-theory-of-human-rights/#:~:text=The%20so%2Dcalled%20%E2%80%9CThree%20Generations,rights%E2%80%94turns%2040%20this%20month.> accessed on 24 July 2022.

²⁴ Article 3, UDHR 1948.

²⁵ Article 4, UDHR 1948.

²⁶ Article 5, UDHR 1948.

²⁷ Article 12, UDHR 1948.

²⁸ Article 13, UDHR 1948.

²⁹ Article 18, UDHR 1948.

³⁰ Article 19, UDHR 1948.

³¹ Article 20, UDHR 1948.

³² Article 22, UDHR 1948.

³³ Article 23, UDHR 1948.

³⁴ Article 25, UDHR 1948.

³⁵ Article 26, UDHR 1948.

³⁶ Article 27, UDHR 1948.

(ILO) 1919 recognized that universal and lasting peace can be achieved only if it is based upon social justice and that unjust and hard conditions of labour to which large populations of people are subjected, can jeopardize global harmony and peace. About three decades afterwards, the Preamble of the UDHR would affirm the inherent dignity, and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. Prior to the enactment of these instruments, the ideals of '*liberté, égalité, fraternité*' (liberty, equality and fraternity) had resonated throughout the French Revolution.

In 1966; in order to assuage the sensibilities of the two blocs of the cold war, the United Nations adopted two covenants on human rights; one for civil and political rights (ICCPR),³⁷ and the other for economic, social and cultural rights (ICESCR). While the capitalist West accorded more urgency to civil and political rights, the Eastern bloc tended to put more emphasis on economic, social and cultural rights. The ICCPR and ICESCR transformed, expanded and consolidated the provisions of the UDHR into binding legal obligations. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the major universal treaty devoted to the promotion of economic and socio-cultural rights.³⁸ Every Party to the ICESCR commits to achieve progressively the full realization of the rights recognized in the covenant, and adopt legislative measures to promote them.³⁹ The ICESCR accommodates several socio-economic rights, including the right to work,⁴⁰ right to social security,⁴¹ right to an adequate standard of living,⁴² the right to the highest attainable standard of health; and the right to education.⁴³ At the regional level, the African Charter on Human and Peoples Rights 1981 (Banjul Charter) promotes and protects human rights and basic liberties in Africa. Nigeria domesticated the Banjul Charter through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983. As Manisuli Ssenyonjo rightly stated, the Banjul Charter is the first convention to protect the three generations of human rights without any distinction on justiciability.⁴⁴

³⁷ International Covenant on Civil and Political Rights (ICCPR), 16 December 1966

³⁸ The ICESCR was adopted by the United Nations General Assembly (UNGA) on 16 December 1966 and entered into force on 3 January 1976 pursuant to Article 27; UNTS, 993.

³⁹ Article 2 (1), ICESCR 1966.

⁴⁰ Articles 7 and 8, ICESCR.

⁴¹ Article 9, ICESCR.

⁴² Article 11, ICESCR; the right to adequate standard of living incorporates rights to food, water, sanitation and housing.

⁴³ Articles 13 and 14, ICESCR

⁴⁴ Ssenyonjo, M. (2011). Analyzing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter. Vol. 29. No. 3. Netherlands Quarterly of Human Rights; 358-397.

Economic, Social and Cultural Rights in the Constitution

In contrast with the civil and political rights enshrined in Chapter IV of the CFRN, economic, social and political rights are vaguely written and mixed up with several other aspirations of the State, for example, the composition of federal government agencies to reflect Nigeria's ethnic diversity or national character.⁴⁵ ESCRs are incorporated into the second chapter of the constitution (CFRN 1999) under the heading; 'Fundamental Objectives and Directive Principles of State Policy.' The CFRN declares that the State social order is founded on the ideals of Freedom, Equality and Justice.⁴⁶ The constitution appears to have explicitly recognized the connection between socio-economic conditions and the welfare of the individual. Consequently, it stipulates that the national economy should be run in such a manner as to secure the maximum welfare, freedom and happiness of every citizen.⁴⁷ Generally, the ESCRs enshrined in the constitution are comparable to those protected by the ICESCR and the Banjul Charter. One of the ESCRs in the constitution is the requirement for the State to provide suitable and adequate shelter, food, a reasonable living wage, and welfare schemes for the aged, unemployed, sick and disabled.⁴⁸

Furthermore, the right to equal and adequate educational opportunities at all levels is protected. This obligation includes the provision of free and compulsory education from primary school to the university, and the participation of the individual in adult literacy programs.⁴⁹ Another duty of the State extends to the preservation and promotion of cultural values that enhance human dignity; and also the encouragement of the development of technological and scientific studies which enhance cultural values.⁵⁰

A brew of rights is protected by Section 17 of the constitution. In Section 17 (3), the State has a responsibility to direct its policy to ensure that: (a) all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; (b) conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life; (c) the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; (d) there are adequate medical and health facilities for all persons: (e) there is equal pay for equal work without discrimination on account of sex, or on any other ground

⁴⁵ Section 14 (3) CFRN 1999.

⁴⁶ Section 17 (1) CFRN 1999.

⁴⁷ See Section 16, CFRN 1999.

⁴⁸ Section 16 (2) (d), CFRN 1999.

⁴⁹ Section 18 (1), CFRN 1999.

⁵⁰ Section 21, CFRN 1999.

whatsoever; (f) children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect; (g) provision is made for public assistance in deserving cases or other conditions of need; and (h) the evolution and promotion of family life is encouraged.

Second generation rights have also been codified by the Child Rights Act of 2003, although for the benefits of the child only. Thus, a child has a right to leisure, recreation and cultural services.⁵¹ With respect to health, ‘every child is entitled to enjoy the best attainable state of physical, mental and spiritual health.’⁵² Section 15 which protects the right to education reads: ‘every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education.’

Enforcement of Economic, Social and Cultural Rights

The desirability of enforcing economic, social and cultural rights is not misplaced. Nigeria grapples with a myriad of socio-economic challenges culminating in chronic poverty and a low quality of life. A World Bank study states that ‘as many as 4 in 10 Nigerians live below the national poverty line. Many Nigerians, especially in the country’s north, also lack education and access to basic infrastructure, such as electricity, safe drinking water, and improved sanitation.’⁵³ Yet, the enforcement of ESCRs through legal means faces a fundamental setback; the ouster of court jurisdiction in Section 6 (c). Section (6) (c) of the CFRN provides that judicial powers shall not extend to any issue or question as to whether any act of 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 Principles of State Policy set out in Chapter II of this Constitution. Subject to some conditions, an ouster clause or private clause excludes judicial review over a matter.⁵⁴ Although the right of access to courts may be limited in diverse ways, the use of ouster or private clauses appears to be the most controversial way of doing so.⁵⁵

⁵¹ Section 12, Child Rights Act 2003.

⁵² Section 13, Child Rights Act 2003.

⁵³ The World Bank. “Deep Structural Reforms Guided by Evidence are Urgently Needed to Lift Millions of Nigerians Out of Poverty, Says New World Bank Report” 22 March 2022. Press Release No: 2022/052/AFW Available at <https://www.worldbank.org/en/news/press-release/2022/03/21/afw-deep-structural-reforms-guided-by-evidence-are-urgently-needed-to-lift-millions-of-nigerians-out-of-poverty> accessed 31 July 2022. See also “World Bank. 2022. A Better Future for All Nigerians: Nigeria Poverty Assessment 2022.” Washington, DC. Available at <https://openknowledge.worldbank.org/handle/10986/37295> accessed 31 July 2022.

⁵⁴ J. M Hlophe (1986) ‘South African Ouster Clauses: Meaning and Effects’, Vol. 45. No3. The Cambridge Law Journal; 369-372.

⁵⁵ Australian Law Reform Commission. ‘Laws that Restrict Access to the Courts’ 31 July 2015.

In several instances, the judiciary has been invited to espouse the jurisprudence on ouster clauses.⁵⁶ In construing the provision of the CFRN excluding the jurisdiction of courts in impeachment proceedings, the Supreme Court in the case; *Inakoju v. Adeleke* observed that ‘...the courts become helpless when the constitution itself provides for an ouster clause.’⁵⁷ Nevertheless, the court held that since impeachment proceedings were subject to certain conditions, the courts could exercise jurisdiction to ascertain the validity of impeachments proceedings by their conformity to those conditions. However, in relation to the justiciability of economic, social and cultural rights, the ouster clause operates as an absolute bar to litigation. In other words, there are neither provisos nor qualifications.

However, the case of *Jonah Gbemre v. Shell Petroleum Development Corporation and Others* was a watershed in the enforcement of second generation rights, as it had endorsed the contention that the violation of economic, social and cultural rights interfered with the enjoyment of first generation human rights. In the proceedings, Mr. Jonah Gbemre, the Applicant, suing for himself and his community, argued that the continuous flaring of gas during petroleum exploration and production in the Niger-Delta region, by the Respondents, violated his right to life, right to dignity of the human person, and right to a clean, pollution-free and healthy environment.

In granting the reliefs sought by the Applicant, the court decided that the actions of the Respondents in continuing to flare gas in the Applicant’s community were gross violations of their fundamental right to life, including a healthy environment, and dignity of the human person textualized in the CFRN 1999.⁵⁸ Despite Jonah Gbemre case’s being a welcome development, one problem with it, is that it does not fulfil the requirement laid down by the Supreme Court in *Attorney-General of Ondo State v. Attorney-General of the Federation*, where His Lordship, Uwaifo declared that the Directive Principles can be made justiciable by legislation.⁵⁹ At best, *Gbemre’s* case may be regarded as a burst of judicial activism, which bodes well for the enforceability of economic, social and cultural rights which have not been embedded in any local enactment. To Sterling Harwood, judicial activism connotes any of the following practices in adjudications: (i) refusing to take an attitude of

Available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/18-judicial-review-2/laws-that-restrict-access-to-the-courts/> accessed on 31 July 2022.

⁵⁶ For example, see *General Sanni Abacha v. Chief Gani Fawehinmi* (S.C. 45/1997) 28 April 2000. Also reported in (2007) 4 NWLR (Pt. 1025) 423.

⁵⁷ *Inakoju v. Adeleke* (2007) 4 NWLR (pt.1025) 423.

⁵⁸ *Mr. Jonah Gbemre v. Shell Petroleum Development Corporation and others* (Unreported). Suit No. FHC/B/CS/53/05.

⁵⁹ *Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 9 NWLR (Pt. 772), 222.

judicial deference for legislative or executive power or judgment; (ii) relaxing requirement of justiciability; (iii) breaking precedent and (iv); loosely or controversially construing constitutions, statutes or precedents.⁶⁰

In contrast, the *LEDAP* case passes the test of a supportive legislation, but like the *Jonah Gbemre* case, is a decision of a high court, which is subject to review by the Court of Appeal or even the Supreme Court. In *LEDAP v. The Federal Ministry of Education*, the right to basic education was held to be enforceable because the National Assembly had passed the Compulsory and Free Universal Basic Education Act 2004, which guaranteed the right of every child to free, compulsive and universal education, and thereby created enforceable rights under Section 18 of Chapter II of CFRN.⁶¹ Following this reasoning, there are good prospects for enforcing the second generation rights in the Child Rights Act, 2003.

Then another question pops up. What is the place of human rights treaties in matters of enforcement? The answer to this question has been determined with reference to the forum, court or tribunal, before which it is raised; that is, whether the question is brought before the Nigerian judiciary or a regional human rights court. Prior to its passage into law by the National Assembly, a treaty is not enforceable. Section 12 (1) of the CFRN states that ‘no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’ As a result, Nigeria is regarded as a strict dualist State.

In a dualist State, international law is not incorporated into the constitution except by legislative exercise. Therefore, treaties are subordinate to the constitution.⁶² On the other hand, monism unifies international law and the legal systems of States, but projects the primacy of international over them.⁶³ Nigeria became a party to the ICESCR on 29 July 1993, but has not yet transformed it into a local legislation.⁶⁴ Nevertheless, economic, social and cultural rights have been codified by the Banjul Charter, which has been passed into national law.

⁶⁰ Sterling Harwood (1992) *Judicial Activism: A Restrained Defense*. Cornell University, p.2.

⁶¹ Legal Defence And Assistance Project (*LEDAP*) v. Federal Ministry of Education and Another. Suit No. FHC/ABJ/CS/978/15. 1 March 2017.

⁶² Jonathan Turley (1993) ‘Dualistic Values in the Age of International Legisprudence’ Vol. 44. No. 2. *Hastings Law Journal*: 185-272.

⁶³ Spaak, Torben (2013). ‘Kelsen on monism and dualism.’ *Basic Concepts of Public International Law: Monism & Dualism*: 322-343.

⁶⁴ Ajepe Taiwo Shehuafé (2013) *The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience* Vol. 2. No.1. Babalola University: *Journal of Sustainable Development Law and Policy*: 101-120

In *General Sanni Abacha v. Gani Fawehinmi*, an appeal concerning the enforcement of the rights of the respondent, the Supreme Court of Nigeria, per Michael Ekundayo Ogundare J.S.C, held as follows: 'No doubt, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is a statute with an international flavour. 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 vigour 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 Mr. Adegboruwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly....from removing it from our body of municipal laws by simply repealing the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Nor is the validity of another statute to be necessarily affected by the mere fact that it violates the African Charter or any other treaty, for that matter.'⁶⁵

The attitude of regional courts has been radically different. International tribunals tend to apply international law as opposed to municipal law. Thus, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.⁶⁶ At the regional level, the Nigerian government has been held by the Court of Justice of the Economic Community of West African States (ECOWAS) to be in breach of the right of all peoples to a general satisfactory environment favourable to their development.⁶⁷

Conclusion

In order to fulfil one of the basic functions of government, that is, the provision of essential services to its citizenry, it is desirable to actuate the justiciability or enforceability of economic, social and cultural rights. Where ESCRs are rendered justiciable, they become standards by which government can be assessed and held accountable for the performance or neglect of its responsibilities. However, the paradigm shift towards the justiciability of ESCRs lags behind the yearnings of people and the reality of the acute need of those services, which would be available if ESCRs are enforced. The preceding discussion leaves only two options for the enforceability of ESCRs. The first is by judicial activism, through which the court

⁶⁵ General Sanni Abacha v. Chief Gani Fawehinmi. Suit No. S.C. 45/1997. 28 April 2000.

⁶⁶ Article 27, Vienna Convention on the Law of Treaties Done at Vienna. 23 May 1969

⁶⁷ The court held that Nigeria was in breach of Articles 1 and 24 of the Banjul Charter. See SERAP v. Federal Republic of Nigeria. Judgment No. ECW/CCJ/JUD/18/12. 14 December 2012. See also The Social And Economic Rights Action Centre v. Nigeria.

relaxes the non-justiciability clause. This option lies entirely within the province of the judicial power in interpreting the law. In the second option, the legislature is required to pass a law, giving effect to any ESCR in order to render it enforceable. The most progressive step is to completely remove the clause ousting the jurisdiction of the court to inquire into the enforcement of ESCRs. This will render it unnecessary to promulgate specific implementing legislations for specific ESCRs.

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