

IFE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOL 1: No. 2, July - December, 2014
ISSN: 2437-167X



Published by
Department of International Law
Obafemi Awolowo University, Ife-Ife, Nigeria

IFE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

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TACKLING THE CAUSE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS VIOLATIONS THROUGH THE RECOGNITION OF THE RIGHT OF INHERITANCE IN INTERNATIONAL HUMAN RIGHTS LAW: ISSUES AND PROSPECTS*

Amoloye-Adebayo Azizat O.,

Introduction

This paper contributes to the emerging scholarship on a more responsive and meaningful protection of economic, social, and cultural (ESC) rights under International Human Rights Law (IHRL). Using the problem of disinheritance and discriminatory inheritance practices as an example, it posits that there is a serious need to re-examine current approaches to guaranteeing ESC rights. As a background, it attempts to describe what has been the nature of scholarship on ESC protection and charts the emerging trends. Moreover, it analyses the extent of the probability of the violation of ESC rights as a result of an unregulated inheritance regime. It concludes on the note that the issue of disinheritance and discriminatory inheritance practices form part of the manifestations of imbalance in power relations between individuals and is a fertile field for regulation by IHRL.

Economic Social and Cultural Rights Protection in IHRL: The Journey So Far

Arguably, the international system for the guarantee and protection of ESC rights has its anchor in the UDHR, particularly Articles 22-28. The standards contained in these provisions are, *inter alia*, the right to adequate standard of living incorporating such rights as to health, food, housing and general well-being; right to social security; right to work; right to education; and right to participation in cultural life. These standards appear later expanded, further defined and expressed in terms of legal obligations in the International Covenant on Economic Social, and Cultural Rights, 1966¹ (ICESCR). Although, the ICESCR arguably constitutes the main international text on the subject of ESC rights, relevant provisions are also contained in other international treaties such as the International Labour Organization (ILO)

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¹ This treaty entered into force on 3 January 1976, GA Res. A/RES/2200A (XXI), 993 UNTS 3.

Conventions and the international human rights conventions on racial discrimination, women, children, migrant workers and persons with disabilities.²

Similar provisions are also contained in regional treaties such as the European Social Charter,³ the African Charter on Human and Peoples' Rights⁴ and the 'Protocol of San Salvador'.⁵ However, it may be argued that the uniqueness of ICESCR as an international instrument dedicated exclusively to the protection of ESC rights is partly because it aspires to have universal application.⁶ A more fundamental reason is that, as variously claimed in a number of General Comments⁷ by the Committee on ESC Rights (CESCR), the normative content of the ICESCR on a typical right of this category may be regarded as the most important, wide-ranging and comprehensive provisions of all international instruments on the same subject. Illustrative examples are the provisions of the ICESCR on the right to education⁸ and rights to food and housing (both covered by the provisions of its Article 11). For these reasons, an analysis of the legal regime for the protection of ESC rights in this paper will primarily draw upon provisions of the ICESCR. This will, however, not bar references to relevant provisions in other international human rights instruments where appropriate.

Despite the constancy and consistency of the assertion that all human rights are universal, interdependent and indivisible,⁹ it may be argued that the international

²For a list of some of these international human rights treaties, see <http://www2.ohchr.org/english/law/>; Brownlie, I and Goodwin-Gill, G.S., 2006. *Basic Documents on Human Rights*. Fifth edition. Oxford: University Press. p.1.

³Adopted in 1961 and later revised in 1996; Council of Europe Treaty Series, No. 035.

⁴Adopted in 1981, OAU doc. CAB/LEG/67/3 rev. 5.

⁵This is the earlier mentioned Additional Protocol to the American Convention on Human Rights in the Area of ESC Rights adopted in 1988. See *Basic Documents Pertaining to Human Rights in the Inter-American System* OEA/Ser.L/V/II rev 10 (2004). P.85.

⁶See paragraph 4 of the preambular provisions of the ICESCR, 1966, which provides - 'Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights ...'

⁷See General Comments 4 (1991), 12 (1999) and 13 (1999) of the Committee on ESC Rights (CESCR). For example, the CESCR has stated in categorical terms in para. 2 of General Comment 13 that: 'The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles to the right to education, articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law.'

⁸Expressed in its Articles 13 and 14.

⁹See for instance the statement at the World Conference on Human Rights: Vienna Declaration and Programme of Action, 1993. UN Document A/CONF.157/23. A more recent affirmation is paras.4

protection of ESC rights has been, and continues to be, less successful *vis-à-vis* the enforcement of their Civil and Political rights (CP) counterparts. A long time ago, it was observed that:

*The international community as a whole continue[s] to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action.*¹⁰

A number of points that appear to support this contention have been recorded regarding the international protection of ESC rights. In the first place, the drafting of the ICESCR was a 'contentious, difficult and challenging matter'.¹¹ The initial efforts to incorporate ESC rights standards in a single treaty alongside those for CP rights had proved abortive resulting in the decision to adopt two separate Covenants in 1966.¹² Furthermore, it is usual for a core human rights treaty¹³ such as the ICESCR to contain provisions for the establishment of an 'international supervisory'¹⁴ body called a 'Committee' to monitor compliance with its standards. However, the ICESCR contains no such provision and instead places the

and 13 of the UN General Assembly 2005 World Summit Outcome, GA Res.A/RES/60/1 that: '4. We affirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations. 13. We affirm the universality, indivisibility, interdependence and interrelatedness of all human rights.'

¹⁰Statement of the Committee on Economic, Social, and Cultural Rights to the World Conference, UN Doc.E/1993/22/ p.83, para. 5.

¹¹Baderin, M. A., and McCorquodale, R., 2007. 'The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development' in Baderin, M. A., and McCorquodale, R., (eds.) *Economic, Social and Cultural Rights in Action*. Oxford: University Press. p.23.

¹²*Ibid.* Pp.4-7.

¹³There are in existence nine core international instruments on human rights. These are the two International Covenants of 1966 and the conventions on women; children; migrant workers and their families; persons with disabilities; elimination of racial discrimination; against torture; and on protection from enforced disappearance. See <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. Last accessed 18 November 2012.

¹⁴O'Flaherty, M., 2002. *Human Rights and the UN: Practice Before the Treaty Bodies*. 2nd Edition. The Hague, etc: Martinus Nijhoff Publishers. p.1.

responsibility for the implementation of its provisions on an organ of the United Nations, the Economic and Social Council (ECOSOC).¹⁵

It is axiomatic that such an established committee plays a crucial role in ensuring that the accentuation of the network of standards and the scope of obligation of State Parties in a human rights treaty is a continuum. Unfortunately, the initial implementation of the ICESCR had little of this service. In the stead of a committee, ECOSOC established 'Working Groups' that were generally perceived as less than satisfactory methods of supervision of State Parties' treaty obligations.¹⁶ It has in fact been argued that this initial state of affairs resulted in the ICESCR existing 'only as a textual reference point subject to the speculative claims of both its proponents and detractors.'¹⁷ In 1985, ECOSOC¹⁸ finally established an ICESCR Committee (CESCR or the Committee). This set in motion a process that has aided a deeper reflection and better appreciation of the standards envisaged and expressed in the ICESCR through General Comments periodically issued by CESCR.¹⁹ In spite of this development, some analysts have been constrained by the stark reality of the enormity of economic and social deprivations facing a large number of people in the world²⁰ to conclude that: no other treaty is 'more frequently misinterpreted, downplayed or intentionally abused' than the ICESCR.²¹

A number of arguments have been advanced to justify the disparity between the international protection of CP rights on the one hand and ESC rights on the other. This is in addition to the seeming inclination in some quarters to consider less

¹⁵See Articles 16-22 of the ICESCR, 1966.

¹⁶Craven, M., 1995. *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*. Oxford: Clarendon Press. Pp. 40-42.

¹⁷*Ibid*, p.1.

¹⁸By its resolution 1985/17.

¹⁹The CESCR has till date issued 21 of such general comments directed towards a more effective implementation of the covenant ranging from guidelines for State-Parties in fulfilling their treaty obligations to clarification of objective standards in respect of the rights guaranteed by the covenant. For instance, the first general comment issued in 1989 was on State reporting while the latest published in 2009 concerned the 'right of everyone to take part in cultural life.' See <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. Last accessed 20 February 2012.

²⁰According to one report in 2006, around 80% of the global population do not have access to social security. And even within this percentage, 20% exist in conditions of extreme deprivation and poverty. See Cichon, M. and Hugemeyer, K., 2006. 'Social Security for All: Investing in Global and Economic Development. A Consultation' *Issues in Social Protection Series, Discussion Paper 16*, ILO Social Security Department, Geneva.

²¹Simma, B., 'The Implementation of the International Covenant on Economic, Social and Cultural Rights, cited in Baderin, M. A., and McCorquodale, R., 2007. *Supra* note 10, p.23.

seriously the protection and violation of ESC rights than the violation of CP rights.²² However, to each and every one of these contentions there are cogent counter arguments. For instance, the notion that ESC rights are positive rights ultimately tied to the constraints or availability of resources and their allocation has been challenged with the view that a number of CP rights also require for their fulfilment positive actions and considerable State expenditure.²³ Additionally, it is opined that in actual fact a number of ESC rights are negative rights requiring no more than that States refrain from their violation.²⁴ Accordingly, it has been stated by the CESCR that-

*In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.*²⁵

A related notion focuses on the concern that the very nature of ESC rights makes their enforcement onerous. Firstly, it has been argued that it is difficult to ascertain who the final duty bearers of the rights are in meaningful terms to the rights-holder in relation to certain rights such as the right to health and food.²⁶ Secondly, promoting ESC rights, according to another view, may result in States' interference and intrusion upon personal privacy in the guise of rights' protection. This intrusion is highly unlikely in the enforcement of CP rights which are supposedly concerned mainly with personal freedom and autonomy.²⁷ A counter argument to the raised issues is that the stated policy problems are not peculiar to ESC rights and would, in reality, hold true for the implementation of a number of CP rights²⁸ such as the right to life and freedom of movement. In particular, it has

²²Statement of the Committee on Economic, Social, and Cultural Rights to the World Conference, UN Doc.E/1993/22/ P.83, para. 5.

²³Hirschl, R., 2000. 'Negative' Rights vs. 'Positive' Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order.' 22 *Human Rights Quarterly*. Pp. 1072-3.

²⁴Green, M., 2001. 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurements.' 23 *Human Rights Quarterly*. Pp.22-3.

²⁵See CESCR General Comment 9, 1998 'The Domestic Application of the Covenant'. Para.10.

²⁶O'Neill, O., 2005. 'The Dark Side of Human Rights'. 81(2) *International Affairs*. Pp.427-439.

²⁷Craven, M., 1995. *Supra* note 15, p.10.

²⁸Yamin, A.E., 2005. 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda.' 27 *Human Rights Quarterly*. p.1214.

been demonstrated that the idea that the nature of ESC rights makes the determination of correlating duties problematic is merely the consequence of an oversimplification of the analysis of duties.²⁹ As one analyst has noted-

*When someone is tortured . . . observers almost unconsciously hold the state responsible. However, when people die of hunger or thirst [or when they suffer because they are unjustly disinherited], the world still tends to blame . . . the simple inevitability of human deprivation, before placing liability at the doorstep of the state. Worse yet, societies increasingly blame victims of such violations for creating their own dismal fates . . .*³⁰

According to a third objection to the nature of ESC rights, the underlying obstacle to the protection of these rights resides not in their intrinsic nature. It is rather connected with the lack of legal clarity of the provisions which express ESC rights' standards as well as those reflecting the nature of concomitant State Parties' obligations in the ICESCR. The provisions of Article 2 of the ICESCR obligating each Member-state to ensure the protection of ESC rights within its local jurisdiction to the 'maximum of its available resources' has been charged as being problematic.³¹ To one particular critic, these words add up to 'a difficult phrase- two warring adjectives describing an undefined noun. "Maximum" stands for idealism; "available" stands for reality.'³² On a cumulative level, it is claimed that the normative contents of ESC rights as formulated in the entire provisions of the ICESCR are such that they are burdened with 'intellectual and policy problems.'³³

²⁹Shue, H., 1988. 'Mediating Duties', 98(4) *Ethics*, P.704. "[T]he difficulty is not with the discourse of rights but with the oversimplified analysis of duties that rights-based theories usually assume. If correlated with a particular right like the right to food are actually several kinds of duties, some of these correlative duties will be general and some will be special-and some will be, strictly speaking, neither general nor special but the fruit of new relationships created by new institutions designed expressly to allocate previously unallocated duties."

³⁰Leckie, S., 1998. 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights,' 20 *Human Rights Quarterly*, P.82.

³¹Robertson, R.E., 1994. 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights,' 16 *Human Rights Quarterly*, P.694.

³²*Ibid.*

³³Odinkalu, C.A., 2001. 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights,' 23 *Human Rights Quarterly*, p.332.

Yet if the socio-economic and political climate within which the ICESCR was adopted is dispassionately considered, it may be difficult to envision how the normative contents of these rights and resulting States' obligations could have been more properly expressed. It may thus be argued that only with the benefit of hindsight have detractors of the ICESCR been able to sustain arguments about the nature of the legal standards and obligations it stipulates. For, as noted by Beetham, the social and political background to the adoption of the ICESCR resulted in a text that struggles to attain and possibly maintain a balance between the economic advancements of the Northern States and the relative material inferiority of their Southern counterparts.³⁴ To him:

This uneasy conjunction of minimum and maximum agenda ... and the language of 'progressive achievement as resources allows' stem partly from the attempt to bridge the two. With hindsight it might have been better if the original text had concentrated on establishing a minimum agenda, while leaving it to regional charters to develop their own formulation of rights which might be more ambitious than, yet consistent with, the universal one.³⁵

Perhaps some allegations that the ICESCR is an ideological relic of the Cold War era³⁶ and the initial attitude towards its implementation make the continual affirmation of the indivisibility and interdependence of human rights ineluctable. But, as Scott³⁷ rightly cautions, it is important to always be mindful that human rights are expressed as interdependent and indivisible for the benefit of the individual right-holder not the discourse of human rights generally. Therefore, it appears legitimate and justifiable that in present times special and considerable attention needs to be accorded to the complexity and myriad of circumstances that can result in violations of ESC rights. The reason for this is that such issues, to a very large extent, received less exploration in available jurisprudence in comparative

³⁴Beetham, D., 1995. 'What Future for Economic and Social Rights.' 43 *Political Studies*, pA6.
³⁵*Ibid.*

³⁶In the United Nations, economic, social, and cultural rights are an orphan of the cold war." See Tomaševski, K., 2005. 'Unasked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education.' 27 *Human Rights Quarterly*, p.717; also, Alston, P., and Quinn, G., 1987. 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights.' 9 *Human Rights Quarterly*, p.160.

³⁷Scott, C., 1999. 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights".' 21 *Human Rights Quarterly*, p.634.

terms to conditions that may perpetuate the violation of CP rights. Instances of denial of inheritance and discriminatory inheritance practices, to the current author, constitute illustrative examples of the less explored areas of violation of ESC rights.

It is not the intention to argue that the possible ways through which CP rights may be violated are now immediately ascertainable with the exactitude of mathematics for their simplicity. The point sought to be made is that, in relative terms, acts constituting violations of CP rights appear to have achieved more precision by the construction of relevant provisions in human rights instruments 'in the constant jurisprudence of international courts'.³⁸ This is in addition to the abundance of available jurisprudence of the relevant treaty bodies on matters involving violations of CP rights. It is conceded that there currently exists a 'growing intellectual development and sophistication' which has ensured that ESC rights 'are no longer as neglected as they once were in relation to CP rights'.³⁹ Of crucial importance in this regard is the jurisprudence of the CESCR⁴⁰ which is heavily documented

Similarly, the jurisprudence of the regional human right bodies in the Americas, Africa and Europe and of national/constitutional courts in some domestic jurisdictions in the promotion and protection of ESC rights are well documented.⁴¹ The fact that the issue of the recognition and protection of ESC rights continues to be in reception of much judicial and academic attention nationally and internationally is commendable. This may be a clear indication that the question of non-justiciability of ESC rights, if not already 'dead and buried', is presently reduced merely to 'a quiet echo from the past'.⁴² Nevertheless, the alarming levels

³⁸Tinta, M.F., 2007. 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions.' *29 Human Rights Quarterly*, p.434.

³⁹For example, see Chapman, A. and Russell, S., (eds.) 2002. *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Antwerp, etc.: Intersentia, p.3

⁴⁰Tinta, M.F., 2007. *Supra* note 37, p.435.

⁴¹See for instance Clapham, A. 2006. *Human Rights of Non-State Actors*. Oxford: University Press. P.p432-531; Tinta, M.F., 2007. *Supra* note 37, p.434; Nolan, A., 2009. 'Addressing Economic and Social Rights Violations by Non-state actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect.' *9(2) Human Rights Law Review*. Pp.225-255; See Tomaševski, K., 2005. *Supra* note 35. P.717; 'Leading Cases on Economic, Social and Cultural Rights: Summaries.' Working Paper No.7 ESC Rights Litigation Programme, Centre On Housing Rights And Evictions (COHRE) 2009. Available at http://www.cohre.org/view_page.php?page_id=381. Accessed 25 May 2012.

⁴²See Scheinin, M., 2006. 'Justiciability and the Indivisibility of Human Rights' in Squires, J., Langford, M. and Thiele, B. (eds.), *The Road To A Remedy: Current Issues in the Litigation of*

of poverty and deprivation⁴³ constituting large scale violations of ESC rights in developing societies and impoverished sections of the industrialized others daily illustrate that much is still needed to be done. While it may be argued that all human rights require resources for their protection, most human rights experts would generally agree that the full realization of ESC rights require greater expenditure of resources by any State.⁴⁴

This reality raises the question as to whether it may be more cost effective for States (especially developing States) to fulfil ESC rights if more attention is directed instead to addressing the 'causes' of violations rather than attempting to eradicate their 'symptoms'.⁴⁵ It appears that much of the present efforts channelled towards the protection of most ESC rights have focused on proving their justiciability and independent existence as human rights and not merely the socio-cultural and economic aspects of CP rights.⁴⁶ It may, therefore, be more fruitful if States are required under existing human rights obligations to give more serious attention to

Economic, Social and Cultural Right. Sydney: UNSW Press. p.17. Available at http://www.cohre.org/view_page.php?page_id=381. Accessed 25 May 2012.

⁴³According to the Human Development Report, 2003, published for the United Nations Development Programme (UNDP), available at http://hdr.undp.org/en/media/hdr03_complete.pdf P.37, accessed 2 June 2012: 'Like South Asia, Sub-Saharan Africa faces enormous poverty. But unlike South Asia, it is being left behind. Almost across the board the story is one of stagnation. Economies have not grown, half of Africans live in extreme poverty and one-third in hunger, and about one-sixth of children die before age five- the same as a decade ago.'

⁴⁴See Baderin, M. A., and McCorquodale, R., 2007. *Supra* note 10, p.12. "Although it has been argued accurately that some [CP rights] also require resources to be protected, it is clear that ESC rights generally require greater resources to achieve. This has greatly affected the full development and realization of the ESC rights over the years, especially in developing states."

⁴⁵See for example the argument by Craven that the human rights project is famous amongst others for 'promising too much, delivering too little; failing to manage conflicting interests; treating symptoms not causes; and so on.' Craven, M., 2006. 'Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights' in Squires, J, Langford, M. and Thiele, B. (eds.), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Right*. Sydney: UNSW Press. p.17. Available at http://www.cohre.org/view_page.php?page_id=381. Accessed 25 May 2012.

⁴⁶Consider the argument by Warbrick that the notion that the European Convention on Human Rights protected ESC rights prior to the adoption of the European Social Charter is misconceived. In his view, what that Convention did in qualifying cases was to protect the social and economic aspects of CP rights. This much, to him, is certainly not the same as recognizing ESC rights as independent claims. Warbrick, C. 2007. 'Economic and Social Interests and the European Convention on Human Rights' In Baderin, M. A., and McCorquodale, R., (eds.), *Supra* note 10, P.241. Compare this position with the argument by Scheinin that such notion in fact emphasizes the interdependence and indivisibility of all human rights and has the potentiality for the strengthening the protection of economic social and cultural rights by providing some guidance as to how their violations may successfully be adjudicated. Scheinin, M., 2006. *Supra* note 41, Pp.20-23.

preventing circumstances that result in scenarios of homelessness, destitution, and hunger than concentrating majorly on remedial and restitutive measures. The sense of what is intended here is captured by Craven's argument that some terminologies defining the nature of State Parties' obligations in respect of ESC rights

*leaves untouched the basic question as to whether society is structured in a way that allows the continued production and reproduction of impoverishment. . . Without some broader engagement with the structural causes of poverty that permeate the private realm of exchange, an emphasis upon public law remedies will do little other than merely legitimate existing distributions of wealth, status and power throughout society, and render more difficult any action which seeks to reconfigure them.*⁴⁷

This line of argument appears to have also enjoyed international judicial approval in the Advisory Opinion of the International Court of Justice (ICJ) on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁴⁸ It should be noted that the analysis of the Advisory Opinion given below is limited only to issues of ESC rights violation as addressed by the ICJ. In this regard, an important issue for determination by the ICJ was whether the Israeli Government was bound by the provisions of the ICESCR (which it had ratified) as to be considered in violation of some of those provisions by its conduct within the occupied Palestinian territory.⁴⁹ The Israeli government, for its part, argued that the provisions of international human rights instruments generally serve only to protect citizens from violations by their own government.⁵⁰ Therefore, the applicable law on the matter, in its opinion, was/is international humanitarian law.⁵¹

In refusing to be persuaded by the Israeli government's contention, the ICJ made particular findings that the continued construction of a barrier (Wall) by Israel around the relevant Palestinian territories has had dire consequences for agricultural production and aggravated 'food insecurity in the region.'⁵² The Wall has resulted in

⁴⁷Craven, M., 2006. *Supra* note 44, p.36.

⁴⁸*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice Advisory Opinion, 9 July 2004. Full text available at <http://www.icj.org/docket/files/131/1671.pdf>. Accessed 25 May 2012.

⁴⁹Paras 101-103.

⁵⁰Para 102.

⁵¹*Ibid.*

⁵²Para 133.

the destruction of fertile lands and 'some of the most important water wells in the region' are currently at the Israeli side of the Wall.⁵³ The Wall has also resulted in the restriction of movement of persons within and outside of the relevant Palestinian territories; forced people to abandon their abodes of choice; and increased difficulties of access to places of work, health, educational and other social facilities.⁵⁴ The ICJ thus determined that-

*the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.*⁵⁵

In concluding its opinion on this particular point, the ICJ found the Israeli government to be in violation in respect of the Palestinian victims concerned of the following rights: that is, the rights 'to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights'.⁵⁶

At this point, it is useful to again note the earlier stated emerging arguments for the need to concentrate more efforts on addressing the root causes of violation of ESC rights rather than treating the symptoms. Reference by the ICJ in the Advisory Opinion discussed to the existence of an obligation on State Parties 'not to raise any obstacle to the exercise' by individuals of ESC rights appears to reflect its responsiveness to these two developments. More importantly, it also evinces the recognition by that Court of the need to, in deserving situations, adopt a broad and dynamic interpretation of the provisions of the ICESCR if those provisions are not to be entirely deprived of their overall objectives. The fact that the ICJ refused to be persuaded by the argument of the Israeli government that it had no human rights obligations to persons within the occupied Palestinian territory is again illustrative

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵Para 112. Emphasis added.

⁵⁶Para 134.

of the established⁵⁷ fact that acts by States that impede the exercise of ESC rights to persons within (or even outside⁵⁸) their territorial boundaries may qualify as human rights violation under the ICESCR.

For present purposes, a question for determination is whether private actions should be taken as being subsumed under States Parties' "obligation not to raise any obstacle to the exercise" by individuals of their ESC rights. Drawing on the argument that it may be more helpful to work at eliminating the root causes of violations of the category of rights in question, a primary assumption in this paper is that private acts which disinherit or discriminate against otherwise qualified heirs in the distribution of the estate of a deceased relative in certain societies significantly affect their ability to enjoy a number of ESC rights. Therefore, a stronger base for the realization of these rights may be possible if persons prone to such instances in their immediate environments are protected through inheritance regulation. This is especially important for domestic contexts where State-sponsored social security measures for the less privileged members of the society are either ineffective or non-existent.

Inspired by the words of Eleanor Roosevelt, the current author is of the view that unless human rights (and in this paper ESC rights) have meaning in the private sphere of activity of an individual 'they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world'.⁵⁹ Hence, the proposition in this paper is that the question of resource distribution through inheritance, essentially a private matter, is closely connected with the enjoyment of some ESC rights in developing societies such as Nigeria so as to require regulation by IHRL. The 'right to inheritance', the phraseology adopted to argue the link between the two concepts of inheritance and human rights, currently has no explicit and independent legal existence or status in IHRL.

⁵⁷See O'Flaherty, M., 2006. 'The Concluding Observations of United Nations Human Rights Treaty Bodies.' 6 *Human Rights Law Review*. Pp.35-36.

⁵⁸For the statement of this point of view in the context of the discussed Advisory Opinion of the ICJ, see *Ibid*.

⁵⁹At the presentation of "IN YOUR HANDS: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights." United Nations, New York, March 27, 1958. Available at <http://www.udhr.org/history/inyour.htm>. Last accessed 10 September 2013.

The Concept of Inheritance and the Violation of ESC Rights: The Interface

In spite of the current state of legal scholarship on the issue of justiciability and the status of ESC rights as discussed in the section above, two detracting notions appear to still retain some force. The first is the idea that the realization of a number of ESC rights comparatively to the protection of most CP rights generally requires greater expenditure of resources and may further challenge poorer economies⁶⁰ such as Nigeria. The other is the notion that for governments everywhere to be able to fully realise ESC rights, they require a 'huge paternalist and bureaucratic apparatus and a corresponding extension of compulsory taxation, both of which would interfere with another basic right, the right to freedom.'⁶¹ It is stated in furtherance of the latter notion that the guarantee of ESC rights must necessarily require an illegitimate engagement by States with the principles of social justice through wealth redistribution and an incursion into market economies.⁶²

These two arguments appear to articulate the fundamental ideological problems that continue to put the realization of ESC rights in most States in jeopardy. However, human rights advocates have long proposed strategies that put in question the legitimacy of the stated assumptions. Relevant literature has, for instance, sought to prove that oftentimes violations of ESC rights' in developing countries are in reality the results of poor policy making; official corruption; the drive towards economic development and other structural problems.⁶³ The point being that perhaps the realization of ESC rights in economies such as Nigeria requires strategies that target, for example, government corruption and inject ESC rights considerations into policy-making and developmental goals rather than expending additional resources. Discussing official corruption in the South African context, Lehman⁶⁴ has suggested that given 'disproportionate defense spending that is hurting the homeless, jobless, and those without adequate water, sanitation, and education', these concerns should inform a strategy of constitutional adjudication, criticism and challenge.

In her opinion, courts should be able to entertain such challenges and be prepared to undertake judicial review of administrative 'disproportionate'

⁶⁰See Craven, M., 2006. *Supra* note 44, p. 32.; Baderin, M. A., and McCorquodale, R., 2007. *Supra* note 10, p.12.

⁶¹Beetham, D., 1995. *Supra* note 33, p.42.

⁶²Scott, C and Macklem, p., 1992. 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution.' 141(1) *University of Pennsylvania Law Review*, p.21.

⁶³For example, see relevant argument in Lehman, K., 2006. 'In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core.' 22:163 *American University International Law Review*, Pp. 196-7.

⁶⁴*Ibid*, p.197

expenditure of resources in the face of mass violations of the citizenry's ESC rights.⁶⁵ This ideology may have informed an institution by a Nigerian advocate, Femi Falana, of a suit challenging the Nigerian federal government on the state of public health facilities in the country.⁶⁶ Mr Falana sought before the Nigerian Federal High Court⁶⁷ a declaration that the condition of public health facilities in the country violates Article 16(2) of the African Charter on Human and Peoples' Rights⁶⁸ and a perpetual injunction to restrain the government from profligately expending public funds on ailing public officers in foreign hospitals amongst other claims. On policy-making that impacts the realization of ESC rights, Hiskes⁶⁹ has demonstrated how a seemingly disconnected policy decision such as the citing and construction of a golf course in the American context can significantly impact the enjoyment of the human right to water of persons within and outside that country's territorial boundaries.

Regarding economic development, it has been suggested that the inertia by some States to commit to concrete welfare policies may significantly be attributed to both internal and external pressures to attract foreign investments by maintaining favourable and competitive market conditions for TNCs.⁷⁰ On a seemingly pessimistic note, Wiles⁷¹ concludes that it is presently uncertain 'whether the new orientation of scholarship in favour of socio-economic rights will be able to counter these opposing forces.' Indeed, it is worrisome that not only are poorer economies increasingly paying more attention to economic development at the expense of

⁶⁵*Ibid.*

⁶⁶See the account in a Nigerian daily, 'Punch on the Web' Friday, 30 July 2010. Available at <http://www.punchng.com/Article>.

⁶⁷Suit No. FHC/IKJ/CS/M59/10, pursuant to Order 1, rule 2 of the Fundamental Rights (Enforcement Procedure) Rules 2009 as preserved by section 315 of the Nigerian 1999 Constitution. This case is still pending before the court at the time of the writing up of this thesis.

⁶⁸(Ratification and Enforcement) Act, Chapter A9, Laws of the Federation of Nigeria, 2004. This statute actually incorporates the provisions of the African Charter on Human and Peoples' Rights into the Nigerian legal system.

⁶⁹Hiskes, R.P., 2010. 'Missing the Green: Golf Course Ecology, Environmental Justice, and Local "Fulfillment" of the Human Right to Water.' 32(2) *Human Rights Quarterly*. Pp. 326-341. The focus of the article is primarily 'on water usage by the approximately 17,000 golf courses in the United States and on its impact on both water supplies and the prospects for honoring the human right to water worldwide.' See, especially, p.334.

⁷⁰Wiles, E., 2006. 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law.' 22(1) *American University International Law Review*, p.64.

⁷¹*Ibid.*

human development⁷², but in fact that States which had hitherto strong welfare systems are in the trend of introducing significant cutbacks. In a concluding observation by the CESCR on Canada⁷³, the Committee noted 'with concern the cuts in financial support to civil legal aid services with regard to economic, social and cultural rights in a number of jurisdictions of the State party.'⁷⁴ These States appear open to the idea that continued governmental provision of socio-economic goods will affect the basic potentialities for economic development and ultimately infringe individual freedom. That the converse may in fact be the case has long been recognised.⁷⁵ In the first place, it is safe to assume that the concept of individual freedom is a mirage without concurrent 'autonomy concerning the exercise or enjoyment of some specified core'⁷⁶ of ESC rights.

In this sense, it has been emphasized that there is a need for 'broader social welfare policies and economic development strategies' directed at 'achieving the minimum core [of ESC rights] in every possible way'.⁷⁷ In real terms, sustained conditions of abject poverty and gross violations of ESC rights may in the long run prove inimical to economic growth and development for any country. It is axiomatic

⁷²This is despite the availability of data that have sought to prove that a country's level of development is in reality commensurate with the level of its human development and the fact that poverty constitutes a denial of access to almost, if not all, human rights. See U.N. Development Programme (UNDP), Human Development Report 2005: International Cooperation at a Crossroad: Aid, Trade and Security in an Unequal World. Pp.54, 57 and 227-29, available at <http://hdr.undp.org/en/reports/global/hdr2005/>. Accessed 17 July 2012.

⁷³2006 E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, para 14.

⁷⁴Similar concerns were also expressed in the CESCR's Concluding Observations (CO) on Sweden in 1995, E/C.12/1995/5, paras 7-9. Years later, although Sweden had hitherto been one of the few countries in Europe in which tuition was free for all students regardless of national origin, the Swedish parliament has recently passed a law to introduce tuition and application fees for International Students from 2011. See *The Local*, 21 April 2010 (available at <http://www.thelocal.se/followsweden/article/Tuition-fees-from-2011/>, accessed 17 July 2012.) Similarly, in the UK, welfare and benefits cuts appears to be top priority for the new Conservative/Liberal-Democratic coalition government's panacea to economic recovery and growth. See 'The Impact of Welfare Cuts: Britons on the Breadline,' *The Independent*, 4 July 2010 (available at <http://www.independent.co.uk/news/uk/politics/the-impact-of-welfare-cuts-britons-on-the-breadline-2017939.html>, accessed 17 July 2012.) According to Yamin, A.E., 2009, *Supra* note 27, Pp. 5-6- 'We should all be alarmed, not only by the fact that millions of people are slipping into poverty due to current global economic crisis, but also by the tendency of governments to slash social programs and dictate aid without meaningful input from those who are most affected.'

⁷⁵See for example Siegel, R.L., 1985. 'Socioeconomic Human Rights: Past and Future,' 7 *Human Rights Quarterly*. Pp.255-267.

⁷⁶Wellman, C., 1982. *Welfare Rights*. Totowa, N.J.: Rowman and Littlefield. p.31.

⁷⁷Wiles, E., 2006. *Supra* note 69, p.60.

that economies where ESC rights suffer gross violations are often rife with social crises such as civil strife and wars, vandalism and alarmingly high crime rates.⁷⁸ Such economies rarely attract gainful foreign investments but usually require additional social protection 'in the name of national solidarity and in the interest of the political survival of governments with varied ideological baggage'.⁷⁹ These concerns may have inspired a change in the orientation of scholarship by economists of the 1950s and 1960s that was geared exclusively towards State-led-income-based growth to those of people-centred-sustainable-development of the 1970s onwards.⁸⁰ This trend has also been greatly impacted by human rights scholarship evident in the abundance of literature on the concept of a rights-based approach to development.⁸¹ While an extensive discussion of this concept will take the present thesis far afield its focus of concern,⁸² it is relevant to note that the significance of the concept is to

⁷⁸ As Tommasoli has argued, 'Chronic Poverty may also be a significant factor in sustaining wars as violent crime and predation become the only viable livelihood strategy for the chronically poor.' Tommasoli, M., 2003. 'Inequality, Vulnerability to Violent Conflict and Aid Incentives for Peace' Fourth Annual Global Development Conference, available at http://deposit.dnet.org/cms/conference/papers/4th_pr14.4.5_Tommasoli_paper.pdf, accessed 11 August 2012; also, for an exploration of the subject within the Ivorian historical context, see Langer A., 2005. 'Horizontal Inequalities and Violent Conflict, Cote d'Ivoire Country Paper' available at http://hdr.undp.org/en/reports/global/hdr2005/papers/hdr2005_langer_arim_32.pdf, accessed 11 August 2012.

⁷⁹ Siegel, R.L., 1985. *Supra* note 36, p.266.

⁸⁰ See Yamin, A.E., 2009, *Supra* note 27, p. 6.

⁸¹ See for example, Darrow, M. and Tomas, A., 2005. 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation.' 27(2) *Human Rights Quarterly*. Pp.471-538; Alston, P., 2005. 'Ships Passing in the Night: The Current State Of Human Rights And Development Debate Seen Through the Lens of the Millennium Development.' 27(3) *Human Rights Quarterly*. Pp. 755-829; Rozga, D., 2001. 'Applying a Human Rights-Based approach to Programming: Experiences of the UNICEF'. Available at <http://www.equalinrights.org/resource-library/2-human-rights-based-development-programming/>, Accessed 11 August 2012. 'Human Rights and Human Development' UNDP Development Report, 2000, available at http://hdr.undp.org/en/media/HDR_2000_EN.pdf, accessed 12 August 2010; Patel, M., 2001. 'Human Rights as an Emerging Development Paradigm and some implications for Programme Planning, Monitoring and Evaluation' HRAP M&E Workshop Update, available at <http://www.equalinrights.org/resource-library/2-human-rights-based-development-programming/>, accessed 11 August 2012.

⁸² See; inter alia, Sen, A.K., 2001. *Development as Freedom*. Oxford, New York: Oxford University Press; 1999. *Commodities and Capabilities*. Delhi: Oxford University Press; 1983. 'Development: Which Way Now?' 93 *The Economic Journal*. Pp.754-756; Sudhir, A. and Sen A., 2000. 'Human Development and Economic Sustainability' 28(12) *World Development*. Pp. 2029-2049; and discussing his contributions on the subject, see Vizard, P., 2005. 'The Contribution of Professor Amartya Sen in the Field of Human Rights.' CASE paper 91, LSE available at <http://sticerd.lse.ac.uk/dps/case/CP/CASEpaper91.pdf>, accessed 16 August 2012, pp 28-44.

make 'developmental strategies become more "preventive" rather than merely reactive on their approach to poverty and violent conflict.'⁸³

The discussion so far provides ample justification for the assumption that much of ESC rights scholarship currently addresses causes of violations and States' obligations in that respect rather than the question of resource and its degree of availability. Put another way, there have been broader considerations for creating preventive frameworks rather than ameliorative measures in delineating States' obligations towards ESC rights protection. The present paper seeks to add to this growing body of literature by advocating for the regulation of inheritance. As the CESCR has reiterated, 'the implementation of economic, social and cultural rights requires a consideration of a range of issues, including the equitable distribution of existing resources.'⁸⁴ What is, therefore, envisaged is a system that ensures the equitable distribution of the estate of a deceased in relation to the socio-economic requirements of would-be heirs. This is considered to be pertinent since a person that is disinherited may have his ESC rights violated in economies where there are no other provisions for economic welfare and social security. In the same vein, persons who may otherwise not require any external assistance to enjoy basic ESC rights may, nevertheless, suffer violations as disinherited or discriminated heirs.

The CESCR also has found for a fact in one consideration that the denial of inheritance has resulted in harsh living conditions for widows and orphans in that particular jurisdiction.⁸⁵ There appears to be little need for further elaboration to show that the consequence of such situations may be long or short term (depending on the particular circumstances of victims) cumulative violations of such ESC rights. This may be the right to adequate standard of living, comprising freedom from hunger, adequate clothing and housing including the continuous improvement of living conditions⁸⁶. The violation of this right appears self-evident where heirs are denied access to property of a deceased who, in most cases, was the breadwinner responsible for the provision of accommodation and all social and nutritional needs of the spouse and the children. The CESCR has, for example, correctly observed in respect of the 'freedom from hunger' component of Article 11 that States should

⁸³ Darrow, M. and Tomas, A., 2005. *Supra* note 80, p.486.

⁸⁴ Concluding Observation on Jordan, 2000 E/C.12/1/Add.46, para 27.

⁸⁵ CESCR Concluding Observation on Zambia, 2005, E/C.12/Add.106, para 23.

⁸⁶ Article 11 ICESCR

ensure that all persons are protected by adopting all possible and necessary strategies.⁸⁷

It may also be the right to enjoy physical and mental health to the highest degree possible and healthy development of the child⁸⁸. The link between denial of inheritance and the right to health may not be readily obvious. However, it is a fact that in most countries today, health services are rarely cost-free and are mostly only available to persons able to afford them through personal means.⁸⁹ Importantly, the CESCR has stated its recognition of 'formidable structural and other obstacles'⁹⁰ that result in the violation of the right to the highest attainable standard of health. Specifically as it relates to the protection of the right to health of women and children, it has been observed that States' obligation in this regard include breaking down all barriers that can interfere with their 'access to health services'.⁹¹ In the author's opinion, the denial of inheritance as well as discriminatory inheritance practices may constitute part of the structural obstacles or barriers to a victim's realization of the right under discussion from private resources. Therefore, the recognition of the right to inheritance in this connection may be taken to amount to part of States' obligation 'to take measures that prevent third parties from interfering with Article 12 guarantees' as emphasized by the CESCR.⁹²

Other right in this category includes the right to the full development of the human personality and the sense of its dignity through education⁹³. Similar to the right to health, there is almost no such thing as the right to education in most developing societies except where the right holders are in position to ensure fulfilment by individual initiatives such as the payment of fees and the acquisition of learning and research materials. Certainly, the protection by a State of persons from denial of inheritance and discriminatory inheritance practices does not absolve the State concerned of the obligations to realise the right to education to all persons. However, it is possible to argue that the recognition of the right to inheritance may constitute part of a State's obligation to adopt all necessary measures to ensure that third parties do not interfere with the enjoyment of the right,⁹⁴ particular in situations where educational services are not publicly funded.

⁸⁷CESCR General Comment No. 12 'The right to adequate food', 1999. E/C.12/1999/5, para 21.

⁸⁸ Article 12, ICESCR.

⁸⁹This fact is acknowledged by the CESCR in General Comment No. 14, 'The right to the highest attainable standard of health', 2000. E/C.12/2000/4, para 12 (b) (iii).

⁹⁰*Ibid*, para 5.

⁹¹*Ibid*, para 21-3.

⁹²*Ibid*, para 33.

⁹³ Article 13-14 ICESCR.

⁹⁴CESCR General Comment No. 13, 'The right to education', 1999. E/C.12/1999/10, para 47.

Finally, where the State is unresponsive in terms of welfare provision, a disinherited heir faces an additional violation of the right to social protection and assistance from the State⁹⁵ and the right to security in the event of unemployment, widowhood or 'other lack of livelihood in circumstances beyond his[or her] control'⁹⁶.

Conclusion

That there appears to be a connection, in the current author's view, between instances of denial of inheritance as well as discriminatory inheritance practices and the violation of ESC rights has been demonstrated in this paper. As the anecdotal account in the prologue indicates, acts of denial of inheritance or discriminatory inheritance practices where they exist are often the result of imbalance in private power relations within families. In view of these potential violations, it is here conceived that for developing economies in particular, where the incidences of violations of ESC rights appear to be greater, inheritance practices that manifest structural inequality in power relations within families ought to be prevented or fruitfully managed by the State in the best interest of all concerned.

⁹⁵Article 10 ICESR. See CESCR General Comment No. 19, 'The right to social security', 2008. E/C.12/GC/19, para 4(b).

⁹⁶Article 25 (1) UDHR