

## A Legal Assessment of the Positive Duties Imposed by Economic, Social and Cultural Rights in Nigeria

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### Abstract

*Human rights are not only internationalized but have become the benchmark upon which the activities of governments and organizations are assessed. A holistic approach has become the practice adopted in appraising these rights. This is because, these rights compliment each other. But the real challenge is the ability of government to realize the economic, social and cultural rights of their citizens. This has imposed positive duties on states. This article appraises these duties as it relates to Nigeria in the context of private party violations and concludes by comparing such treatment in other jurisdictions.*

### 1. Introduction

In the jurisprudence of international Human Rights law, the recognition of a duty expected of a state “to take action” is seen as the common denominator of all understandings of the notion of positive obligations. This notion is one which has been regularly relied upon both by treating-monitoring bodies and indeed in academic literature. Yet, there is no unanimity with respect to its meaning as it varies, depending on the context and sometimes, on the particular obligation issue.

Essentially, human rights are viewed as a protection against the power of the state to deprive people of their liberties, personal security and property. Increasingly, it is recognised that exclusive focus on the defensive function of human rights primarily benefits those groups in society that already enjoy access to social power and resources. This means that the regime of human rights acts as a shield to all-weak, poor, strong, rich and power. The violator of human rights relies on the protective shield of human rights when his own rights are in jeopardy. So, in order to be effective in redressing violations and promoting a more equitable society, it is needful that the positive duties imposed by human rights are recognised.

It is important at this stage to point out that these positive duties are equally applicable to civil and political rights as well as economic, social and cultural rights.<sup>1</sup> When viewed properly, the concept of interdependence of human rights<sup>2</sup>, assures that without proactive measures by the state to guarantee universal access to essential services and resources (including education, food, water and healthcare), civil and political rights will not make any meaning. Also, without civil and political rights (such as freedom of speech, right to assembly and administrative justice), citizens will be denied the ability to participate as active agents in the realization of their social and economic needs.

The Nigerian 1999 constitution cannot be said to be proactive in this regard. It adopted a naïve approach by securing the civil and political rights in its chapter 4, adorning same with some form of enforcement mechanics but seemed to wish away the real purport of economic, social and cultural rights. It consigned same to chapter 2 of the constitution without any positive form laid down for its realization except the empty “directive principles”.

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<sup>1</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punished (1984) places extensive positive duties on states parties. The Inter-American Court of Human Rights has held that the state is under a general duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victim adequate compensation”: *Velasquez Rodriguez case*, 29 July 1988, Inter-Am. Ct. H.R., series C. No. 4, paras. 173-4

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Indeed, in the present globalised world, where important public functions are increasingly being privatized, the positive duties imposed by human rights preserve state responsibility for ensuring civil and political freedoms, and the meeting of basic socio-economic needs.

## 2. Articulating Duties

In articulating the duties incumbent upon states, the take off point will be that imposed by human rights in its formulation of respect, protect, promote and fulfill.<sup>3</sup> This delivery illustrates that human rights impose a combination of negative and positive duties on the state. Appreciated in the context of economic, social and cultural (ESC) rights, the duty to respect compels the state to refrain from legislation or conduct which has the effect of depriving or limiting people's access to ESC rights.

Additionally, the duty 'to protect' compels the state to adopt legislative and other regulatory measures to ensure that private actors do not violate the citizens ESC rights. A promotional duty is imposed on states to cause public education regarding the ESC rights and the mechanism for assessing them. The point of note here is articulating the dual duty of publicity and procuring a workable mechanism for accessing these rights. Chapter 2 of the 1999 Constitution of Nigeria is curiously lacking in this respect. The so-called chapter 2 rights are not only unenforceable, but the directive principles provide no signal or platform of direction. It should ideally direct properly to the realization of the ESC rights. But the direction which is without a platform directs to illusion and emptiness. A duty is placed on administration decision-makers to consider socio-economic rights and their underlying purposes in administrative decision-making affecting access to social benefits.

The duty to fulfill has been interpreted by the UN Committee on Economic, Social and Cultural Rights to incorporate a duty 'to facilitate' and 'provide' access to the rights.<sup>4</sup> This includes a positive duty on the state to adopt legislative and other measures (*inter-alia*, budgetary, administrative and programmatic) to guarantee that those who currently lack access to essential goods and services secure such access, and to progressively improve the quality of that access. A practice has emerged, the UN Committee has procured indicators for assessing compliance with this aspect of the states duty. They include the availability of services, their accessibility, which includes physical, economic and information accessibility, the presence of *de jure or de facto* discrimination, *acceptability and the quality* of services.<sup>5</sup>

In their nature, these duties cannot be clinically separated from each other. They are somewhat intertwined in practice. An instance is the duty to refrain from unfair discrimination, i.e., the duty to respect. This can be fulfilled by the taking of positive measures like providing facilities for people with disabilities to participate equally in employment and society. Also, forced arbitrary evictions are a violation of the duty to respect the right of access to adequate housing, but additionally impose positive duties on state authorities to take positive steps to provide appropriate alternative accommodation.<sup>6</sup> This gives an insight into the fact that human rights impose both negative and positive duties on the state. But spotting claims into one or other of these categories of duties should not be determinative of the appropriate interpretative approach to any particular case.<sup>7</sup> In the learned view of Sandra Liebenberg:

The adjudication of the positive socio-economic rights claims should always be a contextual inquiry guided by the nature of the interests at stake, the history and facts of the case, and the cogency of the justifications that are offered by the respondent for taking or failing to take particular steps.<sup>8</sup>

<sup>3</sup> See Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton, Princeton University Press (1980): *SERAC v. Nigeria*, *infra* note 9.

<sup>4</sup> See, *General Comment* No. 15, para 25

<sup>5</sup> See, e.g., *General Comment* No. 14, para 12.

<sup>6</sup> *General Comment*, No. 7, 'The Right to Adequate Housing (Art. 11 (1) of the covenant).

<sup>7</sup> See e.g., Craven, M., "Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights", in *Squires, J., Langford, M. and Thiele B.* (eds), (2005). *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre, The University of New South Wales with Centre on Housing Rights and Eviction, NUSW Press, pp. 30-6.

<sup>8</sup> Sandra Liebenberg, "Adjudicating the positive Duties imposed by Economic, social and Cultural Rights", *Integrity Bulletin*, Vol. 15. No3 London, 2006, p. 109

Adjudicating socio-economic rights obligations through the complaints mechanism of international human rights treaties or under domestic constitutional law has always presented some challenges. This is essentially because the doctrines of state sovereignty and separation of powers including questions relating to the institutional competence of international tribunals and domestic courts to review matters of social and economic policy are commonly raised as obstacles to the justiciability of these socio-economic rights. The objectives are usually intense in the context of the positive duties imposed by socio-economic rights. The question is – should unelected judges who lack expertise in economic policy be entrusted with the power to shape the economic and social policies of the state? Some see it as interference in the internal affairs of state. The worrisome angle though is flatly where there are absolutely no resources to carry out these positive duties.

In the cases where the states have the resources like Nigeria, the concern of separation of power and institutional competences are frequently overstated, and essentially rely on rigid, outmoded conceptions of the relevant principles. Conceded, separation of powers and respect for the institutional competencies of the other arms of government are certainly constraining influences on judicial power. But this does not effectively lead to the conclusion that the judiciary and international human rights supervisory bodies do not have a significant role to play in holding the state accountable for the impact of its actions and omissions on people's welfare.

Indeed, there is in fact a wealth of jurisprudence from both international supervisory bodies and domestic courts, showing that it is feasible to adjudicate the positive duties imposed by socio-economic rights without undermining the instituted roles and competences of the state and its other branches. Interestingly, this jurisprudence showcases how violation of civil and political rights as well as economic, social and cultural rights is frequently interrelated in actual practice. This implies that a holistic approach to human rights enforcement is vital to guarantee effective relief to the victims of violations and to deal with the structural causes of future human rights violations.

A brief review of this jurisprudence is intended to draw illustrative examples from a selection of international and domestic jurisdictions.

### **3. Adjudicating the Duty to Protect Socio-Economic Rights against Private Party Violations**

A special note is taken of the case of *SERAC v. Nigeria*,<sup>9</sup> representing a landmark in the protection of economic, social and cultural rights by the African Commission on Human and Peoples' Rights (The Commission) under its communication procedure.<sup>10</sup>

The communication alleged series of violations of the African Charter on Human and Peoples Rights (the African Charter) arising from the exploitation of oil reserves in Ogoniland by a consortium consisting of the state-owned petroleum company and the Shell Corporation. These operations involved environmental degradation with accompanying health problems experienced by the local population, the destruction of homes and forced evictions, and brutal military repression of resistance to the said exploration.

The Commission found (in its decisions) that the military government at the material times failed to protect the Ogoni community against interferences in the enjoyment of their rights by the powerful Petroleum Multinational Corporations. And in relation to the destruction of people's homes and forced evictions, the Commission purposefully, derived a right to shelter or housing from a combined reading of Articles 14 (the right to property) and 18(1) (protection of the by the state) of the African Charter. In a considered view, it found that the state breached the duties to respect and protect the right to shelter by directly participating in the evictions, and failing to prevent further deprivations by private agents as well as the failure to provide access to legal remedies.<sup>11</sup>

Further, the Commission held that the right to food was secured upon a joint and purposeful reading of the right to life (Article 4), right to health (Article 16) and the right to economic, social and cultural development (Article 22).

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<sup>9</sup> Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and social Rights (CESR) v. Nigeria, Comm. No. 155/96, Oct. 2001 (hereinafter 'SERAC v. Nigeria').

<sup>10</sup> See, African Charter on Human and peoples' Rights (the African Charter), 1981, Articles 55-9. See also, Free Legal Assistance Group & Others v. Zaire, Comm. Nos. 25/89, 56/91, 100/93 (1995), Union Interafricaine des Droit de l' Homme & Others v. Angola, Comm. No. 159/96 (1997)

<sup>11</sup> SERAC V. Nigeria, para 60-63

In its reasoning, the government of Nigeria violated this right when its security forces and the state oil company destroyed food sources in Ogoniland. This it did when private oil companies were allowed to destroy food sources, and “through terror, has created significant obstacles to Ogoni communities trying to feed themselves”.<sup>12</sup>

Other findings include the violations of the state duty “to respect and protect the people’s right to freely dispose of their wealth and natural resources” (Article 21) and “to generally satisfactory environment favourable to their development” (Article 24). The commission showed great competence (unlike the capacity of any domestic court) when it recommended a wide range of measures intended to remedy these human rights violations and prevent a recurrence, it called for:

- (a) An investigation into the violations, adequate compensation to the victims, including relief and resettlement assistance as well as “a comprehensive cleanup of lands and rivers damaged by oil operations”;
- (b) structural mechanism to prevent further violations such as ensuring appropriate environmental and social impact assessment for any future oil development; and
- (c) the establishment of independent oversight bodies for the petroleum industry and ensuring that communities affected by oil operations are provided with proper information and meaningful access to regulatory and decision-making bodies”.<sup>13</sup>

The SERAC decision, particularly, as it relates to Nigeria shows how comfortably an international tribunal can handle issues relating to human rights violations-without jurisdictional limitations unlike a domestic court or tribunal which is inhibited by the laws creating it. This is one major challenge faced by the domestication of the African Charter by Nigeria. By domesticating it, the Charter has become subject to domestic legal mechanisms for enforcing human rights. Since it is the local courts that enforce these rights, it seems that the rights acquire the same status that the 1999 constitution confers on them, i.e., chapters 2 and 4 provisions. Whilst chapter 2 rights are non-justiciable, chapter 4 rights are. The confusion though is, why clothe entitlements with the vigour of “rights” when indeed, they cannot be legally realized. The fact remains that with respect the realization of these rights, an international tribunal is better equipped to handle same. This is moreso, with the coming into force the Protocol on the African Court on Human and Peoples’ Rights (1998). The opportunities are enhanced for a rich potential for a further development of both the substantive and remedial jurisprudence relating to the positive duties imposed by economic, social and cultural rights.

The Inter-American Court of Human Rights has in the *Awas Tingni Case*,<sup>14</sup> also emphasised the positive obligations on state parties to the American Convention on Human Rights to protect the economic, social and cultural rights of communities. It concerned a concession granted by the Nicaraguan government to a foreign company to extract timber on untitled land that included the ancestral territory of an indigenous community, the Awas Tingni. The Inter-American Court found that the omission of the state to complete the legal demarcation and tilting of the ancestral land of the Awas Tingni combined with the grant of the concession to the private company constituted a violation of the right of the community ‘to the use and enjoyment of their property’ (Article 21). Further the court felt that the failure to provide a clear and accessible procedure for the demarcation and tilting of indigenous lands constituted a violation of Article 25 of the American Convention (the right to judicial protection) as it deprived the community of an effective legal remedy for the exploitation of their communal property.

#### **4. Realising the Duty to Promote and Fulfill Socio-Economic Rights**

This area purportedly greatly challenges the Nigerian courts and quasi-judicial bodies. But indeed, this should represent the cure reason for the existence of government. The fulfillment of the duty justifies why there should be a government in existence. The respect of the CP rights does not task the resources of government since what is required is in the nature of restraints.

The duty here entails requiring the state to take positive steps to ensure that those who lack access to social services and resources gain such access, and most importantly, progressively improve the quality of the services.

<sup>12</sup> *SERAC v. Nigeria*, paras 64-66

<sup>13</sup> *SERAC v. Nigeria*, para 70.

<sup>14</sup> *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 31 August 2001, Inter-Am. Ct. H.R., Series C, No.

Unlike the Nigerian courts, the South African Courts have illustrated how it is quite possible to develop flexible, context-sensitive review standards for these positive duties. It is desired to appraise the constitutional framework of these two countries to determine whether it is merely the naivety of the Nigerian courts that is responsible for this inadequacy or something more. The 1996 South African Constitution entrenches a range of social, economic and cultural rights. The core provisions contained in sections 26 and 27 of the Constitution provide that everyone has a right of access to adequate housing; healthcare services; sufficient food and water; and social security, including social assistance for those who are unable to support themselves and their dependants. These rights are rights properly so-called but are qualified by a second subsection which provides that:

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.<sup>15</sup>

One notices the influence or guidance of Article 2 of the International Covenant on Economic, social and cultural Rights, 1966, in the formulation of these sub-sections. On the contrary, Chapter II of the 1999 Constitution of the Federal Republic of Nigeria, starts with the caption- “Fundamental Objectives and Directives Principles of State Policy”. From sections 13 to 16 of the Constitution, no reference was made to any substantive rights or privileges, as what was made clear were directive principles and mere state policies which were not formulated in concrete legal terms that may be subject to enforceability.

The said “Directive principles” and “fundamental objectives” were categorized into political and social objectives. Section 17 of the constitution itemized/described some actions that are not rights of the citizens *stricto sensu* and conjures up a litany<sup>16</sup> of other objectives of the state which should not grace the sacred pages of a constitution.

Unlike the 1999 Constitution of Nigeria, the African Charter on Human and Peoples’ rights which has become part of the law of Nigeria through the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, chapter 10, laws of the Federation of Nigeria, 1990, specifies each of these rights – CP, ESC, SR, as rights properly so-called. The real challenge though, is that this regime of rights did not come with a different enforcement mechanism.<sup>17</sup> Moreover, it creates an additional challenge of hierarchy between it and the Nigerian Constitution. In practical terms, the Nigerian courts are yet to come to terms with the enforcement.

The South African legal climate offers a conducive background and intendment to purposefully interpret these rights. The constitutional court (the court) has interpreted the scope of the positive duties imposed by those provisions in four landmark cases: *Soobramoney v. Minister of Health, Kwa-Zulu-Natal*;<sup>18</sup> *Government of the Republic of South Africa and Others v. Grootboom and Others (Grootboom)*;<sup>19</sup> *Minister of Health and Others v. Treatment Action Campaign and Others (JAC)*<sup>20</sup>; and *Khosa v. Minister of Social Development; Manlaule v. Minister of Social Development (Khosa)*.<sup>21</sup>

The Court held in *Soobramoney* that the state was not obliged to provide kidney dialysis treatment to a dying man who did not comply with the criteria for admission to such a programme. The position of the court would have been different if indeed the applicant had complied with the said criteria, as the court deemed the criteria to be rational. The issue in *Grootboom* concerned the obligation on the state to provide temporary shelter to a community that had been evicted from where they had settled and had literally “no access to land, no roof over their heads”.<sup>22</sup>

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<sup>15</sup> See, Sections 26(2) and 27(2) of the 1996 Constitution of South Africa.

<sup>16</sup> They include: promote national prosperity; a dynamic and self-reliant economy; equality of rights, obligations and opportunities before the law; governmental actions shall be humane, etc.

<sup>17</sup> Chapter iv of the Nigerian Constitution which procured the CP rights has provided for it a different enforcement mechanism- S. 46 empowering the CJ to make rules with respect to the practice and procedure of a High Court for the purposes of the section.

<sup>18</sup> 1997 (12) BCLR 1696 (CC)

<sup>19</sup> 2000 (11) BCLR 1169 (CC)

<sup>20</sup> 2002 (10) BCLR 1033 (CC)

<sup>21</sup> 2002 (6) BCLR 569 (CC)

<sup>22</sup> *Grootboom*, supra, 19 para 99.

The issue on *TAC* was with government's obligation to adopt and implement a comprehensive programme for the reduction of mother-to-child transmission of HIV in the public sector, including the provision of the antiretroviral drug, Nevirapine. *Khosa* centred on a constitutional challenge to government social assistance legislation which restricted the payment of social grants to citizens thereby excluding access to these grants by indigent permanent residents in South Africa.

The Court boldly and ingeniously evolved the model of reasonableness review: This model of review delicately balances the primary role of the legislature and executive to formulate economic and social policies giving effect to constitutional obligations with the Courts role in assessing whether the programme is reasonably capable of facilitating the realization of the relevant socio-economic rights.<sup>23</sup> Following therefrom, the court has developed a number of criteria for a programme which makes reasonableness review a more substantive standard than the one traditionally applied in administrative law. These criteria include the following:

- The programme must be comprehensive, coherent, coordinated;<sup>24</sup>
- Appropriate financial and human resources must be made available for the programme;<sup>25</sup>
- It must be balanced and flexible and make appropriate provision for short, medium and long-term needs;<sup>26</sup>
- It must be reasonably conceived and implemented;<sup>27</sup>
- It must be transparent, and its contexts must be made known effectively to the public;<sup>28</sup> and
- It must provide relief for those whose situation is desperate and who are living in intolerable conditions or crisis situations.<sup>29</sup>

The criteria shows that it is not sufficient to show a statistical advance in the realization of the relevant rights while ignoring those whose needs are most pressing "and where ability to enjoy all rights is therefore most in peril"<sup>30</sup>. This invaluable aspect of the reasonableness test is justified mostly in the context of the value of human dignity.<sup>31</sup> The court was not swayed by the argument that government is under an unqualified minimum core obligation to provide essential levels of basic services to the poor, rather, it did hold that it may be relevant to have regard to the content of a minimum core obligation in determining whether the measures taken by the state are reasonable.<sup>32</sup> The court upheld the UN Committee's views on the duty to progressively improve access to the rights, and to avoid deliberately retrogressive measures.<sup>33</sup>

In the case of *Grootboom, TAC and Khosa*,<sup>34</sup> the court applied these criteria and carefully evaluated government's resource and capacity justifications. It found that the state was under a positive duty to adopt an emergency housing programme, to extend access to Nevirapine throughout the public health sector and to expand access to social grants to include permanent residents. Specifically, in the case of *Grootboom*, the court issued a declaratory order and *TAC* case, mandatory orders were given against the state to take steps to facilitate the provision of Nevirapine for the prevention of mother-to-child transmission of HIV in the public sector and to take reasonable measures to extend HIV-testing and counseling facilities. A novelty was introduced in the decision of *Khosa*, where the court granted a 'reading in' remedy in terms of which the extended group, the permanent residents, were read into the eligibility criteria of the social assistance legislation.

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<sup>23</sup> *Grootboom*, op. cit., para 41

<sup>24</sup> Op. cit., paras. 39, 40

<sup>25</sup> Op. cit., para 39

<sup>26</sup> Op. cit., para 43

<sup>27</sup> Op. cit., paras 40-43

<sup>28</sup> *TAC*, supra not 20, paras 123

<sup>29</sup> *TAC*, ibid, paras. 78-9

<sup>30</sup> *Grootboom*, para 44

<sup>31</sup> Op. cit., paras 44, 83. See also, Liebenberg, s., "The value of Human Dignity in Interpreting Socio-Economic rights", *SA Journal on Human Rights* 21, 2005, pp. 1-31

<sup>32</sup> See *General Comment* No. 3, "The Nature of States Parties' Obligation (Article 2, para. 1 of the Covenant)" (1990), para 10.

<sup>33</sup> *Grootboom*, para. 33; *TAC*, para. 34

<sup>34</sup> *General Comment* No. 3, para. 9; *Grootboom*, para. 45

A reading of *President of RSA and Another v. Modder Klip Boerdeny (pty) Ltd and Others*<sup>35</sup> will reveal other remedies used by the South African courts in socio-economic cases. They are interdicts as well as damages. Structural interdicts are most relevant violation requires far-reaching systematic changes that may not be remedied by “a once and for all” court order. In this case, the state is required to adopt a plan of action for remedying the breach, to report back to court on the plan and its implementation, and to act in terms of further directions that the Court may give. Equally, the litigants are given an opportunity to comment on the state’s plan and its implementation.<sup>36</sup>

This commendable form of judicial activism may be suited only for jurisdictions where democratic principles with enhanced respect for the rule of law have taken a deep root. A nascent democracy with weak judicial guarantees like Nigeria’s may experience great difficulties in embarking upon their exercise. Firstly, the executive will see it as meddlesomeness in their duties whilst the legislature may see same as usurpation of legislative functions. Nonetheless, this practice is gaining acceptance in many jurisdictions. The African Commission on Human and Peoples’ Rights has also considered the scope of the positive obligations to fulfill the socio-economic rights in the African Charter.

In *Purohit and Moore v. The Gambia*,<sup>37</sup> the petitioners challenged the conditions under which mental healthcare patients were held in The Gambia, under antiquated mental healthcare legislation, the so-called Lunatics Detention Act (LDA).<sup>38</sup> The Commission was of the view that the right to health in Article 16 of the Charter requires the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.<sup>39</sup> The commission was blunt and acknowledged that millions of people in Africa are not currently enjoying the right to health maximally because of a lack of resources and the extent of poverty in many African countries. It observed that there are many structural barriers in Africa that impede the full realization of health rights.<sup>40</sup>

Regarding Article 16 of the Charter, the Commission, in interpreting it placed an obligation on a state party to the African Charter “to take full advantage of its available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind”<sup>41</sup> With some edge of emphasis, the Commission concluded that The Gambia had violated the right to health in Article 16 as well as the right “to special measures of protection” for the aged and disabled (Article 18(4)) in that it had failed to take sufficient steps over a long period of time to reform the relevant legislation and to improve the nature of healthcare given to mental health patients.

The Commission recommended that the state repeal the LDA and replace it with a new legislative regime for mental health compatible with the African Charter and international standards and norms for the protection of mentally ill or disabled persons. In the interim, the Commission recommended that the state should create an expert body to review the cases of all persons detained under the LDA and make appropriate recommendations for their treatment or release. Further, the state was urgently to provide “adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia”.

This decision is ideally proactive as it does not require African states to achieve the immediate result of full enjoyment of socio-economic rights such as the right to health services. It penciled down the states duty to taking “concrete and targeted steps, while taking full advantage of its available resources”, towards achieving the full realization of the relevant right. It shall be emphasized again how a body with competence to deal with individual complaints of socio-economic rights violations can develop practicable standards for assessing state compliance with its obligations. It equally showcases how these bodies can apply standards to evaluate whether the state’s justifications for failing to take the appropriate steps are reasonable in the light of historical developments and in the relevant economic and social context.

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<sup>35</sup> (2005)8 BCLR, 786 (CC)

<sup>36</sup> See, Trengove, W., “Judicial Remedies for Violations of Socio-Economic Rights” *ESR Review* 1, 1999, pp. 8-11

<sup>37</sup> Comm. No. 24/2001 (2003)

<sup>38</sup> The Commission felt that this piece of legislation which was enacted in 1917 and received the last amendment in 1964 “is lacking in terms of therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities”: para. 83.

<sup>39</sup> *Purohit and Moore v. The Gambia*, Comm. No. 24/2001 (2003)

<sup>40</sup> *Ibid*, para. 84

<sup>41</sup> *Ibid*

## 5. Treatment in Other Jurisdictions

It may be important to briefly highlight the treatment of the positive duties imposed by socio-economic rights in other jurisdictions using the European Committee on Social Rights (the European Committee) interpretation as an example. In *Austism-Europe against France*,<sup>42</sup> it was alleged that France was not taking sufficient steps to ensure that children and adults with autism enjoyed equal education. The complaint alleged that this failure constituted violations of Article 15 of the European Social Charter (the right of persons with disabilities to independence, social integration and participation in the life of the community), Article 17(1) (the right of children to education and training) read with Article E of part V (the right to non-discrimination).

The European Committee on Social Rights (the European Committee) held that the relevant substantive rights and the discrimination claim was “so intertwined as to be inseparable.”<sup>43</sup> It affirmed that discrimination has a positive dimension in that it could arise from a failure “to treat differently persons whose situations are significantly different.”<sup>44</sup> According to it, indirect discrimination “may arise by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.”<sup>45</sup> The Committee went further to define the standards it would adopt in reviewing the positive duties imposed by social rights: When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a state party must take measures that allow it to achieve the objectives within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities.<sup>46</sup>

A comprehensive review of domestic law, programmes and budgetary measures adopted as it relates to the education of autistic children and adults was undertaken by the European Committee.<sup>47</sup> Based upon the review, the committee concluded on a number of grounds that France had failed to achieve sufficient progress in advancing the provision of education for person with autism. The fact was highlighted that France used a more restrictive definition of autism than the one proposed by the World Health Organization, and that there were insufficient statistics “with which to rationally measure progress through time.” The Committee concluded that: Whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults.<sup>48</sup>

## Conclusion

Civilised states respect the human rights of her citizens. Of course being the primary custodians of these rights, there is no other way to express statehood than to vigorously seek to protect them. States are only meaningfully in existence when they discharge their duties, the fundamental ones being the regime of the positive duties imposed by economic, social and cultural rights. The more a states discharges these duties, the more it becomes a responsible international player. Nigeria should be in that league considering the enormous resources that is endowed upon her. Nigeria should make vigorous efforts in addressing the challenges she faces in discharging these duties. The bulks of these challenges are structural and lack of will. Now that there are opportunities to amend the constitution, the socio-economic duties should be represented. Clear-cut legal background should be created to enable its realization. These rights should be emboldened with a strong legal teeth that can bite. Most constitutions secure them as rights properly so called and provide an enabling legal environment for their enforcement. The current constitutional provision that situates them as a class of responsibilities that are subject to objectives and directive principles are no more elegant but old-fashioned. When these rights become justiciable governance will cease to be a mere game of politics that possess the colours of “do or die”. The fear that citizens will seek to enforce their socio-economic rights will make citizens more responsible to their duties to the state as committed actors in galvanizing the state to greater heights.

<sup>42</sup> Complaint No, 13/2202, 4 November 2003.

<sup>43</sup> Op.cit., paras 47,57

<sup>44</sup> Op.cit., para. 52

<sup>45</sup> Op.cit.para. 27

<sup>46</sup> Op.cit. para.33

<sup>47</sup> Op.cit., para. 27

<sup>48</sup> Op.cit. para.53