

Interrogating the Inadequacies of the Promotional and Protective Mandate of the African Charter's Economic, Social and Cultural Rights Provisions

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Abstract

There is a plethora of rights that are provided in different international and regional instruments such as the Universal Declaration of Human and People's Rights (UDHR) and the International Convention on Economic, Social and Cultural Rights (ICESCR). The conspicuous nature of socio-economic and cultural rights is that they require immediate and progressive realisation and cannot be deferred. Economic, social and cultural rights include the right to education, social security, food, water, health and other rights that enable people to live a dignified life. It is a strand of human rights that require so much specifics to the extent that vagueness may culminate in misinterpretation and even the creation of crises. This paper seeks to deliberate on those economic, social and cultural rights (ESCRs) which are contained in the African Charter, and the extent to which the provisions of the African Charter fall short of international human rights standards in articulating these rights.

Key words: Socio-economic and cultural rights; Universal Declaration; Promotional and Protective Mandate; African Charter; Human Rights

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1. Introduction

Unlike civil and political rights which are realised progressively, economic, social and cultural rights are for immediate realisation. Economic, social and cultural rights include the right to education, social security, food, water, health and other rights that enable people to live a dignified life. The African Charter explicitly provides for three ESCRs which are the right to work³, the right to health⁴ and the right to education.⁵ It is the mandate of State parties to ensure that citizens enjoy these rights. There are several rights that are provided in different international and regional instruments such as the Universal Declaration of Human and People's Rights (UDHR) and the International Convention on Economic, Social and Cultural Rights (ICESCR). However, this paper deliberates on economic, social and cultural rights (ESCRs) which are contained in the African Charter and the extent to which the provisions of the African Charter fall short of international human rights standards in articulating socio-economic and cultural rights. As a result, this paper seeks to compare the standards provided by the UDHR and the ICESCR in order to determine the inadequacy and vagueness of the African Charter provisions of ESCRs. International instruments are discussed alongside the General Comments and the Optional Protocols that seek to reinforce the realisation of ESCRs by state parties by providing explanatory notes. A case law of the SERAC case is presented to give credence to the inseparability of ESCRs. The UDHR, though not binding, provides a generic but more comprehensive normative framework for the realisation of basic human rights. Unlike the African Charter which limits its provision of socio-economic rights to the right to work, health and education, the UDHR goes beyond these to include the right to adequate living standards incorporating adequate food, clothing, housing and medical care.⁶

³ Article 15, African Charter on Human and Peoples Rights.

⁴ Article 16, African Charter on Human and Peoples Rights.

⁵ Article 17, African Charter on Human and Peoples Rights.

⁶ Article 25 (1), UDHR.

2. African Charter on Human and People's Rights

Unlike the UDHR and the ICESCR, the African Charter provides for a limited number of socio-economic rights, notably the right to work (Article 15), the right to health (Article 16) as well as the right to education (Article 17). In its provisions of ESCRs the Charter overlooks other vital rights that inform the wellbeing of citizens such as the right to housing, the right to water and the right to food. Even the three ESCRs that are provided by the Charter, it does not provide detail as to how and to what extent these rights should be provided, nor does the Charter provide the modalities of how and/or cater for the different categories of social groups. The Charter falls short on providing for promotional mechanisms of how the three ESCRs should be provided. It is on this basis that this paper seeks to support the argument that the Charter is inadequate and vague, and falls short of the promotional and protective mandate as stipulated in international human rights instruments such as the UDHR and the ICESCR.⁷ Below are the three ESCRs as provided in the African Charter. Alongside each ESCR are discussions about how the same ESCRs are elaborated in the UDHR, ICESCR and General Comments.

2.1 Right to work

The African Charter stipulates that *'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal'*.⁸ The Charter does not elaborate on what it means by 'equitable and satisfactory conditions' or suggest how such conditions can be achieved. This leaves the provision open to subjective interpretation. This is unlike the same right as set out in the Universal Declaration of Human Rights⁹ and most comprehensively under ICESCR.¹⁰ The ICESCR provides explanatory notes on the conditions under which workers should operate which should be fair and favourable. Additionally, the ICESCR gives workers bargaining powers by allowing them freedom to form and join trade unions.¹¹ General Comment 8 provides a normative content on the right to work by providing that workers should not be forced to work and that their safety should form an integral part of working conditions. This is in addition to appropriate remuneration, appropriate vocational training, respect for the workers' physical and mental integrity and development as well as recognition of the worker within the community.

Although the African Charter provides that individuals shall have the right to work under equitable and satisfactory conditions but does not expound to include receiving just and favourable remuneration as well as the adoption of *equal-pay-for-equal-work* principle, all of which are inadequacies to the provision. This provision does not state how this should be accomplished and is therefore open to many and varied interpretations and potential to abuse and corruption. The term 'satisfactory' is subjective and the attainment of such a level is open to anybody's interpretation. This has left room for abuse and corruption on the part of those who are mandated to preside over the employment process. No explanatory notes to further provide detail of how the satisfactory conditions can be realised is not given as well as the working conditions of workers. The UDHR expands the right to work to include the protection of the worker against unfair dismissal¹², discrimination at workplace¹³ as well as the right to equal pay for equal work.¹⁴ The UDHR also takes into consideration the welfare and protection of the worker's family by not isolating the worker from his/her family, with specific reference to social protection.¹⁵ Included in its provisions to empower the worker, the UDHR allows workers access to, join or form trade unions. The UDHR also takes cognisance of the need for the worker to take rest and leisure and for workers to be allowed stipulated number of working hours as well as paid holidays.¹⁶

2.2 The Right to health

The African Charter on Human and People's Rights imposes an obligation on State parties to provide health care to their nationals.¹⁷ Article 16 (1) of the Charter provides that *'every individual has the right to enjoy the highest*

⁷ Dennis M. & Stewart D 'Justiciability of Economic, Social and Cultural Rights: Should there an international complaints mechanism to adjudicate the rights to food, water, housing and health' (2004), American Journal of International Law (98) 469.

⁸ Article 16, African Charter

⁹ Article 23, Universal Declaration of Human Rights (UDHR) (1948).

¹⁰ Article 6 ICESCR (1966).

¹¹ Article 8, ICESCR (1966).

¹² Article 23 (1) UDHR.

¹³ Article 23 (2) UDHR).

¹⁴ Article 23 (2) UDHR.

¹⁵ Article 23 (3) UDHR.

¹⁶ Article 24, UDHR.

¹⁷ Ankumah EA 'The African Commission on Human and People's Rights: Practice and Procedures (1996) 147.

attainable state of physical and mental health'.¹⁸ Although there are some detail about the quality of health service that citizens should get, as indicated by the term 'best attainable state of physical and mental health' but the provision leaves it to State parties to 'take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.¹⁹ This can be interpreted to mean that the right to health is only attainable to an individual once he/she is sick yet ideally medical care should be a continuous process. This provision falls short of the fact that the realisation should be progressively realised irrespective of whether one is sick or not.

The Charter does not explain whether people have the right to free medical care, taking into cognisance the high levels of poverty among most African countries, and more so in rural areas where the majority of people are located. Rights are claimable and this cannot be the case if the Charter is silent on whether the medical care is for free or not. It can only be regarded as a right if medical care is provided free of charge to individuals or at least affordable to the poor. Article 16 (1) and (2) of the Charter suggest that State parties are obliged to provide health care to their people at all times This is not clear because the provision does not indicate whether the medical care is for curative or preventative purposes as in the case of immunisation and/or vaccination purposes which are for the prevention of outbreaks. The fact that the Charter stipulates that State parties should provide 'health care to their nationals at all times without limitation'²⁰ does not specify how this should be executed and what promotional measures should be put in place. The provision does not seem to cater for the health workers and their working conditions and without whom such health care programmes can be achieved.

General Comment 14 of the ICESCR does not isolate the right to health with other ESCRs but seeks to show the interconnectedness of health to a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. The General Comment further extends this right to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable drinking water and adequate sanitation, safe and healthy working conditions, and a healthy environment'.²¹ The General Comment specifies that availability, accessibility (including non-discrimination, physical accessibility, affordability and information accessibility), acceptability and quality are all inherent to the right to health.²² The ICESCR does not confine its provisions to the health provision but includes complementary approaches, such as the formulation of health policies, and/or the implementation of health programmes developed by the World Health Organization (WHO) (such as the stipulation on COVID-19), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable. In addition to their own citizens, States parties to the Convention also have an international obligation to respect the right to health of citizens of other countries. This provision enables State parties to realise that globalisation obliges them to make all citizens of the world their responsibility in providing health facilities and services, and not confine their services to their citizens within their jurisdictional locations

2.3 Right to Education

The African Charter provides that individuals should have access to free education.²³ Under the same provision, the Charter provides for the promotion of moral and traditional values recognised by the community.²⁴ This suggests that the Charter equates the provision of education to morals and traditional values and does not fully explain how the provision of education links up with moral and traditional values. This is unlike in the ICESCR where the right to education is provided under Article 13 while the right to cultural and traditional practices is provided separately under Article 17 which provides explanatory notes of what is involved in moral and material interest.

While the Charter provides that every individual shall have the right to education, but it is unlike the ICESCR which goes further to indicate the extent to which this right to education should be implemented.²⁵ In the ICESCR, the right to education is further elaborated under Article 13 which provides that education should be

¹⁸ Article 16 (2) African Charter.

¹⁹ Article 16 (2) African Charter.

²⁰ Odinkalu CA 'Implementing Economic, Social and Cultural Rights under the African Charter' The African Charter on Human and People's Rights: The System in Practice, 1986-2000'.

²¹ General Comment 14, ICESCR (2000).

²² General Comment 14, ICESCR (2000).

²³ Article 17, African Charter.

²⁴ Article 17, African Charter.

²⁵ Jackson LAS 'The International Covenant on Economic Social and Cultural Rights: A Critical Examination of the Relative Importance of Resource Constraints on Benchmarks and Benchmarking Processes in The African Context'

free and that it should be compulsory at primary school level. Additionally the ICESCR alludes to the fact that education should not only be free and compulsory but universal.²⁶ This is unlike in the African Charter which does not provide details of how and to what extent individuals should enjoy the right to education. Instead, the Charter delves into the individual's right to a cultural life and the promotion and protection of morals and traditional values.²⁷ The ICESCR provides elaboration on the right to education. The instrument provides that while every individual has a right to education, it should be compulsory and free to all at primary school level.²⁸ Thereafter, education at secondary, including technical and vocational education should be available and accessible to all.²⁹ The instrument specifies which levels of education that should be free, compulsory and accessible to all. However, while the African Charter provides for the right to education, it does not specify which levels of education should be made freely available and/or accessible to individuals. Furthermore the ICESCR takes a holistic approach to education provision by involving parents³⁰ in contributing to the education of children and addresses the plight of those who have not been able to access education³¹ as well as the welfare of the teaching staff whose working conditions should be regularly reviewed and improved.³² The ICESCR further elaborates on the inclusion of moral and religious education in the education of children. Gender discrimination in the provision of education has also been highlighted in the Convention on the Elimination of Discrimination Against Women (CEDAW) which provides for equal access to education irrespective of gender.³³ Explanatory notes on the right to education elaborate on the need for progressive implementation of education provision and sets targets for State parties to achieve in the realisation of the right to education.³⁴ In addition, explanatory notes exhort State parties to draft or come up with plans of action for the provision of compulsory and free education.

3. Provisions of ESCRs in the African Charter

While the Charter precisely provides for the right to work (Article 15), the right to health (Article 16) and the right to education (Article 17) but most other ESCRs are implicitly contained in the Charter. Some ESCRs are implied in the right to existence (Article 20) which would entail a plethora of other ESCRs such as the right to food and the right to housing all of which constitute a decent livelihood and existence. Consequently it can be noted that the Charter is also understood to include a right to housing and a right to food as "implicit" in the Charter, particularly in light of its provisions on the right to life (Article 4), right to health (Article 16) and to development (Article 22).³⁵ Additionally while the Charter provides for the right to enjoy the best attainable state of physical and mental health (Article 16) this cannot be achieved without the right to food or decent shelter and the necessary clean drinking water. Despite the fact that the right to food, water, shelter and water are not explicitly provided in the Charter, but they are implied because for one to enjoy those specific rights that are stipulated, one have got to have access to food, water and shelter.

It can therefore be noted that the ESCRs provisions of the Charter do not provide clarity on the extent to which the rights should be provided or the mechanisms that should be taken into consideration in promoting these rights. In some cases, State parties overlook their obligation to dispense such rights unless courts of law intervene. This also shows that ESCR are intertwined and interdependent and the provision of one right implies the provision or the need for the provision of other associated ESCRs. In some cases courts of law intervene to provide clarity. This is the situation in the decision by the African Commission on Human and Peoples' Rights in the *SERAC v the Nigerian Government* (2001) case in which the Nigerian Government was found to have overlooked a plethora of rights of the people of Ogoniland, notably the right to a healthy living environment, right to clean drinking water, right to food as well as the right to shelter by destroying buildings and exposing people to unhealthy conditions due to industrial toxic waste. In the SERAC case the people of Ogoniland accused the government, in its exploitation of oil resources that it had failed to respect, protect, promote, and fulfill the ESCRs of the people of Ogoniland. The African Commission on Human and Peoples' Rights

²⁶ Article 13, ICESCR.

²⁷ Article 23 (3) UDHR.

²⁸ Article 14 ICESCR.

²⁹ Article 13 (3) ICESCR.

³⁰ Article 13 (4) ICESCR.

³¹ Article 13 (3) ICESCR.

³² Article 13 (4) ICESCR.

³³ Article 10, CEDAW.

³⁴ General Comment No. 11 (2000).

³⁵ Dankwa V, Flinterman, C. & Lecki, S 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) Human Rights Quarterly 20 (3) 715.

Commission established that the complaints had exhausted all local remedies to seek compliance and that the Nigerian Government had continued to violate people's right to a health environment as enshrined under Article 24 of the African Charter. Violations of the Ogoni people's ESCRs was not only confined to the right to a health environment but included right to shelter and food through burning and destroying houses and food. The SERAC case indicates the interconnectedness of ESCRs and is the first claim before an international monitoring body that deals directly with the violation of ESCRs within an international context. Within the African context, the SERAC case presented evidence of a renewed commitment by the Commission to the implementation of ESCRs in many African countries and became instructive to domestic courts in Africa on the enforcement of ESCRs. The case increased the resolve of African courts to address the violation of ESCRs on the African continent. In addition the SERAC Case has demonstrated that ESCRs are justiciable and reinforced through the courts of law.

Given the abundant detail and accompanying explanatory notes in the form of General Comments on the realisation of ESCRs, the UDHR and the ICESCR can be viewed as providing international standards and normative framework for ESCRs. The section below provides a synopsis of the ESCRs as provided in the UDHR and the ICESCR as well as in General Comments, namely the right to health, education and work. Additionally these instruments explicitly provide for the right to housing/shelter, water and food with appropriate explanatory notes which make them claimable and justiciable.

4. Inadequacy of the African Charter

The inadequacies of the African Charter have been reflected in its explicit provision of three ESCRs and implicitly reflecting on other ESCRs. This is unlike in the UDHR and the ICESCR where all ESCRs are elaborately presented, including the right to housing, food and water all of which collectively enable individuals to live a dignified live. The UDHR does not only provide for the right to housing, but provides details about how individuals can live a dignified live by showing the inseparability of, and interconnectedness between socio-economic rights such as those involving health, food, housing and employment. The UDHR does not limit the issue of health to workers but includes the old age, children, the disabled as well as those in the widowhood. The UDHR also provides for social security for all individuals. This is unlike in the African Charter which gives an impression that each socio-economic right is a stand-alone and does not enumerate the various categories of people who are most likely to be disadvantaged or discriminated against by society such as children and those in the widowhood. Most importantly the Charter implicitly provides for some of the ESCRs thereby making vague provisions of ESCRs.

5. Conclusion

The African Charter has been acclaimed for including ESCRs and civil and political rights in one binding instrument. Despite the several shortcomings of the African Charter, the instrument has its own strengths insofar as providing socio-economic rights is concerned. Firstly the Charter exhorts pressure on African governments to develop a human rights regime on the continent³⁶ and provides normative legal and policy frameworks for the provision and protection of socio-economic rights and an "*African fingerprint*" on the human rights discourse.³⁷ The Charter affirms the cardinal principle of interdependence and indivisibility of all human rights by expressly declaring "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality."³⁸ The ESCRs enshrined in the African Charter are formulated as direct entitlements of individuals or groups and are understood in such a way as to create immediate obligations, unlike in the ICESCR which provides for progressive realization of ESCRs. This provides urgency in the African Charter than the ICESCR.³⁹ In addition the ICESCR lacks urgency in its provision of ESCRs whose realization is dependent on the availability of resources unlike civil and political rights which are presented as precise and claimable.⁴⁰

³⁶ Chirwa DM 'Toward Revitalizing Economic, Social, and Cultural Rights in Africa: *Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*' Human Rights Brief: A Legal Resource for the International Human Rights Community, 10 (1) 2.

³⁷ Chirwa DM'10 (1) 3.

³⁸ Chirwa DM'10 (1) 4.

³⁹ Chirwa DM'10 (1) 5.

⁴⁰ Chirwa DM'10 (1) 7.

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