

Litigating Corruption in International Human Rights Tribunals: SERAP before the ECOWAS Court

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This paper is the eighth in a series examining the challenges and opportunities facing civil society groups that seek to develop innovative legal approaches to expose and punish grand corruption. The series has been developed from a day of discussions on the worldwide legal fight against high-level corruption organized by the Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict, held in June 2014.

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Introduction

In a country where systemic corruption and the resulting poverty, inequality and discrimination deprive many Nigerians of dignity and freedom to explore ways towards development and prosperity, our goal at SERAP is to hold the government accountable for acts of corruption and violations of economic, social and cultural rights guaranteed under international and regional human rights treaties.

In November 2010 SERAP won a landmark decision from the Court of Justice of the Economic Community of West African States (ECOWAS), which declared that the right to education is a legally enforceable human right in Nigeria.¹ In this chapter I discuss the process involved in litigating the case, the arguments canvassed, the ECOWAS Court decision, and the follow-up we have done and plan to do.

Background

In 2005, during the administration of President Olusegun Obasanjo, Nigeria's anticorruption watchdog launched an investigation into allegations of corruption at the Universal Basic Education Commission (UBEC), a government agency set up in 2004 to provide additional federal funding support for schooling in disadvantaged areas of the country.

The investigation by the Independent Corrupt Practices and Other Related Offences Commission (ICPC) was launched in response to a petition filed by SERAP, backed by information from whistleblowers and SERAP's own investigative efforts. Its final report detailed extensive corruption and mismanagement in the handling of N54.78 billion (approximately \$270 million) in government funds during 2005 and 2006; the report found evidence that funds meant for building and repairing schools and classrooms had been diverted to fraudulent front companies, while in other cases state officials had overpaid favored contractors for work that was either substandard or not done at all.

The ICPC investigation resulted in several states repaying N3.4 billion (about \$17 million) to the federal government. The outcome of the investigation was widely welcomed in the Nigerian media, as was the role played by SERAP in initiating the ICPC investigation.

¹ The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Another, ECW/CCJ/APP/12/07, 30 November 2010, http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_right_to_education.pdf

Case before the ECOWAS Court

In 2007, SERAP used the findings of the ICPC as the basis of an approach to the ECOWAS Court, contending that the kind of corruption documented was not an isolated case but an example of systematic high level corruption and theft of funds meant for primary education in Nigeria.

It argued that this type of corruption is the reason Nigeria has been unable to attain the level of education that the citizens deserve, and provides a plausible explanation for the sordid statistics that over five million Nigerian children have no access to primary education, and the poor learning environment across the country. It also argued that the Nigerian government contributed to these problems by failing to seriously address allegations of corruption at the highest levels of government and the level of impunity that facilitate corruption in Nigeria. This in turn has contributed to the denial of the rights of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the rights to education. Finally, the case was made that corruption destroys the people's natural wealth and resources and is the primary cause of the problems denying the majority of the citizens' access to quality education.

Overall, the case was based on the provisions of Article 4(g) of the 1993 Revised Treaty of ECOWAS, as well as Articles 1, 2, 17, 21 and 22 of the ACHPR. The core substantive rights involved are: the right to education, the right of the people not to be dispossessed of their wealth and natural resources and the right of people to economic and social development. SERAP asked the court for:

- A declaration that every Nigerian child is entitled to free and compulsory education by virtue of Article 17 of the African Child's Rights Act, section 15 of the Child's Rights Act 2003 and section 2 of the Compulsory Free and Universal Basic Education Act 2004.
- A declaration that the diversion of the sum of 3.5 billion naira from the UBE fund by certain public officers in 10 states of the Federation of Nigeria was illegal and unconstitutional as it violated Articles 21 and 22 of ACHPR.
- An order directing the defendants to make adequate provisions for the compulsory and free education of every child forthwith.
- An order directing the defendants to arrest and prosecute the public officers who diverted the sum of 3.5 billion naira from the UBE fund forthwith.
- An order compelling the government of Nigeria to fully recognize primary school teachers' trade union freedoms and to solicit the view of teachers through the process of educational planning and policy-making.

- An order compelling the government of Nigeria to assess progress in the realization of the right education with particular emphasis on the Universal Basic Education; appraise the obstacles, including corruption, impeding access of Nigerian children to school; review the interpretation and application of human rights obligation throughout the education process.

The arguments in support of the right to education were straightforward and canvassed under international, regional and domestic law; Articles 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); “education shall be directed to the full development of the human personality and the sense of his or her dignity, and shall strengthen the respect for human rights and fundamental freedoms”, Article 17 of the African Charter on Human and Peoples’ Rights (ACHPR) guarantees that every individual shall have the right to education, Article 17 of the African Child’s Rights Act.

Objections by the Nigerian government

Not surprisingly, the Nigerian government rejected each of SERAP’s claims, raising three issues for the court to consider:

- That the court lacks jurisdiction over the case.
 - That SERAP failed to exhaust local remedies before approaching the ECOWAS Court.
 - That SERAP failed to satisfactorily establish its claim against the government.
- The court correctly and firmly dismissed all of these objections.

The Court’s Decision

The court held that on the basis of ECOWAS protocols and agreements SERAP was not required to exhaust domestic remedies before seeking a remedy from the court. The court then assumed subject-matter jurisdiction on the basis of Article 9 of Supplementary Protocol on the Court of Justice. Article 9 of the Supplementary Protocol which governs the jurisdiction of this Court has eight sub-sections, which grant the Court jurisdiction on several different issues.

Relevant to SERAP’s case is Article 9(4) of the Supplementary Protocol, which grants the court jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS. Article 9(4) stipulates in part that “...the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State”.

The court said that it “clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples’ Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS.”

Furthermore, the government—while not contesting that every Nigerian child is entitled to free and compulsory basic education—claimed that this right was not justiciable in Nigeria.

As expected, the court disagreed and held that the right to education is justiciable under the African Charter on Human and Peoples’ Rights. According to the court, “It is well established that the rights guaranteed by the African Charter on Human and Peoples’ Rights are justiciable before this Court. Therefore, since the plaintiff’s application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.”

The government had also contended that SERAP lacked the requisite *locus standi*, or standing, to initiate the case because it had failed to show that it had suffered any damage, loss or personal injury as a result of the acts alleged in the suit. In roundly rejecting this objection, the court stated:

“The authorities cited by both second defendant and plaintiff support the viewpoints canvassed by them. However, we think that the arguments presented by the plaintiff are more persuasive for the following reasons. The doctrine ‘Actio Popularis’ was developed under Roman law in order to allow any citizen to challenge a breach of public right in Court. This doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court. Plaintiff cited authorities from around the globe to support the position that in human rights litigation, every spirited individual is allowed to challenge a breach of public right. Decisions were cited from the United States, Ireland, Bangladesh, Pakistan, India, the United Kingdom and other jurisdictions which all concur in the view that the plaintiff in a human rights violation cause need not be personally affected or have any special interest worthy of protection. A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.”

The court found that the UBEC, by the law establishing it, has a responsibility to ensure that the funds they disburse to the Nigerian states are utilized for the purposes for which they were disbursed. Thus, UBEC cannot argue that if funds given to the states are not properly accounted for they are not responsible. According to the court, the language of the UBEC Act places on it the onus to be satisfied that the funds are properly utilized, hence the power given to UBEC to refuse further disbursements.

As to the status of the report produced by the ICPC, the court said that such a report only constituted *prima facie* evidence of the facts investigated. Thus, it was the responsibility of the authorities to act further on it, and secure a judicial verdict. The court agreed that embezzling, stealing or even mismanagement of funds meant for the education sector would have a negative impact on education since “it reduces the amount of money made available to provide education to the people.”

The court, however emphasized that “there must be a clear linkage between the act of corruption and a denial of the rights to education.” According to the court, “whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that [the government] should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.”²

Conclusion

The crux of this landmark decision of the ECOWAS court is clear: for the first time, an international tribunal declared that a set of socio-economic rights like the right to education is a right to which every Nigerian child is entitled, beyond simple principles of state policy. The ruling made clear that the right to education imposes obligations on states that are justiciable in a higher court.

Secondly, although the court did not find conclusive evidence of corruption in the case (despite stating that there was *prima facie* evidence), it considered in its ruling that corruption in education could constitute a violation of the right to education, if efforts are not made to prosecute corrupt officials and recover stolen funds.

SERAP was also successful in securing an order from the court to the government to provide the necessary funds to cover the shortfall lost to corruption, “lest a section of the people should be denied a right to education.”

Significantly, the ruling also underlined the right of civil society groups such as SERAP to bring litigation of this kind before the ECOWAS Court, establishing it as

² Para 28.

another mechanism through which to seek enforcement of the rights protected under the African Charter of Human and Peoples' Rights.

But regrettably, and despite the active efforts of both Nigerian and international civil society groups, the 2010 judgment has not yet been implemented—neither by the administration of President Goodluck Jonathan, in power in November, 2010, when the judgement was issued, nor by his successor Muhammadu Buhari, elected in 2015.

The law clearly requires implementation: Article 15(4) of the ECOWAS Treaty makes the Judgment of the Court binding on Member States, including Nigeria. Also, Article 19(2) of the 1991 Protocol provides that the decisions of the Court shall be final and immediately enforceable. Also, Article 19(2) of the 1991 Protocol provided that the decisions of the court should be final and immediately enforceable. The court could also refuse to entertain any application brought by the offending member state until such a state enforces the court's decision.

Meanwhile, more than five million Nigerian children of school age still roam the streets with no access to primary education. Some 115 million Nigerian adults were still illiterates. Corruption continues to afflict the funding of education, and the provision of other basic services across Nigeria.

Ultimately, implementing decisions of the ECOWAS Court requires genuine political will. Civil society has a role to play in mobilizing this political will.

From a strategic standpoint, the case highlighted the high impact that a national civil society organization such as SERAP can have in utilizing public interest litigation, through human rights law, as a means to tackle corruption. Further, the very act of taking a public case to a regional court, and that court ordering the government of Nigeria to address the shortfall in funds lost to corruption, drew attention to the issue not only in the country but internationally as well. This assists SERAP and others in keeping the issue in the public eye—and ensuring that the social and economic rights enumerated in the African Charter turn into reality on the ground.

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