JUSTICIABILITY OR JUDICIALISATION: CIRCUMVENTING ARMAGEDDON THROUGH THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

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1. Introduction

Hitherto the tendency in the literature\(^1\) and even in judicial fora was to characterise Socio-Economic Rights (SERs) as juridical orphans who had no ties of consanguinity\(^2\) with the pantheon of liberty-oriented rights.\(^3\) The single most impregnable devise that sustained this discrepancy was the concept of the justiciability of rights.

Although essentially a [Western] myth,\(^4\) the concept of justiciability, surprisingly, assumed an obscurantist function, almost attaining maturity as an infallible juridical canon or dogma. Strangely, notwithstanding that peculiar African conditions should have prompted an African approach to the problem of the hierarchisation of

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2 Professor Belani now concedes that this “category” of rights is a “poor step cousin to civil and political rights”; see also, Aarthi Belani, “The South African Constitutional Court’s Decision in TAC: A ‘Reasonable’ Choice?”, *CHRGJ Working Papers* No 7 (2004), p. 19.


rights; attempts were made to trivialise SERs even in some African Constitutions.

Happily for “security-oriented rights” jurisprudence, this ancien tendency to treat SERs as non-justiciable is gradually falling into desuetude. Indeed, no less a quasi-juridical organ than the African Commission on Human and People’s Rights (hereinafter “the African Commission”) furnished the rationale for this new trend. According to it, “International Law and human rights must be responsive to African circumstances. Clearly, [...] economic and social rights are essential elements of human rights in Africa.”

To its eternal credit, the African Charter on Human and Peoples’ Rights (African Charter), mindful of these African circumstances, does not offer any basis for a distinction in the implementation of various categories of rights. That is why it does not dichotomize in the mode of implementation of the two categories of rights.

Interestingly, current trends in the constitutionalisation of rights points to an increasing awareness of the cogency of the case for the domestic judicial enforcement of all categories of rights. Recent examples can be found in some African Constitutions like South Africa; Uganda; Ghana; Malawi. Two recent Constitutions have even opted for a revolutionary posture capable of rendering the

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5 Indeed, it was even forgotten that one of the characteristics that distinguish the ACHPR from the ECHR and ACHR is the Charter’s amalgamation of all categories of rights into one document, see M. von der Linde; also, Chidi A. Odinkalu, “Analysis of Paralysis”, *Human Rights Quarterly* 23 (2000) 2, p. 339, <muse.jhu.edu/journals/human rights quarterly/yo23/23.2 odinkalu.htm>.

6 See, for example, the Constitutions of Nigeria, Zambia etc., see Simson Mwale, “Can we afford the ECS Rights in the Constitution”, paper presented at the *Alliance Française* (4 April 2006).


10 See John C. Mubangizi, “The Constitutional Protection of Socio-Economic Rights in selected African Countries: A Comparative Evaluation”, *Afr. J. Legal Stud.* 2 (2006) 1, p. 1, <www.africalawinstitute.org/ails>. In Namibia, although section 101 of the Constitution makes economic rights un-enforceable in the courts, it nevertheless guarantees a limited range of economic and social rights, e.g., right to education (Section 20); freedom to form and join trade unions (Section 21 (1) (e)).