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REALISING ECONOMIC AND SOCIAL RIGHTS IN AFRICA: INNOVATIONS, CHALLENGES, AND “PROSPECTS” AN INTRODUCTION

Obiora Chinedu Okafor*

On 26-27 of October 2007, this writer convened an international workshop at the Osgoode Hall Law School of York University, Toronto, Canada, under the theme “Realising Economic and Social Rights in Africa: Innovations, Challenges, and ‘Prospects’”.¹ The workshop brought together a small group of 30 or so (mostly African) experts and experienced doctoral students in the area of economic social and cultural rights (from academia, the United Nations, NGOs, judiciaries, and so on) to brainstorm the afore-mentioned topic.

The main issues that were discussed and debated at that workshop included the following: is rights language a facilitator or a barrier to the realisation of desirable Economic Social and Cultural rights (ESC) values and material conditions in Africa? Is the judicial adjudication of ESC rights a challenge to democratic theory and practice, and if so,

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is there a democratic deficit entailed? Is the South African model and experience of constitutionalising and adjudicating ESC rights replicable in the rest of Africa? Are the Washington Consensus and Global Free Trade regimes impediments to or facilitators of the realisation of ESC rights in Africa? How has the realisation or non-realization of ESC rights tended to affect women, minorities, and children in Africa? How may we understand the ESC rights record of the African Human Rights System (the system that is constituted by the African Charter, Commission, and the newly established Court)?² How might the African Charter be utilised within domestic institutions to further ESC rights struggles? What local advances if any have occurred within specific African countries in the implementation of ESC rights? What roles have been played by civil society actors in the

² By the “African Charter” is meant the African Charter on Human and Peoples’ Rights, 1981 (in force 1986), reproduced in Christof Heyns (ed.), *Compendium of Key Human Rights Documents of the African Union* (Pretoria: Pretoria University Press, 2005), p. 20. By the “Commission” is meant the African Commission on Human and Peoples’ Rights which was established under the Charter. By the “Court” is meant the African Court of Human and Peoples’ Rights which was established by the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, 1998, in force 2004, reproduced in Christof Heyns (ed.), *ibid.*, p. 32. As its judges have now been elected and its location chosen, the Court should be fully functional by 2008.

For more on the nature of this system, see Obiora Chinedu Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007). See also, Rachel Murray, *Human Rights in Africa: From the OAU to the AU* (Cambridge: Cambridge University Press, 2004); Rachel Murray, *The African Commission on Human and Peoples’ Rights and International Law* (Oxford: Hart Publishing, 2000), p. 29; Makau Mutua, “The African Human Rights System in a Comparative Perspective”, *Review of the African Commission on Human And Peoples’ Rights* 3 (1993) 5, p. 11; Claude Welch Jr., “The African Commission on Human and Peoples Rights: A Five Year Report and Assessment”, *Human Rights Quarterly* 14 (1992), p. 43; Evelyn Ankumah, *The African Commission on Human and Peoples’ Rights* (The Hague: Martinus Nijhoff, 1996); Chidi Odinkalu, “The Individual Complaints Procedure of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment”, *Transnational Law and Contemporary Problems* 8 (1998), p. 359; and Obiora Chinedu Okafor, “The African System on Human and Peoples’ Rights, Quasi-Constructivism, and the Possibility of Peace-building within African States”, *International Journal of Human Rights* 8 (2004), p. 413.

production of these advances? How might ESC rights be better secured in war time or in times of conflict in Africa?

This special issue collects peer-reviewed, revised, updated and edited versions of almost all of the papers that were delivered at that workshop (although one of the articles included in this collection was written for the workshop but could not, for logistic reasons, be delivered there). Among them, the articles published in this volume address and engage all the above issues and questions, illuminating hitherto hazier areas, clarifying important points, and updating the extant literature. Together they push the scholarly envelope in the ESC rights area; significantly advancing this field of knowledge as a result.

More specifically, the articles tend to coalesce around a number of sub-themes. In a sense, Pierre Sob's article sets the tone for the rest of the volume when he focuses on the implementation gap in the ESC rights field, with particular reference to the work of the United Nations. On the whole, Dr. Sob's article provides an explanation of the international (especially UN) framework that supports the struggle to implement and realise ESC rights around the world, and in this case on the African continent, while shedding some light on the limitations of international legal system in this respect. It is precisely the existence of this kind of implementation gap that has made the struggle to realise ESC rights so important, and this special issue so relevant and timely.

The articles by Dakas C.J. Dakas, Bonny Ibhawoh and Amy Tsanga deal with certain of the threshold theoretical and/or methodological issues and questions that frame, shape and limit scholarly and/or activist understandings of both the status of ESC rights in Africa and the viability of the struggle to realise them on that continent. Drawing from her extensive and deep experience in the women's movement in Africa, Tsanga makes a strong argument that, given the lessons that can be drawn from the historical tendency of all too many governments on the African continent to run with every fad purveyed to them from other places – with little to show for it – scholars, activists and governments ought to be more sceptical about the capacity of rights language to provide the principal discursive path to the realisation of the values that are denoted and

represented by ESC rights. For Professor Tsanga, less may in fact be more here. Somewhat less sceptical about the dominance of rights language in the extant field, Dakas C.J. Dakas makes a compelling argument for the inclusion within the Nigerian Constitution of justiciable, that is judicially enforceable, ESC rights. Thus for Professor Dakas, less does not mean more in this respect. Professor Ibhawoh's philosophical disposition is akin to Dakas', for while arguing that scholars need to pay more attention to the conceptual and methodological objections that many INGOs have offered to the suggestions that they ought to pay as much attention to ESC rights as they have historically paid to civil and political rights, he nevertheless chides these INGOs for this very "lack"; in effect for not treating ESC rights as full-fledged rights. As such, in a sense, his is not an argument for lesser use of rights discourse, but is in fact an argument for more of that approach.

The articles by John Mubangizi, Chima Nweze, Judy Oder, and Anashri Pillay discuss, make a case for, and critique the local innovations in the constitutionalisation and judicial or quasi-judicial implementation of ESC rights that are being made both in some African countries (especially in South Africa) and at the regional level (within the African Commission). While Mubangizi and Pillay focus more squarely on the South African experience (although Pillay also makes a South Africa/India comparison), Oder and Nweze largely concentrate on the African Commission's jurisprudence (although Nweze also offers a general conceptual argument in favour of the transplantation of the South African and African Commission jurisprudential approaches to all African states). While offering a detailed overview of the South African experience so far in the constitutional guarantee and judicial adjudication of ESC rights, Professor Mubangizi considers the ESC rights constitutionalisation record (or the lack thereof) in an allegorical couple of other countries in Africa, and endeavours to analyse the challenges facing other African countries which might in future desire to replicate the South African model. In the end, however, he is more optimistic than might have been expected; arguing that at the very least even the generally resource-poor countries that inhabit the African continent might be able to protect effectively the "negative" dimensions of ESC rights

(something that is too often missed in the extant literature). Pillay's article also contains a detailed examination of the ESC rights jurisprudence of South Africa's Constitutional Court. While expressing positive views overall about the "reasonableness" model that seems to have become the cornerstone of the Constitutional Court's jurisprudential approach in the ESC rights area, a model that takes its cues from administrative law, she notes the difficulty in identifying the overarching principles that inform that court's approach, and utilises a South African/India comparison to ground her warning to the South African courts about the need for them to take a more coherent and principled approach to its ESC rights philosophy, one that "strikes a balance between respect for democratic decision-making and enforcement of the rights." Citing copiously and effectively from the jurisprudence of the South African Constitutional Court, and the African Commission, as well as from the work of international human rights bodies, Justice Nweze of the Court of Appeal of Nigeria systematically undermines even the strongest arguments in favour of the non-justiciability of ESC rights in Africa. In addition to his South African and African Commission-focused arguments, Nweze also offers a powerful argument that the non-justiciability argument is wholly unsuited to the socio-economic condition in which most African peoples currently find themselves; one that tends to be characterised by extreme poverty in the midst of plentiful resources. For her own part, Oder offers a fairly detailed examination of the nature and orientation of the African Commission's jurisprudence on a specific ESC right, the right to health, illuminating the ways in which the Commission has creatively utilised even the civil and political rights standards in the African Charter in order to protect an ESC right like the right to health, and offering suggestions as to how to advance the Commission's work in this area.

Mosope Fagbongbe's article is as focused on the African Charter and the rest of the African human rights system as it is on the struggle to realise women's ESC rights in Africa. While she offers critical examinations of "the history of the implementation of women's rights within the AU, including the events that led to the adoption of the Women's Protocol," and of the conceptual and institutional

apparatuses through which women's rights are sought to be protected on the African continent, because of the prevalent scepticism in the literature about the performance of the African human rights system, she also dwells to some extent on the somewhat vexed question of the potential effectiveness of this African Union (AU) sheltered system in delivering on its normative and institutional promise of gender equality in the ESC rights, and other, areas. In the end, Fagbongbe puts most of her trust in civil society: only by ensuring the fullest creative involvement of such actors can the potential of the African system in the women's ESC rights area be more fully realised.

The articles by Paul Ocheje and Jeanne Woods both consider the historically persistent dimensions of old and newer forms of globalization, and the peculiar ways in which they have always affected the struggle for ESC rights in Africa. Both scholars argue that these effects have, on the balance, been negative. Professor Woods focuses on the ways in which neo-liberal globalisation (with its severe diminishing of actual State control of their economic life and significant accentuation of IMF/World Bank and Transnational Corporate power) and the more concentrated projection of US global military power in Africa (especially via the so-called AFRICOM) have together worked, and will in future work, to inhibit the realisation of ESC rights on the African continent. For his part, Professor Ocheje maps and analyses the socio-economically detrimental effects on the enjoyment of ESC rights in Africa of the "neo-liberal policies of adjustment" that have been pursued by far-too-many governments on the continent. For him, these policies have hardly served the developmental ambitions of these states, and in many cases have greatly harmed their capacity to ensure the enjoyment by their peoples of ESC rights. He concludes by calling on African states to "develop a [more] nuanced and more imaginative understanding" of the relevant neo-liberal policies and of "the situational possibilities that currently exist for the realisation of ESC rights" on the continent.

Obijiofor Aginam's and Uche Gwam's articles engage the public health and right to health aspect of ESC rights as closely as Judy Oder's contribution; but do so from different angles (both as between them and Oder, and as between themselves). However, while

both articles (that is those by Aginam and Gwam) deal with the interaction of public health-related international norms and institutions with the various domestic socio-economic and political contexts on the African continent, they are not all that similar in other respects. Professor Aginam's article concentrates on the interaction of the requirements of global free trade agreements that have been signed by most African states under the auspices of the World Trade Organization (WTO) and their public health obligations under the normative documents that the same countries have adhered to within the World Health Organisation (WHO), and argues that unless greater policy coherence is established within African governmental regimes themselves, they will not be able to deal as adequately as they could and should with the problems associated with this WHO/WTO normative interaction. Dr. Gwam's contribution focuses on the negative effects on the enjoyment of human rights, especially ESC rights, of the illegal and harmful dumping of toxic waste in Africa (as elsewhere in the so-called Third World). Gwam notes the difficulties involved in the prosecution of the agenda in the then UN Commission on Human Rights and in the current UN Human Rights Council of restraining toxic waste dumpers (a difficulty he attributes to the (mostly Western) powerful forces behind this activity), and laments about the structural ineffectiveness of international human rights law in providing an adequate remedy for such violations. In the end, he argues that given the very harmful effects of the dumping of toxic waste on the enjoyment of ESC rights in Africa, such measures as are possible still need to be adopted and pursued.

Overall and all together, the articles collected here provide, in large measure, a bird's eye view of the state of knowledge in this area of the human rights field, and a set of eagle-eyed analytical insights in the same area. They raise new questions, report enriching innovations, illuminate fresh or persisting challenges, and map the immediate and longer-term prospects for the realisation of ESC rights on the African continent. While they do not, and could not have, exhausted all the issues and all the insights that are relevant to this area, it is hoped that they have *helped* to sustain the energetic and useful conversation that has more recently begun on the subject of the realisation of ESC rights in Africa.

