THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM
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Theory, Practice and Prospect

Sisay Alemahu Yeshanew

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The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System

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To My Late Mother, Mulunesh Yifru (D1993)
PREFACE

Sisay Alemahu Yeshanew’s book is based on his doctoral thesis, titled ‘The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Law, Practices and Prospects’, completed at the Åbo Akademi University, Finland. I had the privilege of acting as the ‘Opponent’ during the successful oral defence of the thesis, in April 2011. To me, it is therefore a particularly welcome development to see the thesis being made available to a wider audience, in the form of this book. To keep abreast with the rapid developments in the field, the work has benefited from the inclusion of further and more recent case studies from the domestic as well as regional levels.

The African human rights system may be the most recent of the three major regional human rights systems, but its jurisprudence on justiciable socio-economic rights is the richest and most developed. Since its adoption in 1981, the drafters of the African system’s normative pillar, the African Charter on Human and Peoples’ Rights (African Charter), have been commended for including socio-economic rights alongside, and on par with, other rights in a single binding human rights instrument. Based on the principle of indivisibility of all rights, the African Charter does not distinguish, in principle, between the manner or extent of justiciability of the rights in the Charter. At the same time, it should be acknowledged that only a limited number of socio-economic rights are provided for under the Charter. Socio-economic rights as a category of human rights aim to protect, maintain and advance the fulfilment of basic human needs and determinants of a minimum acceptable quality of life consistent with the dignity of human beings. Of the rights that form part of this pool, quite a number has not been included in the Charter, such as the right to food, water, shelter, sanitation, clothing, and to social security.

While numerous texts dealing with the African Charter, and human rights system more generally, discuss this important aspect, few of these commentaries have done this in any great analytical depth. Filling this void, Yeshanew’s book examines the substantive, jurisdictional and procedural guarantees for the protection of socio-economic rights in the African regional human rights system. The author also adds cultural rights to the discussion, but in my view, the main contribution lies in the analysis of socio-economic rights, as the controversy about justiciability is much less pronounced in respect of cultural rights. The author analyses the laws and practices of the African regional system with respect to the
judicial and quasi-judicial enforcement of these rights against the background of justiciability theories and practices relating to the rights. One of the strengths of the work is its solid location in both theory and practice.

After dealing with the concepts and situating his study within the existing literature, the author poses the question whether socio-economic rights are justiciable. He looks at the justiciability of rights as a quality that depends mainly on the protection and normative content of the rights and related obligations, and their subjection to a judicial or quasi-judicial organ with a mandate to adjudicate individual and group claims and to indicate remedies as part of authoritative decisions. The book then takes stock of the main objections against the justiciability of socio-economic rights, namely that, on the normative terrain, these rights are vague and, in the jurisdictional domain, that they entail resource-dependent positive duties of enforcement, about which judicial and quasi-judicial organs lack the democratic legitimacy and institutional competence to decide. In providing principled responses to these objections, Sisay Yeshanew contends that too much emphasis has in the past been placed on the argument that socio-economic rights share many characteristics, including justiciability, with civil and political rights (this is the ‘transitivity’ argument) and argues for the justiciability of socio-economic rights in their own.

The book then examines the place of socio-economic rights in the genesis and development of the African regional human rights system by unearthing valuable insights from the travaux préparatoires of the African Charter. Providing a significantly innovative contribution, the text links the discussion on the justiciability of these rights at the regional level with their protection at the national level, posing the question to what extent the regional protection of socio-economic rights actually resonates with that of the domestic systems it supplements.

The book proceeds to examine the judicial and quasi-judicial mechanisms available for the enforcement of socio-economic rights in the African regional human rights system. In particular, the following are discussed: the mandate and procedures of the African Commission on Human and Peoples’ Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the African Court on Human and Peoples’ Rights. The author concludes that the three monitoring organs in the African system ensure differing levels of justiciability. The Court is mandated to reinforce the protection mandate of the Commission and arguably that of the Committee, as it may also apply the African Charter on the Rights and Welfare of the Child (African Children’s Charter).

Against this background, the book poses the question what the substantive bases for the justiciability of socio-economic rights in the African system are. While
devoting most of his attention to the relevant provisions of the African Charter, Sisay Yeshanew also includes the African Children’s Charter and the Protocol to the African Charter on the Rights of Women in Africa in the scope of the inquiry. His analysis produces an important criticism of the widely held position that obligations of states relating to socio-economic rights in the African system are “immediate”. Instead, the author shows that a more nuanced approach is called for, taking into account the specific wording of the rights in the Charter. The major shortcomings in the normative landscape are surveyed, and reforms are suggested. The book also appropriately ponders the various strategic options for addressing these shortcomings, and suggests ways of bridging gaps in the provisions of socio-economic rights and related obligations in the African system. The book argues that the open-ended general obligations of States Parties to the African treaties may be interpreted as accommodating resource-related qualifications. It also finds grounds for the qualified understanding of duties of states in specific-rights provisions, especially of the African Children’s Charter. The preparatory materials of the African Charter also indicate that there was no intention to subject all socio-economic rights and the related duties to immediate realization. The argument for qualification may be seen as an invitation to a hurdle for the justiciability of the rights in light of the view that the ‘progressive realization’ standard is difficult to adjudicate. However, the author interestingly argues, “it is better that the African monitoring organs face the difficulty of developing appropriate standards of adjudication of progressively realizable duties than pass vacuous decisions based on the unrealistic expectation that states may immediately realize all obligations that demand resources.”

In the final substantive chapter of the book where he examines methods of inquiry by which legal provisions are applied to disputes in finding whether rights are violated, the author mainly discusses the minimum core and reasonableness models of review and argues for their combined application. Commending the practice of the African Commission to consider all socio-economic rights protected in the Charter as directly justiciable and its consideration of all groups of rights as interdependent set of values, the author strongly argues for the improvement of the quality of reasoning of the Commission in terms of analysis of applicable legal provisions and consideration of competing perspectives.

In his recommendations, the author recognized that the practical effects of the mechanisms of justiciability of socio-economic rights in the African system depend on a range of factors and measures. He addresses the recommendations mainly to the African human rights monitoring organs, litigants, African states and the policy organs of the African Union (AU). As he notes, their implementation will undoubtedly advance the contributions of the mechanisms of adjudicatory enforcement of the rights to the amelioration of socio-economic and cultural ills in the states of the continent.
Preface

This book provides both a very useful overview of the existing academic and other literature on the topic, and adds a fresh and insightful new voice. It is comprehensive and informative, and devotes much attention to detail and analysis. Insightful recommendations to a wide series of actors leave much ‘food for thought’. Although the methodology adopted is mainly legal in nature, the study does not totally eschew matters that may fall within disciplines other than law. In the background part, for example, it made use of socio-economic measurements that are the output of sociological research methodology.

The author’s solid and balanced presentation and his well-substantiated critique of the relevant issues make this a contribution that everyone engaged with the issue of justiciability of socio-economic rights should have reference to.

Professor Frans Viljoen
Director Centre for Human Rights, University of Pretoria, South Africa
ACKNOWLEDGMENT

This book is an updated version of my doctoral thesis, which was defended at Åbo Akademi University in April 2011. In the period over which the book was written, many individuals and organizations have extended their generous material, spiritual and intellectual support. I thank them all. Most prominent are the supervisors of my doctoral thesis, Professor Martin Scheinin of the European University Institute and Professor Fons Coomans of Maastricht University. My deepest gratitude goes to them.

In addition, I thank Professor Sandra Liebenberg and Professor Wouter Vandenhole for their inspiring remarks and constructive substantive comments as part of their statements of approval of my doctoral thesis for public defence. Great thanks also go to Professor Elina Pirjatanniemi, Professor Frans Viljoen, Professor James Cavallero, Dr Girmachew Aneme and Moges Solomon for their kind interest in discussing, at different times, substantive and methodological issues of the thesis with me and also for their invaluable comments on the draft of the thesis. I extend my heartfelt thanks to the academic as well as the administrative staff of the Institute for Human Rights at Åbo Akademi University and the participants of the various seminars of the Nordic School in Human Rights Research where I presented parts of the thesis.

The completion of the research was made possible with finances pooled from various sources. The Finnish Graduate School in Human Rights Research and the Human Rights-Based Approach to Development Project at the Institute for Human Rights (funded by the Academy of Finland) have been the major financiers of my research stay in Finland, my participation in many valuable seminars and also field researches. Special thanks go to the Research Institute of Åbo Akademi Foundation for covering the costs of my participation in the 46th Ordinary Session of the African Commission on Human and Peoples’ Rights in Banjul, The Gambia. In this connection, I would also like to thank the members of the Commission for their cooperation in providing interviews. I have further benefited from the Åbo Akademi Rector’s grants, which provided bursaries for three months in the final stages of the doctoral thesis and also covered the costs of my research visit to the Secretariat of the African Union in Ethiopia. I further thank the Centre for Social Studies at the University of Coimbra where much of the updating of the thesis into a book took place.
Acknowledgment

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# ABBREVIATIONS

## JOURNALS AND LAW REPORTS

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<th>Abbreviation</th>
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<tbody>
<tr>
<td>AHRIJ</td>
<td>African Human Rights Law Journal</td>
</tr>
<tr>
<td>AHRLR</td>
<td>African Human Rights Law Reports</td>
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<tr>
<td>AIR</td>
<td>All India Reporter</td>
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<tr>
<td>AJHR</td>
<td>Australian Journal of Human Rights</td>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<tr>
<td>BCLR</td>
<td>British Columbia Law Reports</td>
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<tr>
<td>CLB</td>
<td>Commonwealth Law Bulletin</td>
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<tr>
<td>EECR</td>
<td>East European Constitutional Review</td>
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<td>EHRLR</td>
<td>European Human Rights Law Review</td>
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<td>European Journal of International Law</td>
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<td>HRLJ</td>
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<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<tr>
<td>ICON</td>
<td>International Journal of Constitutional Law</td>
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<tr>
<td>IJHR</td>
<td>International Journal of Human Rights</td>
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<tr>
<td>ILM</td>
<td>International Legal Materials</td>
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<tr>
<td>JAAS</td>
<td>Journal of Asian and African Studies</td>
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<td>JAL</td>
<td>Journal of African Law</td>
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<tr>
<td>NILR</td>
<td>Netherlands International Law Review</td>
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<tr>
<td>NJHR</td>
<td>Nordic Journal of Human Rights</td>
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<tr>
<td>NQHR</td>
<td>Netherlands Quarterly of Human Rights</td>
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<tr>
<td>NYBIL</td>
<td>Netherlands Yearbook of International Law</td>
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<tr>
<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<tr>
<td>SALJ</td>
<td>South African Law Journal</td>
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<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>ANPPCAN</td>
<td>African Network for the Prevention and Protection against Child Abuse and Neglect</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all forms of Discrimination Against Women</td>
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<tr>
<td>CERD</td>
<td>Convention on the Elimination of Racial Discrimination</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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### Abbreviations

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<td>CP</td>
<td>Civil and political</td>
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<tr>
<td>CRC</td>
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<tr>
<td>CUP</td>
<td>Cambridge University Press</td>
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<tr>
<td>ECHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>ECOSOCC</td>
<td>Economic, Social and Cultural Council</td>
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<td>HRC</td>
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<td>HUP</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
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<td>IFI</td>
<td>International Financial Institutions</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
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<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
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<td>OUP</td>
<td>Oxford University Press</td>
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<tr>
<td>PAP</td>
<td>Pan African Parliament</td>
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<tr>
<td>PRC</td>
<td>Permanent Representatives Committee</td>
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<tr>
<td>PSC</td>
<td>Peace and Security Council</td>
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<td>SAPs</td>
<td>Structural Adjustment Programmes</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WB</td>
<td>World Bank</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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