



ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
SCHOOL OF LAW

COMPETENCE AND LEGITIMACY OF ETHIOPIAN COURTS IN THE
ADJUDICATION OF SOCIO-ECONOMIC RIGHTS: AN APPRAISAL OF
THE CHALLENGES AND PROSPECTS

BY
SISAY BOGALE KIBRET

DECEMBER 2010

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DECEMBER 2010

DECLARATION

I, **Sisay Bogale Kibret**, hereby declare that this dissertation is my own original work and has never been presented in any other institution. I also declare that where sources are used, they are duly acknowledged.

With Regards!

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DEDICATION

This dissertation is dedicated to my parents

W/ro Dasash Ayalew

&

Kes Bogale Kibret

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ACRONYMES

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of Child
African Commission	African Commission on Human and Peoples' Rights
AU	African Union
CCI	Council of Constitutional Inquiry
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of Child
DPSP	Directive Principles of State Policy
ECHR	European Convention on Human Rights
ESCRs	Economic, social and Cultural Rights
FDRE Constitution	Constitution of the Federal Democratic Republic of Ethiopia
G.A.Res.	General Assembly Resolution
HOF	House of Federation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PIL	Public Interest Litigation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights

ABSTRACT

Socio-economic rights are those human rights that aim at securing basic quality of life in terms of food, water, shelter, education, health care and housing for all members of a particular society. For proper enforcement of these rights, two things shall go hand in hand: legal recognition and judicial scrutiny in case of violations. To this end, the existence of courts capable of providing remedies is essential. Accordingly, this dissertation tries to assess the recognition of the rights in the Ethiopian legal system and the competence and legitimacy of Ethiopian Courts in the adjudication of these rights through a qualitative research method (interview of 13 judges along with the assessment of other international and domestic laws and literatures). Thus, the existing theoretical and practical challenges related to competence and legitimacy and other major impediments are identified. The major setback emanates from the FDRE Constitution itself which grants apparent power of interpretation of socio-economic rights to HOF. Other problems include: ouster clauses against powers of courts, poor perception of the people towards the judiciary, ambiguity on status of international instruments in the FDRE Constitution, non-publication of international instruments, absence of domestic legislation on the contents of socio-economic rights and absence of public interest litigation. The author of this dissertation argues that these challenges cannot absolutely hinder courts from judicial scrutiny of socio-economic rights in Ethiopia and can be overcome by the joint action of courts and the government. Accordingly, the dissertation concludes that Ethiopian courts are competent and legitimate to adjudicate socio-economic rights.

Key Words: Socio-economic Rights. Competence, Legitimacy, Recognition, Justiciability, Minimum Core.

CHAPTER ONE

GENERAL FRAMEWORK OF THE RESEARCH

1.1 Background of the Study

The first statutory recognitions of economic, social and cultural rights date from the last third of the 19th century. Economic, social and cultural rights (herein after socio-economic rights or ESCRs) entered in the constitutional law in as early as 1917 in Mexican, the 1919 German and the 1931 Spanish have become part of the constitution in most of the world since the end of the Second World War, including many African countries.¹ ESCRs have also been part of international human rights since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 – as well as in the ILO and WHO constitutions and the Charter of the League of Nations. Regional human rights instruments, such as the African Charter of Human and Peoples' Rights, also include ESCRs in one document. The preamble of the UDHR (1948) points out that '*the highest aspiration of the common people*' is the 'advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and *want*'."²

Moreover, the intention to integrate the different sets of rights was accepted in 1993, by representatives of 171 governments assembled in Vienna at the World Conference on Human Rights who reiterated that all human rights are *universal, indivisible, and interdependent and interrelated*.³ The Universal Declaration of Human Rights recognizes that human rights to which economic, social and cultural rights are part and parcel, are the foundations of peace, justice and democracy.⁴ Human rights are believed to be derived from the inherent nature of human beings and, as fundamental freedoms, are universal and belong to all human beings. Historically, human rights have been conceived as a negative protection of the individual from the state. Accordingly, States have the primary responsibility to create the enabling environment in which all people can enjoy their human rights, and have the obligation to

¹ C. Courtis. *The Role of Judges in the Protection of Economic, Social and Cultural Rights*; Human Rights Office, Development, Economic and Social Issues Branch Research and Right to Development Division Office of the United Nations High Commissioner for Human Rights, South African Chief Justices Forum Annual Meeting Botswana, (7 to 8 August 2009)1.

²Second preambular paragraph, Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), UN Doc. A/810(1948).

³ Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts. 48th Sess., 18, U.N. Doc. A/CONF.157/24 (1993), Part I, Para. 5. [hereinafter Vienna Declaration]

⁴ UNDP. *Poverty Reduction and Human Rights: A Practice Note* (2003).

ensure that respect for human rights norms and principles is integrated into all levels of governance and policy-making. One instance of showing commitments by member states is to recognize human rights in their constitutions. To this end, along with domestic recognitions, states have made commitments on natural rights by regional arrangements: African, European and Inter-American systems.

Coming to Ethiopia, in laying down framework for the domestic protection of ESCRs, much attention is given to their constitutional entrenchment though it cannot be compared with civil and political counterparts.⁵ The FDRE Constitution recognizes that human rights and freedoms, emanating from the nature of mankind are inviolable and inalienable and thus shall be respected.⁶ Its preamble affirms that it is strongly committed to guaranteeing a democratic order, and advancing our economic and social development. It is further firmly convinced that this requires the full respect of individual and people's fundamental freedoms and rights to which socio-economic rights belong. The Constitution further makes all international human rights instruments ratified by Ethiopia an integral part of the law of the land. It goes on providing that the fundamental rights and freedoms specified in the Constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.⁷ All in all, Ethiopia is under duty to properly enforce socio-economic rights within its own territory.

One system of manifestation, but not sufficient, of commitments in to reality is establishment of courts. Courts are one of the main organs of protections of human rights. Often, they are rightly described as "*the bulwark against abusive governmental practices.*" In most jurisdictions they are the primary bodies to which victims of human right violations seek to obtain formal remedies.⁸ In Ethiopia too, they have the duty to respect, protect and fulfill human rights as one organs of the government.

⁵ A. Sisay. *The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia*; Journal of Ethiopian Law Vol.22 (2008).

⁶ The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.17, Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, 1st year No 1.1995 (Hereinafter FDRE Constitution), Art 10.

⁷ See FDRE Constitution, Art 13(2).

⁸ R. Tsegaye. *Making Legal Sense of Human Rights: The Judicial Role in protecting Human Rights in Ethiopia*; Mizan Law Rev.Vol.3 (2009) 322.

1.2 Statement of the Research Problem

The implementation of ESCRs is the most pressing item on the international human rights agenda. Millions of people go without food, health, shelter, education, work, social security not because the resources are unavailable to provide for these basic human rights but many times because societies are badly governed, or democracy is lacking, or the rule of law is absent, or simply because there is a failure of understanding about how one could go about the practical implementation of ESCRs.⁹

As indicated above, in the words adopted by the second world conference on Human Rights in Vienna(1993) all Human Rights are “*universal, indivisible and interdependent and interrelated*” and the international community is duty bound to treat both sets of rights in the same manner, at the same footing, and with the same emphasis.¹⁰ However, responses to violations of socio-economic rights have remained weak when compared to the seriousness accorded to infringements of civil and political rights. Obligations undertaken by states, and consequently by the international community, under international human rights instruments shall be implemented in good faith.' This standard applies to all parts of the contemporary human rights system. However, many obstacles must be overcome in fulfilling this standard, including that of the relative neglect of ESCRs.¹¹ Another problem has been the slow process in clarifying the content of these rights and the corresponding obligations that impose on states.

Preliminary assessment by the researcher on judicial enforcement of socio-economic rights in Ethiopian Courts reveals that there are very few socio-economic right based litigations. On top of this, in his article Dr. Asssefa Fisseha shows that most judges at all levels of the courts are in doubt whether they can interpret chapter three of the FDRE Constitution.¹² This undoubtedly will have negative effect on the realization socio-economic rights in Ethiopia.

Legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party thereby enabling individuals to seek

⁹ B G. Ramcharan (ed). *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials*; The Raoul Wallenberg Institute Human Rights Library. Vol. 22; Martinus Nijhoff Leiden/Boston (2005) 1.

¹⁰ Dankwa et al. *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*; Human Rights Quarterly, Vol. 20, No. 3(1998 (Available at: <http://www.jstor.org/stable/762784>)

¹¹ A Eide. *Economic, Social and Cultural Rights as Human Rights in A. Eide et al. (eds.), Economic Social and Cultural Rights*; Kluwer Law International, 2nd ed. the Netherlands. (2001) 27.

¹² F. Assefa. *Some Reflections on the role of the judiciary in Ethiopia*; Ethiopian Bar Review, Vol. 3 No. 2 (2009) 22.

enforcement of their rights before national courts. Individuals living in Ethiopia as well should be entitled to claim their socio-economic rights within the territory of Ethiopia. As Beddard and Hill¹³ rightly described it “...*why is it apparently acceptable to die of hunger than to be shot?*” For instance, within the meaning of the right to adequate housing, it can be asked why it is acceptable to be eaten by some wild animals or to be taken by flood than to be killed by a human being. Here, it will be wise to assess whether Ethiopian courts have the power to decide on socio-economic rights. Therefore, addressing issues related with competence and legitimacy of Ethiopian courts on the enforcement of these rights is extremely essential in alleviating the problem on the part of courts. This paper will assess whether the courts have such power under the constitution and/or other laws, be it international or domestic legislations.

One of the traditionally neglected issues with regard to ESCRs is the question of their justiciability that is the possibility for people who claim to be victims of violations of these rights to file a complaint before an impartial body and request adequate remedies or redress if a violation has occurred or is likely to occur.¹⁴ The task of interpreting and applying the ESCRs in the Constitution is arguably the most challenging task facing lawyers and courts. Similar problem exists in Ethiopia. As can be simply evidenced from court practices, almost cases related with labor are the only ones prominent to appear now and then. Of course, the vagueness nature of these rights, as some scholars argue, is taken for granted that the real minimum core is not easily assessed and is the major obstacle behind the frequent referral and usage by individuals, the holders of such rights.

In terms of the institutional competence dimension, the judiciary is viewed as inappropriate to deal with the complex matters of social justice. There are also legitimacy based objections which among others, draws on concerns of majoritarian democracy. Issues of social justice are viewed as matters whose determination is within the jurisdiction of the representatives of the people and not the unelected judges. Due to this the involvement of courts in a considerable range of matters which have important resource implications is not acknowledged.

¹³ R Beddard and Dilys M Hill (Eds). *Economic, Social and Cultural Rights Progress and Achievement*; St. Martin's Press, New York (1992) 6.

¹⁴ C. Courtis. *Supra* Note 1 above, at 5.

Thus, in this particular research, the primarily focus is on “*the competence and legitimacy of Ethiopian Courts in the adjudication of socio-economic rights*” and looking answers relevant to it. Accordingly, the researcher needs to sufficiently address the following research questions:

- ✓ What are socio-economic rights, their relations with the traditional civil and political rights and their significance for individuals and states?
- ✓ What duties are imposed on State Parties to Covenant on Economic, Social and Cultural Rights?
- ✓ Whether socio-economic rights are justiciable in Ethiopia?
- ✓ Are Ethiopian Courts competent, legally and technically, to handle socio-economic rights?
- ✓ Whether the Ethiopian courts have the legitimacy on the adjudication of socio-economic rights?
- ✓ What other major impediments faced Ethiopian courts in their involvement to Socio-economic rights?
- ✓ What lessons can Ethiopian courts get from the experiences of other selected jurisdictions in adjudicating on socio-economic rights?

1.3 Objective of the Study

This research paper focuses on providing answers whether Ethiopian Courts can handle cases that base themselves on socio-economic rights. The general objective of this research paper is to elucidate the competence and legitimacy Ethiopian Federal Courts in the realization of socio-economic rights in Ethiopia.

In precise terms, the following are the notable special objectives of this research:

- ✓ To show that socio-economic rights are bedrocks for individuals to realize their other rights and lead dignified life.
- ✓ To point out the lessons that Ethiopian courts can get from the experiences of other international, regional and domestic jurisdictions in adjudicating on socio-economic rights.

- ✓ To explore the practical challenges that faced Ethiopian Courts in adjudicating socio-economic rights.
- ✓ To elucidate recommendations on what shall be done to have better enforcement of socio-economic rights before Ethiopian Courts.

1.4 Significance of the Study

At the beginning, we have said that the exact role of Ethiopian Courts on the realization of socio-economic rights in Ethiopia is not sufficiently studied. Thus, undoubtedly this study will initiate those who have deep aspiration on the implementation of socio-economic rights. In the absence of taking socio-economic rights to regular courts in Ethiopia, this research is expected to raise the awareness of those who can access it to bring violations of their rights.

Thus, the study will have the following significances:

- ✓ To contribute its part to the development of jurisprudence on role of courts on socio-economic rights in Ethiopia.
- ✓ To enhance the knowledge of readers on the overall nature and significance of socio-economic rights to individuals and states.
- ✓ To draw the attention of judges, policy makers, legislative members and human right advocates for the realization of socio-economic rights in Ethiopia and make it their areas of concern in discharging their duties.
- ✓ To serve as bedrock for further research in this fertile area of law in Ethiopia.

1.5 Research Methodology

Many arguments are forwarded in favor and against the legal nature and related justiciability of socio-economic rights. These arguments are also extended towards the competence and legitimacy of Ethiopian courts. Accordingly, the legal and theoretical analysis is the major research method adopted in conducting this research. For this purpose, both primary and secondary sources are employed. The primary sources are based from legislations at international, regional, domestic jurisprudences of others including the FDRE constitution are thoroughly dealt with. Moreover, with the view to achieve the objectives set in the research, interviewees are selected on purposive sampling method among Federal Judges and Assistant Judges at all tiers of courts for they are the major stakeholders in the application of socio-economic rights before courts of law. Accordingly, the researcher has made intensive and in-depth interview with 11 well-experienced judges and 2 assistant judges

from the three tiers of courts at Federal level (4 judges from the supreme court (from supreme court and cassation division), 4 from high court, 3 from first instance court, and 2 assistant judges). In order to get national picture, the researcher focuses his study with judges who come from different states in the country.

Among the secondary sources, books, journals, relevant articles and online sources are consulted. For the appropriate accomplishment of the objectives of this research, library undertakings in AAU Libraries, ECA Library, African Union Library and Resource center are properly utilized. The internet is also a prominent source of materials used in this research.

1.6 Limitations of the Study

In order to assess whether Ethiopian Courts are competent and legitimate in the adjudication of Socio-economic rights in Ethiopia, the subjects of the study are judges and assistant judges at all levels. They are the major actors in the enforcement of socio-economic rights of citizens in connection with the issue at hand. Hence, the research is expected to come up with interesting findings. It would make potentially viable recommendations based on which the challenges might be pointed out and invited for possible solutions.

Yet, this research could not be expected to come up with a hard and fast rule to check the realization of socio-economic rights before regular courts. Failure to bring socio-economic matters before regular Courts might be attached with lack of awareness by the part of the society, the right holders. Assessing the real awareness of the society is outside this research for lack of sufficient time and resource. Moreover, it was not possible to get judges from all states of the country. These are expected to create considerable impact on the outcome of the research.

1.7 Organization of the Study

This dissertation is organized into five chapters. Chapter one provides background to the study summarizes the relevant literatures, identifies the research questions to be tackled with, and introduces the objectives, significance of the research, research methodology and possible limitations.

In chapter two, the nature definition historical development of socioeconomic rights is touched. Moreover, comparison with the Civil and Political Counterparts along with their significance is discussed. Their recognition under ICESCR and the corollary state obligations are thoroughly analyzed. At the end, their status in the African Charter is dealt for Ethiopia is state party to it.

Chapter three discusses comparative experiences on judicial competence and legitimacy on the adjudication of socio-economic rights. Thus, the stand of academicians, UN System, Regional Human Rights Systems (the European , Inter-American and African Regional Human Rights Systems) and National jurisprudence from South africa and India are discussed in depth to evaluate the performance of the ethiopian judiciary.

Chapter Four, being the major chapter, on its part is devoted to show judicial experience in Ethiopia. Thus, the entrenchment of the rights under the Ethiopian Legal System , the issue Justiciability of Socio-Economic Rights under the FDRE Constitution, the Concept of Minimum Core and Its Relevance to Enhance Justiciability in Ethiopia are dealt. Further, the research tries to juxtapose between the law and the practice by making interview with 13 judges. The Judicial Competence and Legitimacy issues in the Ethiopian context, challenges from constitutional power arrangement, ouster clauses against powers of courts, perception of the people towards the judiciary, ambiguity on status of international instruments in the FDRE constitution, problems emanating from the non-publication of international instruments, absence of domestic legislation on the contents of socio-economic rights and absence of public interest litigation (PIL).

The last part, chapter five concludes the findings and provides list of recommendations for effective involvement of the Ethiopian Courts in the enforcement of socio-economic rights.

CHAPTER TWO

SOCIO-ECONOMIC RIGHTS: GENERAL CONSIDERATIONS

2.1 Nature and Historical Development of Socio-economic Rights

2.1.1 Nature and Definition of Socio-economic Rights

Human rights are commonly understood as being those rights which are inherent in the mere fact of being human. The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights without discrimination. Thus, human rights are the rights that one has simply as a human being, without any supplementary condition being required. These rights and freedoms belong to every human being. In similar fashion, Black's Law Dictionary *considers human rights as freedoms, immunities, and benefits that, according to modern values (especially at international level); all human beings should be able to claim as a matter of right in the society in which they live.*¹⁵

Human rights differ from other rights in two respects. Firstly, they are characterized by being: inherent in all human beings by virtue of their humanity alone (they do not have, e.g., to be purchased or to be granted); inalienable (within qualified legal boundaries); and equally applicable to all. Secondly, the main duties deriving from human rights fall on states and their authorities or agents, not on individuals. The important implication of these characteristics is that human rights must themselves be protected by law.¹⁶ Human rights are regarded as fundamental and inalienable claims or entitlements which are essential for life as a human being. Stated otherwise, every person across the globe has these rights in his personality. In this connection, UDHR, the grand document for ICCPR and ICESCR, under its article 2 provides that: “*Everyone is entitled to all rights and freedoms set forth in this Declaration without distinction of any kind such as race, color, sex, language, religion, political or other opinion or social origin, property birth or other status.*”¹⁷

From this one can safely observe that all rights including socio-economic rights of individuals shall be respected irrespective of different factors.

¹⁵ See B Garner. Black's Law Dictionary, 7th Ed, (1999) 745.

¹⁶ M. Sepulveda et al. *Human Rights Reference Hand Book*; University for Peace (2004) 6.

¹⁷ UDHR, Art 2.

The UN Charter is the first international treaty to concern for general respect of human rights. The Charter reaffirmed that faith in fundamental human rights, in the dignity and worth of the human person, for equal protection of rights of men and women.¹⁸ The entry into force of the UN Charter in 1945 marked the formal recognition of human rights as a universal principle, and compliance with human rights was mentioned in the Preamble and in Articles 55 and 56 as a principle to be upheld by all states. Under the Charter, the protection and respect of human rights became a central purpose of the UN¹⁹ with obligations imposed upon Member States through ‘joint and separate action’ to achieve international co-operation in promoting and encouraging ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’. Article 55(a) of same stresses the central responsibility of the UN and its member states for the pursuit of ‘higher standards of living, full employment and conditions of economic and social progress and development.’²⁰ By virtue of these Charter provisions, seen in the context of Article 103 of same, the UN Member States are obliged to observe, promote and encourage universal respect for human rights including socio-economic rights. Since the term human rights is applicable for both civil and political, and socio-economic rights, the concerns of UDHR and UN Charter and other organs in their constitutions is also extended to socio-economic rights.

Accordingly, in its wording, the committee on ESCRs considered human rights, to which socio-economic rights are part and parcel, that: *“Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person.”*²¹

Socio-economic rights are broadly described as conditions in which people live and work. They give people a claim to an adequate standard of living and stress the quality of life in

¹⁸ United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945), Preamble.

¹⁹ UN Charter, Art 1(3) provides that *“the purposes of the UN is to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race,”*

²⁰ See D Olowu. *An Integrative Rights-Based Approach to Human Development in Africa*; Pretoria University Law Press. (2009) 12.

²¹ See CESCR, General Comment 17: *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author* (Article 15, Paragraph 1 (C), of the Covenant), UN Doc E/C.12/GC/17 (12 January 2006), Para 1.

both a material and moral sense. They are also related to aspects of employment, particularly the protection of workers and the conditions in which people lead their lives.²²

For the purpose of this study, the definition forwarded by Professor Frans Viljoen who defined socio-economic rights as: "*entitlements that give rise to the shared concern of ensuring societies where everyone has a minimum decent standard of living consistent with human dignity (the "bare necessities of life")*".²³ It is also said that socio-economic rights are those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water, and shelter, education, health care and housing.²⁴ The source of these rights is believed to be highly attached with the then existing economic inequality in the world within nations themselves and at international level from nation to nation. Therefore, these socio-economic rights are designed to bring social justice by distributing goods and services to those who are in need and deserve it.²⁵ In other words, the nature of this category of rights is to satisfy needs of the marginalized groups of the society.

This action of re-distribution of wealth would be materialized only when the government is engaged in a positive action. This mission of provision of goods and services to the needy could be accomplished either indirectly by issuance of laws or directly by participating in the economy through setting up of public enterprises or levying higher tax rates upon the capable within the nation.

2.1.2 Historical Development of Socio-economic Rights

The origins of human rights may be found both in Greek philosophy and the various world religions. In the Age of Enlightenment (18th century), the concept of human rights emerged as an explicit category.²⁶ Man/woman came to be seen as an autonomous individual, endowed by nature with certain inalienable fundamental rights that could be invoked against

²² F Coomans. *Economic, social, and Cultural Rights: Collective Rights*; Netherlands Institute of Human Rights (1995) 16.

²³ F Viljoen. *The Justiciability of Socio-Economic and Cultural Rights: Experiences and Problems* (2006) 1 (unpublished, on file with the author.) in S. Takele. *The Indirect Approach to Promote Justiciability of Socio-Economic Rights of the African Charter on Human and Peoples' Rights*; Draft, accepted for publication in Rachel Murray (ed.) *Human Rights Litigation and the Domestication of International Human Rights in Africa* (forthcoming 2009) 2.

²⁴ G Erasmus. *Socio-Economic Rights and Their Implementation: The Impact of Domestic and International Instruments*; *International Journal of Legal Information* (2004) 32, at 252.

²⁵ M Fekadu. *The Obligation of States in the Realization of the Right to Work under International Human Right Instruments*; Senior Essay; AAU, (2002)30.

²⁶ H.J. Steiner et al. *International Human Rights in Context: Law, Politics and Morals* (3rd Ed); Oxford university press, (2007) 269.

a government and should be safeguarded by it. Human rights were henceforth seen as elementary preconditions for an existence worthy of human dignity.²⁷

As part of human rights, socio-economic rights have drawn strength from different religious, philosophical and political backgrounds;²⁸ virtually all religions manifest comparable concern for poor and oppressed. The philosophical analysis of Thomas Paine, Karl Marx, I. Kant and John Rawls supported this view. The political programmes of Charles Bismarck in Germany, the New Dealers in the USA, the Mexican Constitution of 1917, the First and Subsequent Soviet Constitution are other examples. Then, ILO, which was established by the Treaty of Versailles in 1919 to abolish injustice and hardship against workers, has become prominent in labor affairs.²⁹ The common view of all the above attempts was that human beings without distinctions shall be granted with certain basic socio-economic rights that enable them leading dignified lives.

As discussed in the previous sub-section, the international law of human rights was created immediately following World War II in response to widespread atrocities committed by states against innocent civilians. Human rights law broke new ground in international relations by establishing binding legal duties that governments owed to individuals and groups rather than to other governments.³⁰ In transforming the UDHR declaration into legally binding obligations, the UN General Assembly adopted two separate international covenants, which taken together constitute the bedrock of international normative regime for human rights, namely International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR).³¹ In the UDHR, Economic, Social and Cultural Rights (ESCRs) are given the same emphasis and recognition as civil and political rights. However, in practice the responses to violations of socio-economic rights have remained weak when compared to the seriousness accorded to infringements of civil and political rights.³² It has

²⁷ M. Sepulveda et al. Supra Note 16 above, at 8.

²⁸ H.J. Steiner et al. Supra Note 26 above, at 270.

²⁹ H.J. Steiner et al, Id. at 269.

³⁰ Mutua. *Human Rights Ideology*; University of Virginia International Law Journal (1996) 46.

³¹ S Leckie. *Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*; Human Rights Quarterly, Vol. 20, No. 1 (1998) (Available at <http://www.jstor.org/stable/762697>)

³² S Leckie, Id.

been long argued that partly the absence of strong enforcement mechanisms in the ICESCR has marginalized ESCRs and stymied their full realization.³³

The controversies led to the establishment of two extremist sides. At one extreme lies the view that socio-economic rights are superior to civil and political rights in terms of an appropriate value hierarchy. And at the other extreme, there exist the argument that socio-economic rights do not constitute rights at all. Proponents on later side hold that treating them as rights undermines the enjoyment of individual freedom, distorts the functioning of free markets by inviting state intervention in the economy, and provide an excuse to downgrade the importance of civil and political rights.³⁴ This kinds of discrepancy existed from the very beginning of initiations to adopt UDHR in binding convention. Things were not going as intended by UN ECOSOC which was given the responsibility to draft a covenant comprising these two sets of rights. Due to political polarities, the then governments (members of the draft committee chaired by E. Roosevelt of USA) did not agree on the forms and substances of the rights to be incorporated during the drafting process.³⁵

Owing to this conflict views, the drafting process was prolonged up to 1953 and finally the drafting committee proposed two separate covenants which was confirmed by the General Assembly. It was in this area of disagreement that the two covenants were adopted in 1966 and came into force after full ten years. Thus, the absence of a sufficiently coherent body of legal regulations, case law or jurisprudence in the area of ESC rights is not because of any fundamental concern relating to their non-justiciable nature, but rather due to ideology. Therefore, socio-economic rights were in many ways a casualty of the Cold War; it was not until the early 1990s that recognition and understanding of ESC rights began to strengthen in response to action by grassroots activists and other civil society actors.³⁶

Whatever arguments are forwarded, the official position today must be and is that the two set of rights under these covenants are, in the words adopted by the second world conference

³³ J. Dennis & P. Stewart. *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* The American Journal of International Law, Vol. 98, No. 3 (2004) Available at: <http://www.jstor.org/stable/3181641> (Accessed on 19 August 2010).

³⁴ Dankwa et al. *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*; Human Rights Quarterly, Vol. 20 (1998) 7. (Available at: <http://www.jstor.org/stable/762784> (Accessed on 20 August 2010)).

³⁵ Dankwa et al. Id. At 8.

³⁶ International Commission of Jurists. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability*; Human Rights and Rule of Law Series: No. 2; Switzerland (2008) 13.

on Human Rights in Vienna “*universal, indivisible and interdependent and inter related.*”³⁷ Therefore, the international community must treat both sets of rights in the same manner, at the same footing, and with the same emphasis as inspired under this conference, Para 5. The establishment of the Committee on ESCR in 1985 and the adoption of Optional Protocol³⁸ are better improvements on such rights.

2.2 Comparison of Socio-economic Rights with Traditional Civil and Political Counterparts

The tension between civil and political rights and social and economic rights has a long history—a history that more often burdens rather than aids an understanding of their genuine differences. Traditionally, it has been argued that there are fundamental differences between ESCR on one side and Civil and Political Rights (CPR) on the other. These two categories of rights have been seen as two different concepts and their differences were taken as a dichotomy.³⁹ According to this argument, CPR are considered to be expressed in very precise language, imposing merely negative obligations which do not require resources for their implementation, and which therefore can be applied immediately.⁴⁰ Socio-economic rights are often criticized for being imprecise and vague. It is claimed that the rights are by nature, open-ended and indeterminate, and there is a lack of conceptual clarity about them.⁴¹ It is further stressed that economic, social, and cultural rights are not really rights but merely desirable social goals and therefore should not be the object of binding treaties.⁴² Consequently, preference to civil and political rights was given for the fact that they were considered as having primary importance over socio-economic rights. This approach characterizes what was called “*the western doctrine of human rights*” which proceeds from the assumption that: “*Although it is not really possible to rank human rights in order of preference, civil and political rights appear to be of primary importance . . .*”⁴³ This can be further manifested in the following manner: when someone is tortured or when a person's

³⁷ Dankwa et al. *supra* Note 20 above at 9 ; See also *Vienna Declaration And Programme of Action: World Conference And Millennium Assembly*; The World Conference On Human Rights In Vienna.(1993) Para 5.

³⁸ The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: The General Assembly Resolution, A/RES/63/117, 10 December 2008.

³⁹ See M. K. Addo. *Justiciability Re-Examined*, in B Ralph and D M.Hill (ed). *Economic, Social and Cultural Rights: Progress and Achievement*; MacMillan in association with university of Southampton (1992) 102-105.

⁴⁰ M. Sepulveda et al. *Supra* Note 16 above, at 9.

⁴¹ E Wiles. *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*; 22 American University International Law Review (2006-7) 50.

⁴² *Id.*

⁴³ A. Cassese. *International Law in a Divided World*; Clarendon Press, Oxford (1986) 301.

right to speak freely is restricted, observers almost unconsciously hold the state responsible. However, when people die of hunger or thirst, or when thousands of urban poor and rural dwellers are evicted from their homes, the world still tends to blame nameless economic or "developmental" forces.⁴⁴ It seems that there is wrong assumption that the fate of socio-economic rights are only under the mercy of governments unlike civil and political rights.

On the other hand, however, up until the mid-1980s, the preference of Socialist States and of most developing States was clearly for ESCRs. These divisions found their expression in a number of United Nations documents. From the late 1960s until the mid-1980s the view of the socialist and developing states was that it was necessary to give a certain priority to economic, social and cultural rights which were defined in a number of documents as a condition for the full realization of civil and political rights. Their position was supported in the Proclamation of Teheran which provides:

*Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international development policies of economic and social development.*⁴⁵

It is also important to note that simply because a right is imprecise or vague does not mean that it cannot be adjudicated before a court of law. Historically, civil and political rights were criticised as being imprecise and vague. While these rights were imprecise at the outset, state enacted laws and judicial review have helped define these rights. To this day, civil and political rights have yet to be completely delineated.⁴⁶ More concrete steps have been taken by the CESCR to show that socio-economic rights are not vague and imprecise. Especially in recent years, the CESCR has begun to issue a series of General Comments which are meant to help clarify the scope and content of the rights contained in the ICESCR.

It is accepted that civil and political rights are the source of freedom; yet economic, social and cultural rights describe all matters mainly freedom, equality and progress. Civil rights

⁴⁴S. Leckie. *Supra* Note 31 Above, at 12.

⁴⁵Proclamation of Teheran in Commission on Human Rights. UN Economic and Social Council. The Realization of Economic, Social and Cultural Rights (E/CN.4/Sub.2/1992/16 3 July 1992) Para 16.

⁴⁶ N Jheelan. *The Enforceability of Socio-Economic Rights*; European Human Rights Law Review, Issue 2 (2007) 152.

advocate about individual development and, economic, social and cultural rights advocate for holistic interest of marginalized class, ethnicity and those with different cultural identity. Both of these rights are said as supplementary to one another. Therefore, one right can not stand alone in the denial of the other. Strengthening this argument the preambles of both ICCPR and ICESCR provides:

*Recognizing, that in accordance with the Universal Declaration of Human Rights, the ideal for free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.*⁴⁷

The other area of academic controversy between CPR and ESCR that needs further clarification is the positive- negative dichotomy of the rights. By positive rights, it means rights that need resources be it in financial or other kind of intervention by the part of the government; and negative rights we mean rights that pledge only non-intervention. Accordingly, one shall be notified that there are civil and political rights that require positive intervention by governments, while some of the socio-economic rights require the mere abstention of political authorities. Yet, most ESCR contain elements that require the state to abstain from interfering with the individual's exercise of the right. As several commentators note, the right to food includes the right for everyone to procure their own food supply without interference; the right to housing implies the right not to be a victim of forced eviction; the right to work encompasses the individual's right to choose his/her own work and also requires the state not to hinder a person from working and to abstain from measures that would increase unemployment; the right to education implies the freedom to establish and direct educational establishments; and the right to the highest attainable standard of health implies the obligation not to interfere with the provision of health care.⁴⁸

The above illustrations show the interrelationship and interdependency between civil and political rights and social and cultural rights as remarkable and unavoidable one. For further understanding the interdependence that exists between Civil and political and economic, social and cultural rights, the answers of the following questions are simple evidence. Is right to vote in reality exercised without to right basic education? Do rights to candidacy and being elected without education have meaning or not? What is the meaning of right to

⁴⁷ See Third Paragraph of the Common Preamble to the IICCPR and ICESCR.

⁴⁸ M. Sepulveda et al. Supra Note 16 above, at 8.

justice without well trained judges? What is the meaning of right to property (arguably civil and political rights category) without having and enjoying it? Is there meaning of right to freedom without fulfillment of basic needs and family? Is there access to information for people without rights to language?

As indicated in the above questions, civil and political rights cannot stand alone in the violation of socio-economic rights. For instance, the right to life (civil right) would be intolerable let alone talking for other civil and political rights. Broader understanding of right to life, therefore, should include and cannot be separated from, other related rights such as the right to food, health, decent environment (all instances of socio-economic rights) all of which require a lot to be done from the government.

Therefore, ESC rights must be approached in exactly the same way as civil and political rights that are set out in instruments such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms (ECHR), or the Inter-American Convention on Human Rights. The civil and political rights set out in such conventions establish an equally wide variety of obligations, guaranteeing freedoms for individuals, prohibiting certain action by States, imposing obligations regarding third parties, as well as duties to adopt legislative and other kinds of measures, or duties to provide access to services or institutions.⁴⁹

The writer of this paper is also of the opinion that this classification of rights will only reinforce the argument that alleges that there is a mere conceptual difference between these sets of rights. Although human rights have been classified in a number of different manners, it is important to note that international human rights law stresses that all human rights are *universal, indivisible and interrelated*.⁵⁰ On the arguments for the classification of CP and ESCR, the Committee on ESCR provides the following interesting concluding remarks:

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment N° 3 (1990) it cited, by way of example, Articles 3 [equal right of men and women to enjoyment of all ESC rights]; 7, paragraph (a) (i) [fair

⁴⁹ International Commission of Jurists. Supra Note 36 above, at 10.

⁵⁰ Vienna Declaration, Para. 5.

wages and equal remuneration for work of equal value]; 8 [right to form and join trade unions]; 10, paragraph 3 [right of children to special measures of protection without discrimination]; 13, paragraph 2 (a) [right to free primary education]; 13, paragraph 3 [liberty of parents to choose for their children schools]; 13, paragraph 4 [liberty of individuals and bodies to establish educational institutions]; and 15, paragraph 3 [freedom for scientific research and creative activity]. (...) While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁵¹

From the above wordings of the committee, one can infer that it is not meaningful for a holder of a right to make choice between right to life from right to food; likewise, between right to election and right to education. There fore, the currently accepted standard is and should be that all rights are *universal, indivisible and interdependent and inter related*.

2.3 Significance of Socio-economic Rights

In light of new global developments and the changing of global structures, the struggle for human rights calls for the mainstreaming of the important role of economic, social and cultural rights in the achieving of social justice worldwide. It is precisely the growing need for this type of discourse that provides the best justification for these rights, rather than any arguments based on questions of historical genesis. Whether economic, social and cultural rights are negative or positive rights plays little importance if it is shown that the endorsement of these rights serves as a good tool for the protection of human dignity and the realization of social justice.⁵²

⁵¹ CESCR, General Comment No. 9: *The Domestic Application of the Covenant* (1998), U.N Doc. E/C.12/1998/24 (1998), Para. 10. See also International Commission of Jurists. *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability: Human Rights and Rule of Law Series*: NO. 2; Switzerland (2008) 11-12.

⁵² A Eide. *Obstacles and Goals to be Pursued*, in A. Eide, et al. (eds). *Supra* note 11 above, at 555.

Failing to recognize basic human material and social needs from a human rights viewpoint is also impractical if we seek the protection of human dignity. The economic, social and cultural needs of every individual should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements. Only in this way will the change of consciousness of the abjectly poor occur and empower them as citizens. Recognition of their humanity must be the first step to be made and it can be done only with the identification of fundamental needs as rights. It is through the recognition by others of us as dignified human beings that we become aware of ourselves as such beings.⁵³

In general, the main contributions of ESCR are the following: Firstly, they contribute to human dignity: people can have dignity only if they are guaranteed with minimum conditions of health, housing, food and education. Economic, social and cultural rights relate to these conditions necessary to meet basic human needs, such as food, shelter, education, health care, and gainful employment. Secondly, they are necessary conditions for meaningful fulfillment of civil and political rights: The implementation of economic, social and cultural rights may be viewed as a necessary precondition for the enjoyment of civil and political rights. Similarly, person without any form of social security will not find much meaning in freedom and personal autonomy.⁵⁴ For instance, it is unthinkable to talk about meaningful existence of civil and political rights such as right to life, expression with out recognition of right to food (economic right). Thirdly, they contribute for peace: denial of socio-economic rights with no doubt leads to conflicts and war. But, her it is not to mean fear of war should be source for recognition of these set of rights rather to show the evil consequences of denial of such vital rights.⁵⁵ Lastly, they contribute for the prevalence of democracy: Democracy, among other things, requires active participation of the public at large. For the public to engage in this kind of engagement, they should be free from fear and want. The poorest members of society tend to be the least active and organized and also the least likely to vote, often because they have been excluded from the electoral roll, in contrast to those enjoying higher standards of living, education and healthcare. Linked to these concepts is the role that

⁵³ A. Eide, et al. (eds.), *Supra* note 11 above , at 25.

⁵⁴ UNICEF, *State of the World's Children Report (1999)*, Available at: <http://www.unicef.org/sowc99> (Accessed on 29 Aug.2010)

⁵⁵ B. Iain. *The Importance of Economic, Social and Cultural Rights in Guaranteeing Civil and Political Rights within the Euro-Mediterranean Partnership*; *Mediterranean Politics*, Vol. 9 (2004) 346.

economic, social and cultural rights can play in underpinning a healthy democracy and the accompanying extent of freedom and choice enjoyed.⁵⁶

2.4 Specific Socio-economic Rights under the Covenant on Economic, Social and Cultural Rights

Economic, social and cultural rights (hereinafter ESC rights or ESCR) in international law include a variety of rights. In this regard Arts 6-15 are devoted to discuss the specific rights which are given recognition in the covenant. These rights include but not limited to;

I. The Right to Work:⁵⁷

This right guarantees the opportunity to earn a living wage in a safe work environment, and to just and favorable conditions of work; to rest and leisure; to form and join trade unions, to strike bargain collectively. Among other things, the Covenant imposes an obligation on State Parties to ensure that fair wages and equal remuneration for work of equal value without distinction is secured and workers are not exposed to unsafe working conditions.

II. The right to social security :⁵⁸

Protection of the family, mothers and children is duly recognized. Special protection is accorded to mothers during a reasonable period before and after childbirth and to children and young persons without any discrimination for reasons of parentage or other conditions.

III. The right to an adequate standard of living:⁵⁹

Here many rights including the right to adequate food, clothing and housing are recognized. For instance, regarding right to housing, the covenant guarantees access to a safe, habitable, and affordable home and protection against forced eviction. Among other things, state parties must ensure that all persons have equal access to adequate housing, and that the housing needs of vulnerable groups (such as the homeless) are given particular emphasis.

IV. The Right to the Highest Attainable Standard of Health:⁶⁰

The covenant guarantees access to adequate health care. Among other things, governments are required to ensure that all persons have access to functioning public health and health care facilities, goods and services, and that these must be available in sufficient quantity to meet the needs of the population.

⁵⁶ Id. at 345-347.

⁵⁷ See the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). Arts. 6(1)(2)through 8(1)(2).[hereinafter ICESCR]

⁵⁸ ICESCR, Id Arts.9 & 10.

⁵⁹ ICESCR, Id ,Art 11

⁶⁰ ICESCR, Id. Art 12.

V. The Right to Education: ⁶¹

The covenant is concerned with free and compulsory primary education and equal access to secondary and higher education. Among other things, governments are obligated to provide free and compulsory primary education, as well as to ensure that education that does not foster hatred or discrimination.

VI. The right to participate in cultural life and enjoy the benefits of scientific progress:⁶² The covenant recognizes that every one should benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Before winding up the discussion in this sub-section, a point worth considering is interdependence and interrelatedness within ESCR themselves. One has to note that all these rights are intertwined. The right to clean water, for example, intersects with the right to adequate housing, the right to food, and the right to the highest attainable standard of health. Similarly, the right to work and the right to education are also connected. The more you are educated, the higher your wage will be and vice versa.

2.4.1 Major State Obligations under the Covenant on Economic, Social and Cultural Rights

The ICESCR enshrines the economic, social and cultural rights that are contained in the UDHR in more developed and legally binding form. Accordingly, it is an improvement on UDHR to the protection of these rights. The ICESCR is the most comprehensive human rights treaty on ESCRs in international law. The Covenant contains important provisions under part II in Articles 2–5 that contain the basic obligations that are required to be observed by the states parties to it. ⁶³ It has to be borne in mind that since the ICESCR is an international treaty, the human rights obligations undertaken by states under it, and consequently by the international community, must be enforced in good faith (*pacta sunt*

⁶¹ ICESCR, Id. arts 13-14.

⁶² ICESCR, Id. Art 15.

⁶³ UNDP. *The MDGs through Socio-Economic Rights: Constitution Making and Implementation Handbook*; United Nations Millennium Campaign (2009) 9. Until 2009, 159 countries have ratified the convention compared to 156 countries to the ICCPR and Ethiopia ratified both Covenants in 1993.

servanda).⁶⁴The Covenant as basic international human rights treaty must generally be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'⁶⁵

The following paragraphs are devoted to show the legal obligations imposed on states once they ratify ICESCR. It has been widely established that the goal of full realisation of ESC rights, like other human rights, imposes three types or levels of multilayered state obligations: the obligations to respect, protect and promote/fulfill.⁶⁶ This approach has been applied by the CESCR in its General Comments, and the African Commission on Human and Peoples' Rights in its decisions.⁶⁷

Obligation to Respect

This obligation provides that state parties shall refrain from any action which infringes on rights, including economic, social and cultural rights, or which prevents persons from satisfying these rights for themselves when they are able to do so. It requires states, at a primary level, to refrain from interfering directly or indirectly with the enjoyment of all human rights and freedom of the individual to use material resources alone or in association with others to satisfy basic needs or enjoy the right in question. Respecting ESC rights obliges states parties, inter alia, not to adopt laws or other measures, and to repeal laws and rescind policies, administrative measures and programmes that do not conform to ESC rights protected by human rights treaties.⁶⁸

In this connection, the Committee on ESCRs provides by way of example that in respecting the right to social security a state should refrain from engaging in any practice or activity that denies or limits equal access to adequate social security; arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security; and arbitrarily or

⁶⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Art 26 provides that every treaty in force is binding upon the parties to the treaty and must be performed by them in good faith.

⁶⁵ Vienna Convention on the Law of Treaties. Art 31.

⁶⁶ See Committee on Economic, Social and Cultural Rights, General Comment No. 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para.15; See also the African Commission on Human and Peoples' Rights in *SERAC v. Nigeria*, Communication No. 155/96, Ref ACHPR/COMM/A044/1 (27 May 2002), Para. 44–47 and the 1996 South African Constitution.

⁶⁷ See M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*; Hart Publishing.(2009) 24. See also *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*, Communication 155/96 (2001) African Human Rights Law Reports 60; (2003) 10 IHRR 282.

⁶⁸ M. Ssenyonjo, at 23.

unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security.⁶⁹

Obligation to Protect

Concerning the obligation to protect, states are beholden to prevent non-state actors, including businesses and international financial institution from interfering with the enjoyment of economic, social and cultural rights of persons within their jurisdiction. This might entail a number of measures by the state, depending on which right is involved.⁷⁰ For example, when a corporation forcibly evicts a community so that they can build a sports stadium and the government stands by and does nothing, they are violating their obligation to protect the right to adequate housing. Similarly, in respect of the right to water, for instance, a state should on the one hand avoid macro-economic policies and trade conditions that would deprive the people of access to clean water as the government of Ghana recently embarked upon, and, on the other hand, secure its dams and water resources against industrial pollutants.⁷¹

Obligation to Fulfill

The obligation to fulfill requires that states should adopt the proper legislative, administrative, fiscal, juridical, educational and other practical measures to secure the promotion of these rights. The obligation to fulfill has facilitation and promotional purpose. The obligation to facilitate involves various proactive measures by a state to strengthen the existing structures and institutions that guarantee individuals' access to the resources necessary for their well-being.⁷² The obligation to promote requires states to undertake actions that create, maintain and restore the realisation of all ESC rights. The steps to be taken to promote a particular right will depend on the right in question but generally involves appropriate education and public awareness concerning access to ESCRs.⁷³

⁶⁹ CESCR, General Comment 19; Para 44.

⁷⁰ See D. Olowu. Supra Note 20, at 29. See also International Commission of Jurists Supra Note 21 above, at 42-48; A E Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda*, 27 Human Rights Quarterly (2005) 1216.

⁷¹ D. Olowu. Supra Note 20 above; see also M Brennan. *To Adjudicate And Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts Are a Viable Option*; QUTLJJ, Vol. 9 No 1 (2009) 65-67.

⁷² D. Olowu. Supra Note 20 above, at 31.

⁷³ Ssenyonjo. Supra Note 67 above, at 23; See also D. Olowu. Id. at 31-32.

The duty to fulfill is necessary particularly when such access is limited or non-existent. In these circumstances, the State is expected to be a proactive agent, capable of bringing about an increase in access to a range of ESCRs. Therefore, emphasis is placed on State action directed at: identifying problematic situations, providing relief; and creating the conditions that would allow right-holders to manage their own access to the provisions protected by rights. The duty to fulfill ESCRs includes an obligation to remove obstacles to the full enjoyment of ESCRs. It also requires the implementation of measures to modify discriminatory social and cultural patterns which result in the disadvantage of vulnerable groups.⁷⁴

If a government chooses to spend its resources in unjustifiable ways which are not aimed at the full realization of human rights they are arguably violating their obligation to fulfill. Some aspects of the obligation to fulfill are subject to progressive realization. Other aspects, however, are immediate, including the obligation to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realization of these rights.⁷⁵

The core obligations of State Parties emanate from Article 2. It directly informs all of the substantive rights protected in Articles 6–15 of the Covenant. Art 2 runs:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*3. developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*⁷⁶

⁷⁴ See International Commission of Jurists, Supra Note 36 above, at 48-49.

⁷⁵ Amnesty International USA. *Economic, Social and Cultural Rights: Questions and Answer*; 4-6 Available at: http://www.amnestyusa.org/escr/files/escr_qa.pdf (Accessed on 12 August 2010).

⁷⁶ See ICESCR, Art 2(1)(2).

The language of Article 2(1) is clearly wide and full of caveats, and any assessment of whether a state has complied or infringed its general obligation to protect rights under the Covenant of a particular individual is a complex matter. The obligation of state parties under Article 2(1) is subject to the availability of resources and seems to be realized progressively. Yet, close reading of this provision of the Covenant tells us that the obligations imposed on states are of two kinds: immediate realization and progressive realization.

As regards the obligation to immediate realization, the Committee on ESCR has identified some obligations as having immediate effect. These include: the obligation to take steps or adopt measures directed towards the full realization of the rights contained in the ICESCR; and the prohibition of discrimination. These are duties which a State party is immediately required to satisfy once it has ratified the ICESCR.⁷⁷ The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in general comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It could also be said that such duties of immediate effect apply in relation to the recognition of ESC rights in a domestic constitution or legal order. The duty to take steps “by all appropriate means” certainly includes legislative action, and may also include, but is not limited to, the provision of judicial remedies, and the adoption of administrative, financial, educational and social measures. The Committee has also made it clear that the obligation to take steps includes the duty to draft and adopt a detailed plan of action for progressive implementation.⁷⁸

As stated above the insertion of the term “...*progressive realization*...” under Art.2(1) allows States considerable discretion in deciding what steps to take to address issues such as group or target prioritization or budget allocation for the fact that e progressive realization is linked with availability of resources. However, progressive realization should not be misinterpreted as depriving ESCRs of all meaningful content. The purpose is rather to give governments flexibility and recognize government’s different economic status and capabilities.⁷⁹ It is not an escape clause. Accordingly, the Committee on ESCR has made

⁷⁷ The International Commission of Jurists emphasized on the *immediate realization* and *progressive realization* by citing examples in Supra Note 21 above, at 26.

⁷⁸ International Commission of Jurists, Id.; See also Ssenyonjo. Supra Note 67 above, at 24; see also General Comment N° 3: *The nature of States parties’ obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, Para. 11; CESCR General Comment 9; Para 10.

⁷⁹ See Amnesty International USA. Supra Note 75 above, at 5.

clear that even these obligations under the concept of progressive realization, can generate appropriate review standards.⁸⁰ Some of the developments in this area concern the establishment of indicators and benchmarks to assess the improvement, stability or deterioration of the enjoyment of rights or the goals enshrined in the ICESCR. The employment of empirical or outcome indicators is an extremely useful tool for the continued supervision of State performance in the implementation of ESC rights within a specific timeframe, such as the timeframe provided by the State reporting system.⁸¹ Thus, states parties are obliged to improve continuously the conditions of ESC rights, and generally to abstain from taking regressive measures. The CESCR has also given attention to the prohibition on States of deliberately introducing retrogressive measures.⁸²

The classification of obligations into immediate and progressive is thus relevant for justiciability of socio-economic rights. Accordingly, compliance with immediate obligations can directly be assessed by adjudicatory bodies, thereby refuting the idea that the whole content of ESC rights is left to the discretion of the elected political branches of the government. Duties linked with progressive realization are, in turn, subjected to a different, less stringent, and possibly less coercive, standard of scrutiny.⁸³ The non-discrimination clauses in any ground except to favor nationals of developing states is also grand obligation that should be taken in to account in the application of the rights enshrined under the convention.

2.5 Socio-economic Rights under the African Charter

The adoption of the African Charter on Human and Peoples' Rights (ACHPR) in 1981 marked the introduction of a third regional human rights system after the creation of the European and Inter-American systems respectively. The African Charter is distinctive in its attempt to append an African fingerprint on the human rights discourse. Not only did its content draw on existing international and regional human rights treaties, the drafters of the African Charter were mandated to have regard to the values of African civilisation and the needs of Africa in formulating the Charter.⁸⁴ Within the African Regional Human Rights

⁸⁰ International Commission of Jurists, Supra Note 36 above, at 28.

⁸¹ International Commission of Jurists. Id, at 29-30.

⁸² See CESCR, General Comments No. 3; Para. 9.

⁸³ International Commission of Jurists, Supra Note 36 above, at 26.

⁸⁴ M Langford (Ed). *African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights in Social Rights Jurisprudence Emerging Trends in International and Comparative Law*; Cambridge University Press (2008) 323.

System, civil and political rights on the one hand and ESC rights on the other are treated and accepted as *universal, indivisible, and interdependent and interrelated*. This means that both sets of rights form a single, unified body of rights and must be treated ‘globally in a fair and equal manner, on the same footing, and with the same emphasis’. Thus, human rights are not subject to a hierarchical sub-classification, as this is considered as prejudice to the effective realization of ESC rights.⁸⁵

To this end, the African Charter in its preamble emphasizes that: “*Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.*”⁸⁶ There fore, unlike the other two regional human rights systems, the African regional system, to which Ethiopia is Party State, there exist only one comprehensive legal document treating both sets of rights.⁸⁷

With regard to state obligations on socio-economic rights, the African Charter formulates socio-economic rights neither with claw-back clauses⁸⁸ nor with such limitations as ‘progressive realisation’ and ‘within available resources’. It also does not have a derogation clause. Therefore this will raise a question to be asked whether socio-economic rights obligations under the African Charter are realisable immediately or whether resource constraints could constitute a valid defense by the State for non-satisfaction of these rights.⁸⁹ In answering this question, Chidi Odinkalu, asserts that relying on some ‘out-of court’ statements of certain members of the African Commission, is of the view that by formulating its rights without internal modifiers, the African Charter requires States parties to implement socio-economic rights immediately.⁹⁰ Thus, unlike ICESCR rights, the African charter recognizes only immediate realization of these rights.

⁸⁵ M. Ssenyonjo, Supra Note 67 above, at 15.

⁸⁶ See ACHPR, Preamble, Para 7.

⁸⁷ S. Takele noted that over two decades after the coming into force of the Charter, the African Commission has received merely two communications principally dealing with socio-economic rights out of the nearly 400 complaints it has received and/or decided since its establishment in 1987, as cited in S Takele, Supra Note 23 above, at 3.

⁸⁸ Claw-back clauses are clauses that provide the right in the document but allow State Parties to provide limitation on different grounds.

⁸⁹ See the provisions of ACHPR. See also M Langford (Ed). At 325.

⁹⁰ Odinkalu. *Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights as cited in M. Evans and R. Murray (eds). The African Charter on Human and Peoples’ Rights: The system in practice, 1986–2000* (Cambridge: Cambridge University Press, 2002) 196–198. For further illustration see also M Langford (Ed), Supra Note 84 above, at 325-326.

Finally, we have to also reconsider that ICESCR and African Charter, though the basics to applicable to everybody irrespective of age, color sex etc, are not the only instruments in providing socio-economic rights to individuals. Other documents purposely established to guarantee specific groups, notably women and children, are equally applicable. Convention on the Elimination of Discrimination against Women (CEDAW), and Convention on the Rights of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, African Charter on the Rights are to mention some as far as this research is concerned.

CHAPTER THREE

COMPETENCE AND LEGITIMACY OF COURTS ON THE ADJUDICATION OF SOCIO-ECONOMIC RIGHTS: ACADEMIC CONTROVERSIES, INTERNATIONAL, REGIONAL, AND NATIONAL JURISPRUDENCE

3.1 Academic Controversies

Recognition of the centrality of ESCRs has led to a quest for judicial protection of those rights. The appropriate role of courts in the enforcement of ESCRs raises several questions. Competence and the legitimacy of the judiciary on the adjudication of socio-economic rights is the subject of strong debate among different scholars. Judicial competency dictates the capacity (legal and technical) that courts can perform certain tasks, in this case the fashioning of legal remedies necessary to implement socio-economic rights.⁹¹ Judicial legitimacy on its part involves the acceptance of the judicial decisions by the people, even those they bitterly oppose, because they view that courts are appropriate organ for making decisions.⁹²

As indicated above, the first objection is directed against the institutional competency of courts. Proponents here hold that courts are not institutionally capable to adjudicate complex socio-economic disputes especially those that raise sensitive issues of resource allocation.⁹³ This competency issues focus on problems related to the viability of courts as appropriate fora for determining on socio-economic rights. These alleged failings include both procedural limitations and informal problems.⁹⁴ The procedural limitations consists of the inability of making all affected parties as part of the proceeding due to logistic reasons, the unforeseeability of all possible consequences of the decision in relation to the individual litigants between whom justice must be done, and the possible inadequacy of the evidence

⁹¹ J. L. Gibson & G. A. Caldiera, *Defenders of Democracy? Legitimacy, Popular Acceptance, and The South African Constitutional Court*; the Journal of Politics (2003) 65. Available online at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/8/0/3/7/pages280378/p280378-3.php (Accessed on August 20, 2010).

⁹² James L. Gibson & Gregory A. Caldiera Id, at 66.

⁹³ M. Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*; South African Journal of Human Rights 20, (2004) 389-390; see also Y. Robin and Y. Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?* Israel Law Review, Vol.37, No.2-3 (2003-2004) 692.

⁹⁴ E. C Christiansen. *South Africa's Use of Constitutional Rights Adjudication to Remedy Persistent Economic Inequalities: an Essay*; available at: <http://ssrn.com/abstract=1477523374> (Accessed on August 25, 2010).

before a court to reflect the many competing interests implicated in the matter.⁹⁵ On the other hand, the informal problems are the inability of the courts to evaluate and choose between various, equally valid and equally complex, policy options, and the judges' lack of economic expertise in deciding matters with budgetary consequences and specific specialist expertise in cases where the realization of the right requires specific technical or specialist field.⁹⁶ In addition, the judiciaries inability to execute its findings itself and is therefore dependent on the executive cooperation for its judgments to have any credibility or impact in reality is also considered by some scholars as a reason for the incompetence of the judiciary in the adjudication of socio-economic rights.⁹⁷ These arguments provide warning the judiciary to be cautious in the adjudication of socio-economic cases; but they do not warrant the incompetence of the judiciary.

To begin with, the procedural limitation argument lacks persuasiveness. The inability of making all affected parties as part of the proceeding seems based on wrong assumption that 'all interested parties should be involved in the litigation to have a just decision', because there is no such requirement in an adversarial form of litigation and there is also a possibility of representative suit that allows for the protection of the rights of those who are not able to involve in the litigation. In addition, it considers the occurrence of harm as a prerequisite for the instigation of litigation before court of law which is not the case in socio-economic rights situation since in the latter case there is a possibility of litigation to prevent future harm like a suit for the avoidance of a policy alleged as discriminatory. Moreover, the belief that justice is done only when all possible consequences of the decision is foreseen is misleading since it is practically impossible even in the case of rights that does not have resource allocation implications. Furthermore, the inadequacy of the evidences in revealing the different competing interests implicated in the matter is not relevant for the determination of the competency of the court since the court is only required to make decisions based on the available evidences impartially.

The lack of professional expertise is not also persuasive argument against on the incompetence of the judiciary. Although poring over budget reports assessing welfare policies require some specific skills, there is no reason why judges could not be trained to

⁹⁵ M. Pieterse, Supra Note 93 above, at 393; see also H.J. Steiner, et al. Supra Note 26 above, at 316; Y. Robin and Y Shany. Supra Note 93 above, at 692.

⁹⁶ M. Pieterse, Supra Note 93 above, at 393.

⁹⁷ M. Pieterse. Id, at 394.

acquire those skills, or could not seek advice from independent experts.⁹⁸ Social rights are supposed to raise questions of a technical nature, which should be left to housing experts, economists and health-care providers to address. However, as Alston has perceptively stated, ‘to suggest that economic rights issues should be dealt with exclusively by economists and others is tantamount to suggesting that civil and political rights issues should be seen as the exclusive domain of criminologists, trade unionists, psychologists, physicians, pediatricians, the clergy, communication experts and others’;⁹⁹ but human rights law itself is a subfield of expertise. In the same way that experts participate in a criminal trial to assess forensic evidence, they could also take part in a case that involves the right to healthcare, for instance, in order to assess medical issues that reach beyond the court’s knowledge.¹⁰⁰

Regarding the third objection, there is a misunderstanding of the role of the judiciary, because the judiciary is not expected to execute its judgments. In all decisions, including civil and political rights, execution of judgments is the responsibility of the executive branch of the government. Thus, though the enforcement of the finding of the judiciary is dependent upon the cooperation of the executive, it does not affect the competence of the court to deal with socio-economic rights since it is applicable only after the determination of the finding of the judiciary.

The second major objection directed against the judiciary is attributable to problems of institutional legitimacy. Proponents of extra-judicial constitutional interpretation (i.e. those who want to take the power of constitutional review away from the courts) argue that judicial review is undemocratic. It is so because it permits unelected judges, who are accountable to nobody, to nullify the acts of democratically elected legislatures who are accountable to the public. They point out that when a supreme court or a constitutional court declares a statute unconstitutional, it is overturning what appears to be the popular will. When judges reject the products of majoritarian democracy, they argue, they engage in counter-majoritarian law making.¹⁰¹ They substantiate their arguments in the following manner.

⁹⁸ H.J. Steiner et al. *Supra* Note 26 above, at 317.

⁹⁹ P Alston. *US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*; 84 *American Journal of International Law* (1990) 375.

¹⁰⁰ V Mantouvalou. *The Case for Social Rights*; Georgetown Law Faculty Publications and Other Works, Paper 331 (2010) 16.

¹⁰¹ D. A. Desierto, *Justiciability of Socio-Economic Rights: Comparative Enforcement of Economic, Social and Cultural Rights in Domestic Courts* (2006) 5; See also M Pieterse. *Supra* Note 93 above, at 390; Y. Robin and

First, it is argued that since socio-economic rights are political, legislative matters involving primary issues of resource distribution, the power of the court to review the action of the legislative or the executive concerning their implementation and enforcement constitutes an illegitimate intrusion in to the policy affairs of the elected branches of government and a breach of the traditional doctrine of the separation of powers.¹⁰² This is because these rights require making political choices, setting priorities, allocating resources and rearranging budgets. Such decisions should be left to the political bodies in a domestic system, not to courts, since they relate to policy issues and the implementation of political arrangements, which are the powers of the other two branches of the government.¹⁰³ Second, in most jurisdictions, judges are not elected and are thus neither directly accountable to the people, nor indirectly accountable in the same way as the executive. Allowing them to review the action of the executive and the legislative branches is dwarfing the political capacity of the people by unelected judges.¹⁰⁴ Third, permitting courts to deal with socio-economic policy issues is allowing them to become part of a process of political bargaining between competing domestic actors about the allocation of resources, which would create the danger of politicization of the courts.¹⁰⁵

The reasons so far discussed are misleading due to their representation of strict conception of separation of power that avoids the other side of the coin (checks and balances) for true democracy and their ignorance of the possible negative consequences that may be accrue from the ousting of the jurisdiction of the court in adjudicating socio-economic rights. Thus, one can notice the defective nature of the aforementioned arguments regarding the legitimacy issue.

To begin with, the strict conception of separation of power proposes an instrumentalist reduction of human rights to tools for guaranteeing majority rule in social decision-making. This position ignores the potential minority protection attributes of socio-economic rights, which are also designed to serve as a counter balance to majority rule and to protect the minority from the tyranny of the majority in relation to distribution related decisions.¹⁰⁶ Thus,

Y. Shany, Supra Note 93 above, at 689; Cecile Fabre. *Constitutionalizing Social Rights*; Journal of Political Philosophy (1998) 263.

¹⁰² E. Palmer. *Judicial Review, Socio-economic Rights and Human Rights Act*; Hart Publishing (2007) 26-27.

¹⁰³ D.A. Desierto. Supra Note 101 above, at 5.

¹⁰⁴ M. Pieterse. Supra Note 93 above, at 390.

¹⁰⁵ D.A. Desierto. Supra Note 101 above, at 6; see also Y. Robin and Y. Shany. Supra Note 93 above, at 690.

¹⁰⁶ Y. Robin and Y. Shany Supra Note 93 above, at 691.

since the socio-economic rights are important in the protection of the marginalized part of the society and for the enforcement of the civil and political rights as well¹⁰⁷, there should be a system by which the actions of the legislature as well as the executive are reviewed for ascertaining their compliance with the constitution. So, the adjudication of socio-economic rights by the judiciary could be considered as checks and balances over the acts of the other branches and not violation of separation of powers.¹⁰⁸ In this regard, it was described that the role of courts is vital when there exists a sufficiently gross failure to uphold basic socio-economic rights that the legislature and the executive have comprehensively failed to fulfil their responsibilities.¹⁰⁹

In addition, the adjudication of socio-economic rights by the judiciary should not be considered as illegitimate by the mere fact of the existence of resource allocation because there are also civil and political rights that claim resources for their enjoyment like the right to fair trial and election rights.¹¹⁰ Resource allocation and its distributive consequences form part of the ordinary course of rights enforcement.¹¹¹ The existence of negative obligations in relation to socio-economic rights should not also be forgotten. The exclusion of socio-economic rights from the reach of the judiciary also undermines the most widely accepted contemporary principles of indivisibility, interdependence and interrelatedness of the rights which is the contemporary understanding regarding all sets of human rights. Moreover, the jurisprudence of the South African Constitutional Court on socio-economic rights shows the possibility of their adjudication without any violation of the doctrine of separation of power. Courts only review the appropriateness of the government policies and programmes. The courts have crafted a way of effectively enforcing socio-economic rights while still maintaining the separation of powers principle and allowing the government control over budgetary considerations.¹¹² Such approaches prove that a state's court system can, if given the opportunity, have a very valuable role in the adjudication and enforcement of socio-economic rights. It does not try to involve in the drawing of budgets as well as in the making

¹⁰⁷ See also the discussion in the comparison between ESCRs and CPRs in chapter two of this paper.

¹⁰⁸ Y. Robin and Y. Shany Supra Note 93 Above, at 690.

¹⁰⁹ L. Clements & A. Simmons. *European Court of Human Rights: Sympathetic Unease in M Langford (ed)*. Supra Note 84 above, at 413.

¹¹⁰ I. E. Koch, The Justiciability of Indivisible Rights, *Nordic Journal of International Law* (2003) 72

¹¹¹ D.A. Desierto, Supra Note 9 above, at 36.

¹¹² M. Brennan. *To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option*; QUTLJ, Vol. 9 (2009)75.

of policies.¹¹³ Furthermore, separation of power without ensuring the enforcement of human rights, which includes obviously socio-economic rights, does not indicate the existence of democracy since the observance of fundamental rights is also one of the attributes of true democracy.

The belief that allowing courts to adjudicate socio-economic rights could dwarf the political capacity of the people is also erroneous. First, the foremost mandate of the judiciary is not dwarfing the political capacity of the people rather ensuring the respect of the same through the enforcement of the constitution, which is also the expression of the people. Second, the court does not interfere on decisions that are constitutional rather on decisions and programmes that are not in line with the constitution. Third, the duty of the judiciary is not serving the majority rather rendering justice through the application of rule of law. At the heart of any constitutional order is the grand principle that public power should be exercised legitimately. In a constitutional democracy committed to the principle rule of law, there is no more proper exercise of power than the exercise of judicial power to ensure the legitimacy of government action. Legitimate government action means that government is operating within the boundaries set by constitution or other establishing laws. One way in which these boundaries are maintained is through judicial review. When government acts in ways that are prescribed by the constitution, the judiciary is expected to exercise its power of judicial review. Judicial review of governmental action that interferes with the fundamental rights to vote and to form political associations, freedom of speech, freedom of conscience, and so forth has been the norm for sometime. But more recently, jurists and scholars alike have called for judicial review of government inaction with regard to socio-economic rights.¹¹⁴ Thus, there is no way that the judiciary is able to dwarf the political will of the people.

The contention that involvement of the judiciary in socio-economic matters would create the danger of politicization is also unrealistic since the disallowance of the court could create the same effect. That is, the illegitimacy of the power of the judiciary to adjudicate such issues would have the effect of making the judiciary as the mouth that express the will of the

¹¹³ J. C. Mubangizi. *Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience: Constitutionalization and Justiciability of Social Rights* (VII World Congress of the International Association of Constitutional Law, Athens (2007) 5-8.

¹¹⁴ See C. N Tate and T Vallinder (eds). *The Global Expansion of Judicial Power*; New York University Press, (1997) 23.

legislature and the executive only.¹¹⁵ It would not allow in striking down unconstitutional decisions and policies of the legislature and executive. It thus enables powerful interest groups to exert considerable influence over the political process, without introducing necessary checks and balances against the resulting decision.¹¹⁶

Finally, the exclusion of the judiciary from the discourse of constitutionally protected socio-economic rights will result for the loss of the right of the state to take the first opportunity to consider the issue by its own courts before the issue of exhaustion of local remedy came to picture. In the last few years thus scholars have begun to focus on socio-economic rights to look for their justification in the moral obligations of the state, solidarity of social groups, and the principles of equality, dignity and justice proposing that the role of courts in such socio-economic rights should be extremely vital.¹¹⁷

3.2 UN Human Rights System

When the UN comes up with different human rights instruments such as ICCPR and ICESCR, the purpose is to enforce the rights within the territories of ratifying states. In this regard, the establishment of the Committee on ESCRs was intended to reduce problems of realizing socio-economic rights. Accordingly, the primary function of the Committee is to monitor the implementation of the Covenant by States parties. It strives to develop a constructive dialogue with States parties and seeks to determine through a variety of means whether or not the norms contained in the Covenant are being adequately applied in States parties and how the implementation and enforcement of the Covenant could be improved so that all people who are entitled to the rights enshrined in the Covenant can actually enjoy them in full.¹¹⁸

Drawing on the legal and practical expertise of its members, the Committee can also assist Governments in fulfilling their obligations under the Covenant by issuing specific legislative, policy and other suggestions and recommendations such that economic, social and cultural rights are more effectively secured. The Committee has since issued a number of General

¹¹⁵ I E Koch. *The Justiciability of Indivisible Rights*; Nordic Journal of International Law (2003) 16-29.

¹¹⁶ Y. Robin and Y Shany. *Supra* Note 93 above, at 691.

¹¹⁷ N Udombana et al (Eds). *Re-thinking Socio-Economic Rights in an Insecure World*; Central European University Press (2006) 103.

¹¹⁸ Office of the United Nations High Commissioner for Human Rights. Fact Sheet No.16 (Rev.1): *The Committee on Economic, Social and Cultural Rights*

Comments¹¹⁹ that are of great value and will be helpful to the Courts in developing judicial protection of economic, social and cultural rights.

Emphasizing on the relevance of the Committee and what it should focus, the Limburg Principle provides that:

*. . . in considering the reports of States parties, the Committee on Economic, Social and Cultural Rights, should analyze the causes and factors impeding the realization of the rights covered under the Covenant and, where possible indicate solutions. This approach should not preclude a finding, where the information available warrants such a conclusion, that a State party has failed to comply with its obligations under the Covenant.*¹²⁰

The principle further considered that judicial measure is one basic solution in fighting problems of realization of ESCRs in which case different measures are required to be taken by a party State including legislative, administrative, **judicial**, economic, social and educational measures, consistent with the nature of the rights in order to fulfill their obligations under the Covenant.¹²¹

In the context of International Human Rights (IHR) treaties, there can be little doubt that enforcement of IHR norms through domestic courts could be far more effective than methods of enforcement available at the international level (e.g., through treaty bodies such as United

¹¹⁹ To date, the committee has come up with 21 General Comments which provides essential interpretive guidelines on the realization of specific rights guaranteed in the Covenant. See Committee on Economic, Social and Cultural Rights, General Comment No. 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23; General Comment No. 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22; General Comment No. 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998); General Comment No. 11, Plans of action for primary education (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999); General Comment No. 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); General Comment No. 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); General Comment No. 14, The right to the highest attainable standard of health (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4 (2000); General Comment No. 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003); General Comment No. 17, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), (Thirty-fifth session, 2005) U.N. Doc. E/C.12/GC/17 (2006); General Comment No. 18, The right to work, (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006); General Comment No. 19, The right to social security, (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008) and General Comment No. 20, Non-discrimination in Economic, social and cultural Rights (Forty-second session, 2009), E/C.12/GC/20 (2009). Moreover, domestic courts and national human rights institutions have also played an important role in the clarification of the content of specific economic, social and cultural rights as cited in C. Courtis, Supra Note 31 Above, at 3.

¹²⁰ The Limburg Principles on the Implementation of the International Covenant On Economic, Social And Cultural Rights [UN doc. E/CNA/1987/17, Para i, Human Rights Quarterly, Vol. 9 (1987)122-135.

¹²¹ The Limburg Principles. Id, Para 17.

Nations (UN) Committees, or inter-state communications), which are less accessible to individual victims and less likely to generate compliance by the state in question.¹²² Moreover, the involvement of domestic courts has also important long-term educational and preventive effects.¹²³ Thus it is accepted that the judiciary is the custodian and ultimate interpreter of a law. Judicial mechanisms are a crucial component of domestic enforcement measures, providing adequate remedies to individuals.¹²⁴ Thus, any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial remedies at both national and international levels and are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.¹²⁵ It has been further noticed that national judicial decisions must ensure that any of their pronouncements do not result in the official sanctioning of a violation of an international obligation of the State concerned.

At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aid in formulating any decision relating to violations of economic, social and cultural rights.¹²⁶ In similar fashion, International Commission of Jurists and many lawyers, judges, adjudicators, bar associations, and the legal community in general strongly argued that victims of violations of economic, social and cultural rights should get effective and adequate remedies domestically.¹²⁷

Holding similar stand, the Committee on ESCR addressed the proper role of courts in the realization of ESCRs, in its General Comment 9, that:

. . . . legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is

¹²² Y. Shany. *How Supreme Is the Supreme Law of The Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*; BROOK. J. INT'L L. Vol. 31:2 (2006) 348-349.

¹²³ Y. Shany. *id.*, at 350.

¹²⁴ Office of the United Nations High Commissioner for Human Rights. *The Right to Adequate Housing: Fact Sheet No. 21/Rev.1*, At 37.

¹²⁵ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Para 22-23 See also V. Dankwa, et al. *Commentary to the Maastricht Guidelines on Violations of Economic Social and Cultural Rights Human Rights Quarterly* 20 (1998) 725-726.

¹²⁶ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. *id.*, Para. 24.

¹²⁷ Bangalore Declaration and Plan of Action; adopted 25 Oct. 1995, reprinted in 55 ICJ REV, Dec. 1995, at 219.

*important, but such procedures are ultimately only supplementary to effective national remedies.*¹²⁸

It is also the position of the Committee that every individual should get an effective remedy via the judiciary of a Party State to ICESCR though administrative remedies that satisfy accessibility, affordability, timely and affectivity have significant role. Thus, the role of the judiciary is duly recognized in the general Comments of the committee.¹²⁹

After consideration of the practical role of courts while receiving State reports, the committee forwards the following as essential remark for State Parties:

*. . . in exercising of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.*¹³⁰

It is generally accepted that domestic law should, as far as possible, be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.¹³¹

Moreover, in December 2008, the UN adopted an individual complaints mechanism for violations of socio-economic rights.¹³² This means that any country that signs on to the Optional-Protocol to the ICESCR (OP-ICESCR), may be forced to answer to an international body for violations of the ICESCR. The typical criticisms associated with socio-economic rights will not justify their lack of implementation. If a state wishes to avoid adjudication of socio-economic violations under this new mechanism, their own domestic court system will have to be able to enforce socio-economic rights. Aside from merely being able to hear socio-

¹²⁸ CESCR General Comment 9, Para 4.

¹²⁹ For further clarification on the appropriate role of the judiciary in ESCRs; See also CESCR General comment 9, Para. 10.

¹³⁰ CESCR General Comment 9, Para 14.

¹³¹ CESCR General Comment 9, Para 15. Similar position of the Committee can be understood from many of its General Comments.

¹³² See the General Assembly adopted the Optional Protocol on ESCRs in Resolution A/RES/63/117 on 10 December 2008.

economic rights disputes, domestic courts will have to be able to provide an effective remedy for their violation.¹³³

Therefore, international law properly allows domestic courts to enforce socioeconomic rights within their territory while exercising their functions. This jurisprudence on international law which allows courts to adjudicate on socio-economic rights helps one to conclude that competence and legitimacy issues are well accepted under the UN human rights system.

3.3 Regional Human Rights Systems

3.3.1 The European Regional Human Rights System

The European Social Charter is the counterpart, in the field of economic and social rights, of the Council of Europe's much better known European Convention on Human Rights. The original version of the Charter was adopted in 1961. A number of further rights were added by a protocol in 1988. In 1996, many of the existing rights were substantially amended and a number of new rights were added in the Revised European Social Charter.¹³⁴ Unlike the other two regions, under the European Social Charter, the European Committee of Social Rights is established to give an authoritative interpretation of the Charter. However, the charter has weaker supervisory system in comparison with the European Convention on Human Rights.¹³⁵

Some of the ESCRs are designed to protect the most vulnerable members of society, namely the rights to health, social security, social and medical assistance, protection for the disabled, protection against poverty and social exclusion, and housing.¹³⁶ In its general approach and philosophy when interpreting the Social Charter, the ECSR has recently set out that:

The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights

¹³³ M Brennan. Supra Note 112 above, at 64.

¹³⁴ U. Khaliq & R. Churchill. *The European Committee of Social Rights: Putting Flesh on the Bare Bones of the European Social Charter*, in M Langford (Ed Supra Note 84 above, at 428.

¹³⁵ Regional Protection of Human Rights as field of research of human rights, comparative politics, international law and international organization theory. Paper prepared for 49th Annual ISA Convention, San Francisco, March 26 – 29 (2008)12.

¹³⁶ See European Social Charter, Turin, 18.X.1961 part I. See also European Social Charter (revised) Strasbourg, 3.V. 1996, part I.

*enshrined in the European Convention on Human RightsThus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the main purpose of the Charter.*¹³⁷

Accordingly, the Committee has managed to concretise the contents of such broadly drafted rights recognized in the Charter. The Committee has found that a number of Contracting Parties are not complying with various aspects of their obligations regarding right to health under Article 11(3).¹³⁸ For instance, Belgium was found by the ECSR not to be in compliance with its obligations under Article 11(3) as the immunization coverage levels for some diseases were not considered sufficient.¹³⁹ Further, regarding the right to social security, the Committee held that:

*one of the aims of an unemployment benefit system is to offer unemployed persons adequate protection during at least an initial period of unemployment from the obligation to take up any job irrespective of occupational field, precisely with a view to giving them the opportunity of finding a job which is suitable taking into account their individual preferences, skills and qualifications. . . .Unemployed persons should be treated with due respect for their professional, social and family status and not as ordinary laborers, physically and mentally fit for any job.*¹⁴⁰

Therefore it is the view of the committee that a state that fails to satisfy the above requirements is in violation of the right to social security under Article 12 of the Charter.

In *European Roma Rights Center v. Greece*,¹⁴¹ the Committee, after noting that right to housing permitted the exercise of many other civil, political, economic and social rights, recalled that in order to satisfy their obligations under it, States had to promote the provision of an adequate supply of housing for families, take their needs into account in housing

¹³⁷ Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v. France*, Decision on the Merits, Para. 26–29, as cited in U. Khaliq & R. Churchill, Supra Note 134 above, at 433.

¹³⁸ Conclusions XV-2, Belgium, p. 104, Conclusions XV-2, Greece, at 253 and Addendum to Conclusions XV-2, Turkey, p. 265, as cited in U. Khaliq & R. Churchill, Supra Note 134 above, at 437.

¹³⁹ Conclusions XV-2, Belgium, at 104, id. as cited in U. Khaliq and R. Churchill, id.

¹⁴⁰ Conclusions XVII-1, Denmark, as cited in U. Khaliq & R. Churchill, id, at 17.

¹⁴¹ Complaint No. 15/2003, *European Roma Rights Center v. Greece*, Decision on the Merits, 8 December 2004, as cited in U. Khaliq & R. Churchill. Id, at 448.

policies, and ensure that existing housing was of an adequate standard and included essential services, such as heating and electricity.¹⁴²

Of course, the European Convention on Human Rights contains no unqualified statement concerning entitlement to core socio-economic rights.¹⁴³ There are no direct references to health or social care or social security rights. It provides protection for one's (existing) home but contains no reference to housing. However, the European Court of Human Rights¹⁴⁴ on its part has passed interesting decisions that has a lot to do with the jurisprudence of ESCRs while entertaining cases under the European Convention on Human Rights. The Court has considered a number of cases in which complaints have been made about the burning of houses by security forces in south east Turkey, leaving villagers homeless and destitute. The Court has found that the destruction of the applicants' homes and property constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes under Article 8 of the Convention.¹⁴⁵

In *Price v. United Kingdom*¹⁴⁶, which concerned the conditions of detention suffered by a thalidomide impaired complainant, who in the course of debt recovery proceedings refused to answer questions put to her and was committed to prison. She alleged that she had suffered inhuman and degrading treatment because the prison had inadequate facilities to deal with her disabilities. The Court found that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable and was unable to go to the toilet or keep clean without the greatest of difficulty, violated her Article 3 rights.¹⁴⁷

In the *Belgian Linguistics Case (No. 2)*¹⁴⁸, the right to education was considered where certain French speaking children were prevented, solely on the basis of the residence of their

¹⁴² *European Roma Rights Center v. Greece*, id, at 449.

¹⁴³ Having a look at the convention reveals this fact.

¹⁴⁴ Pursuant to Art.32(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto.

¹⁴⁵ L. Clements & A. Simmons. *European Court of Human Rights: Sympathetic Unease in Langford* (Ed). *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*; Cambridge University Press (2008) 414-415.

¹⁴⁶ *Price v. United Kingdom*, Application no. 33394/96, judgment dated 10 July 2001 as cited in L. Clements & A. Simmons. id, at 422.

¹⁴⁷ *Price v. United Kingdom*, id, at 424-425.

¹⁴⁸ *Belgian Linguistics Case (No 2)* 1 EHRR 252; Application nos. 1474/62; 1677/62; 1769/63; 1994/63; 2126/64 as cited in L. Clements & A. Simmons. id, at 422.

parents, from having access to French-language schools (situated in the six communes on the Brussels periphery which were subject to a special status as regards the use of languages). The Court held that there had been a violation of the Prohibition of discrimination clause under Article 14 together with Article 2 of Protocol 1, as a similar impediment would not have applied to Dutch-speaking children.¹⁴⁹

3.3.2 The Inter-American Regional Human Rights System

The Inter-American Commission on Human Rights (the Commission) which is mandated to promote the observance and defense of human rights' in all Organization of American States (OAS) Member States. The jurisdiction of the Inter-American Commission is automatic when states become party to the American Convention.¹⁵⁰ However, states have to accept the jurisdiction of the Court which enables it to examine individual complaints.¹⁵¹

The ESCRs jurisprudence of the Commission, unlike the CPRs counterpart, is in its relative infancy. However, it is beginning to mature as advocates present an ever widening array of cases and arguments before it.¹⁵² These strategic advances are owed primarily to the perseverance and creativity of regional advocates, the pressing demands of poverty, violence, exclusion, exploitation and lack of rule of law in the region, and the broad jurisdiction of the regional organs over economic, social and cultural rights. Consequently, the Commission today recognises economic, social and cultural rights, together with the rule of law, as the foremost challenges the regional human rights system must now confront.¹⁵³ But this doesn't mean that ESCRs are not recognized in instrument applicable in the region. These rights are protected directly under the American Declaration of the Rights and Duties of Man (American Declaration), the American Convention on Human Rights (American Convention), and the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights ('San Salvador Protocol'). These include the rights to education, to unionization, to strike, to employment, to adequate food, to health, to social security, to housing, to culture, and to just labor conditions. Thus, the Commission has

¹⁴⁹ *Belgian Linguistics Case (No 2)*, id at 425.

¹⁵⁰ See American Convention on Human Rights (ACHR), Nov. 22, 1969, 1144U.N.T.S. 123 (entered into force July 17, 1978) Art. 44.

¹⁵¹ ACHR, Id, Art. 62.

¹⁵² T J. Melish. *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*; New York University Journal of International Law and Politics, Vol.39 No. 2 (2006) 171–343.

¹⁵³ Tara J. Melish. Id.

extensive subject-matter jurisdiction over autonomous ESCRs –the rights that get clear recognition in the provisions of the said instruments.¹⁵⁴

For years, using its comprehensive contentious jurisdiction over social rights, the Commission has developed a growing case-based jurisprudence on the rights to health, to education, to labor guarantees, to social security, to culture, and to housing and land resources, under both the American Declaration and the American Convention.¹⁵⁵ Accordingly, in *Juan Hernandez v. Guatemala*, for example, the Commission found violations of the Convention-based rights to life and integrity, where a detainee died in a Guatemalan prison of cholera. The Commission concluded that States are responsible when prison authorities failed to act with the diligence required protecting the victim's life and health.¹⁵⁶ Also in *Victor Rosario Congo v. Ecuador*¹⁵⁷, the Commission held that duty of Ecuador as Member State included not only medical care to heal the detainee's physical injuries, but also 'such measures as cleansing, food, and psychological attention' to treat the depression and psychosis problems of prisoners.

Moreover, in *Jehovah's Witnesses v. Argentina*,¹⁵⁸ a case which stemmed from a presidential decree that prohibited all activities of the Jehovah's Witness religious order in Argentina, including in the nation's schools, three hundred primary school children were consequently expelled from educational establishments, denied school enrolment or prevented from taking exams on account of their continued exercise of their religious faith. The Commission found Argentina in violation of the affected children's right to education under Article XII of the Declaration.¹⁵⁹

On its part, the Inter-American Court of Human Rights¹⁶⁰ with its broad jurisdictional mandate and regional prestige, and in light of the social and economic reality it interfaces,

¹⁵⁴ T J. Melish. *The Inter-American Commission on Human Rights: Defending Social Rights through Case-Based Petitions* in M Langford (Ed). Supra Note 84 above, at 343.

¹⁵⁵ Tara J.Melish. id, at 351.

¹⁵⁶ *Juan Hernandez v. Guatemala*, Case 11.297, Report No. 28/96, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.95,doc. 7 rev. (1997), at 406, Para. 17.

¹⁵⁷ *Victor Rosario Congo v. Ecuador*, Report No. 63/99, Case 11.427, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.102,doc. 6 rev. (1999). Para 67 as cited in Tara J.Melish. at 353. In doing so, the commission concluded that applicable international standards require that 'every detention center shall possess the services of at least one qualified physician, who must possess some psychiatric knowledge'.

¹⁵⁸ *Jehovah's Witnesses v. Argentina*, Case No. 2137, Inter-Am Comm. H.R., OEA/Ser. L/V/II.47, doc. 13 rev. 1 (1979) as cited in Tara J.Melish, 354.

¹⁵⁹ *Jehovah's Witnesses v. Argentina*, id; See also Tara J.Melish, Supra Note 154 above, at 354.

¹⁶⁰ Statute of the Inter-American Court on Human Rights, art. 1, Oct. 1979, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1, at 98, entered into force Jan. 1, 1989. The Inter-American Court of

has a powerful role to play in the effective protection of economic, social and cultural rights in the Americas. This potential is evident in its small, though growing social rights jurisprudence, especially in the areas of labor rights, children's rights, the rights of detainees, and the rights of indigenous peoples to their ancestral territories.¹⁶¹ Of Course, the Court lacks subject-matter jurisdiction to apply directly, under its contentious complaints procedure, other treaties or instruments protecting ESCRs, such as the ICESCR. Nonetheless, it is competent to consider such treaties indirectly in determining the substantive scope and content of the provisions of the American Convention.

In *Legal Status and Human Rights of the Child*,¹⁶² the Court affirmed that the right to life enshrined in Article 4 of the Convention includes, for children, the 'obligation to provide the measures required for life to develop under decent conditions. The Court particularly underscored the right to education saying that it is mainly through education that the vulnerability of children is gradually overcome. In *Children's Rehabilitation v. Paraguay (Panchito Lopez)*¹⁶³ a case which involved a detention facility for minors in Paraguay identified by grossly inadequate conditions, including overcrowding, lack of basic hygiene, poor nutrition, lack of adequate medical and psychological attention, serious educational deficiencies, lack of recreational activities, and insufficient beds, blankets, infrastructure and trained guards, the Court concluded that, owing to the State's failure to take necessary and sufficient positive measures to guarantee conditions of a dignified life to the detainees – by, for instance providing adequate health and educational programs – Paraguay violated the rights to life and personal integrity of all the prison inmates. In the *Sawhoyamaxa*¹⁶⁴ case, for instance, the Court found the state of Paraguay responsible for the deaths of nineteen indigenous community members (including eighteen children) due to the state's failure to

Human Rights was established in 1979 as 'an autonomous judicial institution' of the Organization of American States ('OAS'), charged with applying and interpreting the American Convention on Human Rights, the principal human rights treaty of the region. See also Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 (1988), 28 I.L.M. 156 (1989), entered into force Nov. 16, 1999 (Protocol of San Salvador).

¹⁶¹ T J. Melish. *The Inter-American Court of Human Rights: Beyond Progressivity*, Electronic copy available at: <http://ssrn.com/abstract=1000265> (Accessed on 10 September, 2010)

¹⁶² *Legal Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of Aug. 28, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17, Para. 24.

¹⁶³ *Children's Rehabilitation v. Paraguay, Judgment* Sept. 2, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 112, Para. 148 ['Panchito Lopez Case'], Para. 80.

¹⁶⁴ *Sawhoyamaxa Indigenous Community v. Paraguay Case*, Inter-Am. Ct. H.R. (ser. C) No. 146, 29 Mar. 2006 in J. Cavallaro S. E. Brewer. *The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice*; Harvard Law School Public Law & Legal Theory Working Paper Series, Paper No. 09-30 Year 5, Number 8, São Paulo (2008) 89-90.

provide adequate conditions to ensure their well being. The court also decided in many other cases that have significance to the jurisprudence of socio-economic rights.

3.3.3 The African Regional Human Rights System

As discussed in the previous chapter of this paper, the ACHPRs adopt principles of the indivisibility and interdependence of human rights. The emphasis of the preamble part of ACHPR at Para 7 is clear manifestation to this. ESCRs in the Charter are regarded in light of the rights of the people in particular the right to self determination and the right to development. The Charter also recognises third-generation rights such as the right to economic, social and cultural development, the right to national and international peace, the right to a general satisfactory environment, and the right of peoples to freely dispose of their wealth and natural resources.¹⁶⁵ Surprisingly, some scholars argue that the implementation of ESCRs in the African context deserves priority over the protection of civil and political rights basing on the belief that many African leaders and scholars in the postcolonial period held and propagated the same emphasis.¹⁶⁶ This at least leads one to conclude that ESCRs in the African Charter cannot be given lesser place than their CPR counter parts.

Unlike the case with ICESCR, state parties to the African Charter assume obligations that have immediate effect. State parties must respect, protect and fulfill all the rights in the Charter, including economic, social and cultural rights. In this regard, it is said that with a significantly new and challenging normative framework for the implementation of economic, social and cultural rights', the African Charter presents economic, social and cultural rights free of claw-back clauses.¹⁶⁷ The African Commission on Human and Peoples' Rights (herein after the African Commission),¹⁶⁸ in this regard, concluded that all provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.¹⁶⁹

¹⁶⁵ F. Coomans. Supra Note 22 above, at 32; See also ACHPRs, arts.

¹⁶⁶ R. Howard. *The full-belly thesis: Should socio-economic rights take priority over civil and political rights? Evidence from Sub-Saharan Africa*; Human Rights Quarterly, Vol.5 (1983) 468.

¹⁶⁷ S. Ibe. *Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities*; African Human Rights Law Journal. Vol. 10: 1 (2010) 208.

¹⁶⁸ The African Commission is established under the African Charter on Human and Peoples rights to promote human and peoples' rights and ensure their protection in Africa. For the mandates and activities of the African Commission, see also ACHPR, Arts.30-59.

¹⁶⁹ Communication 241/2001, *Purohit and Another v The Gambia*, 16th Annual Activity Report (2002-2203) Para. 49.

Yet, the African Charter has been rightly criticized for not expressly recognising some of the key socio-economic rights such as the rights to social security, adequate housing, adequate standard of living, adequate food, and social security.¹⁷⁰ The African Commission has responded to this criticism in a very intriguing way. Accordingly, in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (SERAC Case)¹⁷¹ the Commission decided that Parties to African Charter have a duty to *respect, protect and fulfill*¹⁷² the possible derived rights from a claimed right saying that the charter is a living document that can encompass other rights which are not explicitly provided for. It found that Nigeria is in violation of the rights to housing and food although these rights are not expressly recognized in the Charter. The Commission through its interpretative mandate, provides that “*the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation.*”¹⁷³ Similarly, the right to housing is implicitly entrenched in the rights to property, family protection, and to enjoy the best attainable state of mental and physical health.

The interdependent and indivisibility nature of ESCRs from CPRs was accepted in different communications submitted to the African Commission. Thus, in its decision, the African Commission has reflected the interdependence nature of ESCRs and CPRs. For instance, in *Malawi African Association & Others v. Mauritania*¹⁷⁴, it held that holding people in solitary confinement both before and during trial, especially where such detention is arbitrary, amounts to an infringement of the right to respect for one’s life and integrity of person, as well as the right to a family life.¹⁷⁵ Despite the fact that the African Charter recognises the idea that civil and political rights cannot be dissociated from economic, social and cultural rights, in practice the latter rights have not materialised. The Pretoria Declaration on Economic, Social and Cultural Rights in Africa¹⁷⁶ also provides that: “...there is resistance to

¹⁷⁰ J. O. Onyango. *Beyond the Rhetoric: Reinvigorating the struggle for Economic, Social and Cultural Rights in Africa*; California Western International Law Journal, Vol. 26 (1995)51.

¹⁷¹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96 (2001) AHRLR 60 (ACHPR 2001)

¹⁷² SERAC Case, id, Paras.45-47.

¹⁷³ SERAC Case, id. Para. 65.

¹⁷⁴ *Malawi African Association & Others v. Mauritania*, Communications 54/91, 61/91, 98/93, 164–196/97, 210/98, (2000) AHRLR 149 (ACHPR 2000), (Mauritanian Case).

¹⁷⁵ Mauritanian Case. id, Para. 119–120&124

¹⁷⁶ Adopted at a seminar in Pretoria, South Africa in September 2004 at which representatives of the Commission, 12 African states, national human rights institutions and NGOs participated. The Declaration was adopted by the Commission at its 36th session in December 2004.

recognising economic, social and cultural rights that result in the continued marginalization of these rights, which excludes the majority of Africans from the enjoyment of human rights.”

Regarding the role that courts should play in the struggle to realize socio-economic rights, the African Commission has duly emphasized in its decisions at different occasions. For instance in *SERAC Case*¹⁷⁷ the Commission has given recognition on the appropriate role of domestic courts in applying rights recognized under the African Charter. It provides that the purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgments of law at the national and international levels.¹⁷⁸ Thus it is compatible with the purpose of ACHPR to allow domestic courts to settle human rights matters because it gives the responsible government to be notified of a human rights violation in order to have the opportunity to remedy such violation before being called to account by an international tribunal.¹⁷⁹

In *Purohit and Another v The Gambia case*,¹⁸⁰ the Commission held that ‘*mental health care*’ under the African Charter includes analysis and diagnosis of person’s mental condition and treatment, care and rehabilitation for a mental illness or suspected mental illness. The principles envisage not just ‘attainable standards’, but the highest attainable standards of health care for the mentally ill at three levels: first, in the analysis and diagnosis of a person’s mental condition; second, in the treatment of that mental condition and; thirdly, during the rehabilitation of a suspected or diagnosed person with mental health problems and concluded that Gambia has violated the right to health of the detainees.

¹⁷⁷ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96 (2001) AHRLR 60 (ACHPR 2001) Para. 37. (This is probably the best known case of the African Commission. The complaint concerns the consequences of environmental degradation in Ogoni land (in the Niger Delta of Nigeria) caused by Shell Corporation in collusion with the Nigerian government. In its decision the Commission deals with the obligation of the state to ensure the realisation of rights (also by private parties). The decision also deals with socio-economic rights provided for in the African Charter, and finds some ‘implied socio-economic rights’ in the Charter.)

¹⁷⁸ *SERAC Case*, id, Para. 38.

¹⁷⁹ See also the Commission's decision on communications 25/89, 47/90, 56/91 and 100/93 [*Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995)].

¹⁸⁰ *Purohit Case*, Para.81-82. (This case was brought in regard to the legal and material conditions of detention in a Gambian mental health institution. In its decision, the Commission finds that requiring indigent people like the patients in this case, without legal assistance, to exhaust local remedies in The Gambia before they may approach the Commission is not realistic and should not be required. On the merits the Commission explores the prohibition of discrimination on the basis of disability and the meaning of the right to health, as provided for under the African Charter.)

As a matter of conclusion, the Commission made an important statement regarding the competence of courts which is an inference from the Charter itself which provides that the Charter guarantees the right to a hearing before a competent, an impartial tribunal¹⁸¹ and independent.¹⁸² It has further emphasised that ouster of domestic judicial jurisdiction,¹⁸³ executive control of the judiciary,¹⁸⁴ is a violation of the duty of ensuring independence and impartiality of the judiciary. It is further held that ESCRs are justiciable and enforceable rights and that State Parties to the African Charter have obligations to ensure that individuals and Peoples have access to enforceable ...judicial remedies for any violations these rights.¹⁸⁵

3.4 National Jurisprudence

Currently, many countries include protection of socio-economic rights at the domestic level this is the most accessible and successful way for them to enforce these rights against their respective governments. There are a number of ways in which this can be done.¹⁸⁶ First, governments can enact justiciable bills of rights with entrenched and justiciable socio-economic rights. South Africa is one of the foremost examples of such an approach.¹⁸⁷ Second, socio-economic rights can be protected at domestic level through their entrenchment as higher objective legal norms which are then used as a guide to interpreting other rights or the underlying values in a particular society. A common way in which this is done is through the inclusion of directive principles in a national constitution.¹⁸⁸ This approach allows for a more expansive reading of civil and political rights to include aspects of socio-economic protection. A clear example of such an approach is found in Indian jurisprudence where the courts have adopted an 'organic' approach towards the interpretation of fundamental rights and directive principles. Third, socio-economic rights may be afforded protection through

¹⁸¹ ACHPR, Art 7(1).

¹⁸² ACHPR, Art 26.

¹⁸³ Communication 143/95 and 150/96, *Constitutional Rights project and Civil Liberties organization v Nigeria*, 13th Annual Activity Report (1999-2000) Para 34, as cited in S. Takele, at 36; See also SERAC Case Para.41.

¹⁸⁴ Communication 60/91, *Constitutional Rights project (in Respect of Wahab Akamu, G Adegade and Others) v Nigeria*, 8th Annual Activity Report (1994-1995) Para 12, as cited in S. Takele, id.

¹⁸⁵ African Commission on Human and Peoples' Rights. Draft Principle and Guidelines on Economic, Social and Cultural Rights In the African Charter on Human And Peoples' Right,(2009),preamble,Para.16

¹⁸⁶ K. McLean. *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*; Pretoria University Law Press (2009) 8.

¹⁸⁶ Other examples of countries with constitutions of this nature are Portugal, Hungary, Sri Lanka and Lithuania. Many other countries include only one or two socio-economic rights, and Germany, Canada and a number of states in the US, e.g., include a right to education.

¹⁸⁸ Examples of countries which include socio-economic rights in the directive principles of their national constitutions are Ireland, India, Nigeria and Papua New Guinea. as indicated in K. McLean, Supra Note 82 above, at 9.

domestic legislation. This approach is, of course, not inconsistent with the above two means of protecting socio-economic rights. It is also the most frequent course, and almost all developed countries have enacted legislation dealing with education, access to water, healthcare, and so on. Giving effect to socio-economic rights through legislation is important for a number of reasons, such as providing clarity on the normative content of the right and certainty as to who is responsible for fulfilling the right and how it is to be fulfilled.¹⁸⁹

Besides, the experiences of international and regional socio-economic jurisprudence so far seen, it is vital to have assessment on national jurisdictions, based on the opinion of the author that the study is pivotal in evaluating the Ethiopian practice. The selection is made based on their potential relevance to the Ethiopian aspect.

3.4.1 Republic of South Africa

The constitution of South Africa¹⁹⁰ has recognized extensive lists of socio-economic rights of individuals including multi-dimensional aspects of it along with civil and political rights. The Constitution makes express inclusive of rights to housing, food, water, social security, children's welfare, health care, and education, among other social rights.¹⁹¹ Frequently, the Constitution has been described as a model document for the domestic protection of human rights and the Constitutional Court, the highest court in post-apartheid South Africa, has often been lauded by political progressives and human rights activists for advancing the cause of equality and justice.¹⁹² The inclusion of socio-economic rights was viewed as facilitating social transformation and deepening civic equality and democratic participation.¹⁹³ The constitution in explicit terms renders these socio-economic rights justiciable and requires the state to take action to realize these sets of rights including the duty to respect, protect, promote and fulfil and to take reasonable legislative and other measures within its available resources as required by ICESCR.¹⁹⁴

¹⁸⁹ See S Liebenberg, *The Protection of Economic and Social Rights in Domestic Legal Systems* in A. Eide et al (eds). *Supra* Note 11 Above, at 55- 79.

¹⁹⁰ The Constitution of Republic of South Africa, 1996.

¹⁹¹ The Constitution of Republic of South Africa, Arts.26-29 reveals the fact.

¹⁹² E.C. Christiansen, *Exporting South Africa's Social Rights Jurisprudence* (2007) 1, available at: <http://ssrn.com/abstract=1132342> (Accessed on 25 sept.2010)

¹⁹³ For a discussion of the ANC's proposals regarding the entrenchment of socio-economic rights in a future South African Bill of Rights, see N.Haysom, *Democracy, Constitutionalism and the ANC's Bill of Rights for a New South Africa*; South African Journal on Human Rights, Vol.7 (1991) 106.

¹⁹⁴ D. Brand, *Socio-economic rights and courts in South Africa: Justiciability on a Sliding Scale*; in F. coomans (ed). *Justiciability of Economic and Social Rights: Experience from Domestic Systems*; Maastricht Center for Human Rights (2006) 208.

The constitution gives courts (high Court, Supreme Appellate Court and Constitutional Court) the power to interpret these rights and to resolve disputes on their basis.¹⁹⁵ South African courts enforce socio-economical rights in the following manner: Where a statutory rule or customary law is challenged for its unconstitutionality, courts can leaden the constitutional defect, and the legislative should enact new legislation. Courts can also decide on challenges that state or private conduct are inconsistent with a socio-economic right in which case the court will order remedy to vindicate the right in question.¹⁹⁶ Yet, like we discussed so far, objection is also directed against the practice of South African Courts from institutional competency and democratic legitimacy angles. Regarding institutional competency it was argued that: courts lack the technical knowledge and the capacity to access and process information required to analyze and decide the policy laden and interest basing questions of socio-economic aspects; courts are incapable of the sustained involvement in planning and implementation required to effect meaningful socio-economic transformation and their limited powers do not allow them to implement their orders effectively.¹⁹⁷ On the side of democratic legitimacy argument according to Danie Brand¹⁹⁸ the worries are: judicial effort to protect socio-economic rights might compromise democratic deliberation on crucial issues because it will undermine the capacity of citizens to choose the kind of welfare programmes they favor.¹⁹⁹ Raising the counter- majoritarian forum, it is argued that courts decision on socio-economic rights will erode the extra formal democratic politics.

Nevertheless, the South African Constitutional Court chose to adjudicate such rights as a means of advancing the transformative purpose of the South African Constitution.²⁰⁰ On the role of socio-economic rights the Constitutional Court acknowledged that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions in great poverty. . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and transform our society into one in which there

¹⁹⁵ D. Brand. Id, at 208

¹⁹⁶ D.Brand. Id, at 209.

¹⁹⁷ See F.I. Michelman. *The Constitution, Social Rights and Liberal Political Justification*; International Journal of Constitutional law (2003) 15.

¹⁹⁸ D.Brand. Supra Note 194 Above, at 225; See Also, C.R. Sunstein. *Social and Economic Rights? Lesson from South African*; 12 Chicago Public law and legal Theory Working paper (2003)3.

¹⁹⁹ D.Brand.id, at 225-226.

²⁰⁰ E.C. Christiansen. Supra Note 192 Above, at 2.

*will be human dignity, freedom and equality, lies at the heart of our new constitutional order.*²⁰¹

Accordingly, since 1996, the Court has addressed the Constitution's social rights provisions in numerous cases but these are the landmark cases that have established the foundations of the Constitutional Court's jurisprudence on socio-economic rights: *Soobramoney*,²⁰² *Grootboom*²⁰³ and *Treatment Action Campaign (TAC)*.²⁰⁴

The ground for the case *Soobramoney* was the following. Mr. Soobramoney, who was terminally ill, was in need of dialysis treatment to prolong his life; the hospital refused treatment because the procedure was not life saving. In response, Mr. Soobramoney sued the hospital with the hope that the court would order the hospital to perform the procedure.²⁰⁵ The court ruled that the right to emergency medical treatment 'could not extend to life-prolonging treatment for terminally ill patients, and thus concluded that the state had not violated their socio-economic obligation. But importantly, in *Soobramoney*, the court explicitly recognised that socio-economic rights are a state responsibility and are judicially enforceable. It also further acknowledged a standard of qualified deference to the legislature, in which situation, the legislature had adopted public guidelines that were in line with legitimate medical opinions and these guidelines were applied in a fair and reasonable manner.'²⁰⁶

In the pioneer case of *Grootboom*, a group of residents who were living on the edge of a sports field filed a claim that their right to housing was being violated. The Court found that the government authorities had failed to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to housing as its programmes neglected to provide emergency relief for those without access to basic shelter.²⁰⁷ Regarding the 'reasonableness' of the measures adopted, the Constitutional Court said that the State had a legal duty, at least, to have in place a plan of action to deal with the plight of absolutely homeless people such as the *Grootboom* community.²⁰⁸

²⁰¹ *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal [Soobramoney]*, 1998 (1) SA 765 (CC) Para. 8.

²⁰² *Soobramoney*, id.

¹⁰⁰ *The Government of the Republic of South Africa and Others v Grootboom and Others* (2001) (1) SA 46.

¹⁰¹ *Minister of Health and Others v Treatment Action Campaign and Others* (2002) (5) SA 703, 721.

²⁰⁵ *Soobramoney*. Para1 cum 5.

²⁰⁶ See E C Christiansen. *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*; Columbia Human Rights Law Review (2006-7)38, at 360.

²⁰⁷ *Grootboom*. Para 99.

²⁰⁸ International Commission of Jurists. *Supra* Note 36 Above, at 39.

In *Treatment Action Campaign (TAC)*, the Court held that the failure to take measures without delay to permit and facilitate the use of the anti-retroviral drug, Nevirapine, throughout public health care facilities in South Africa for the purpose of preventing MTCT of HIV was unreasonable. These omissions violated the right of access to health care services entrenched in the South African Constitution.²⁰⁹ And the court ordered that the state plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country.²¹⁰

In the *Grootboom* and the *TAC* cases the Court developed the following criteria for assessing the reasonableness of government programmes impacting on socio-economic rights: the programme must be comprehensive, coherent, coordinated²¹¹; appropriate financial and human resources must be made available for the programme²¹²; it must be balanced and flexible and make appropriate provision for short, medium and long-term needs²¹³; it must be reasonably conceived and implemented²¹⁴; and it must be transparent, and its contents must be made known effectively to the public.²¹⁵

In general, these and other social rights cases²¹⁶ affirm that, although the obligations imposed on the state . . . are dependent upon the resources available for such purposes,²¹⁷ the Court will require creation of a broad policy-based program with particular attention paid to those who are most vulnerable and implementation that includes “all reasonable steps necessary to initiate and sustain” a successful program to advance the asserted right.²¹⁸

²⁰⁹ M. Brennan. Supra Note 192 Above, at 80.

²¹⁰ S. Liebenberg. *South Africa Adjudicating Social Rights under a Transformative Constitution* in M Langford (Ed). Supra Note 84 above, at 85.

²¹¹ *Grootboom*. Para 39 and 40.

²¹² Id, Para. 39; See also S. Liebenberg. Supra Note 189 Above, in M Langford (Ed). Supra Note 84 above, at 85.

²¹³ Id, Para. 43.

²¹⁴ Id, Para. 40-43

²¹⁵ *Treatment Action Campaign (TAC)*, Supra Note 101 Above, Para. 123.

²¹⁶ See, e.g. *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC) (S. Afr.) (concluding a lack of judicial oversight for a debt-related forced home sale was an unconstitutional violation of Section 26); *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) (S. Afr.) (denial of social welfare benefits to non-citizen permanent residents was unreasonable and violated the rights to both equality and social security). For a discussion of the most judgments (including lower court judgments) related to socio-economic rights, see *the Socio-Economic Rights Project of the Community Law Centre's Case Reviews*, at <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/case-reviews-1/south-African-cases>, as cited in E.C. Christiansen. Supra Note 192 Above, at 6.

²¹⁷ *Soobramoney*. Para 11.

²¹⁸ See E.C. Christiansen. id; see also *Grootboom*, Para. 67.

3.4.2 Republic of India

In Indian constitution, where as CPRs are considered fundamental, ESCRs such as the right to work, education, early child care, health, minimum wage for workers are found under the Directive Principles of State Policy (DPSP). The Constitution delineates the enforceable fundamental rights and the non-enforceable Directive Principles of State Policy. It is Part IV of the Indian constitution²¹⁹ which provides a set of directive principles encompassing the above socio-economic rights which were originally envisaged as distinct from fundamental rights, and inferior in status and legal effect to them. Accordingly, it is provided that the Directive Principles (Socio-economic rights): *“Shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”*²²⁰

However, the subsequent amendments to the Constitution have emphasised the need to give priority to the DPSPs over the fundamental rights. In the context of land reforms, the 25th Amendment to the Constitution in 1971 inserted Article 31C which insulated from judicial challenge a law giving effect to the DPSPs in article 39 (b) and 39 (c) of the Constitution.²²¹

In the initial phase, the Indian Supreme Court was reluctant to recognise any of the directive principles as being enforceable in the courts of law.²²² In 1950, for example, in *A.K. Gopalan v. State of Madras*,²²³ the Court felt constrained to adopt a legalistic and literal interpretation of article 21 (right to life) as excluding any element of substantive due process. It was held that as long as there was a law that was validly enacted, the Court could not examine its fairness or reasonableness.²²⁴

²¹⁹ See the 1950 Constitution of India Arts.39-47; See also S. Muralidhar, ‘Judicial Enforcement of Economic and Social Rights: The Indian Scenario’, in F. Coomans (ed), Supra Note 194 Above, at 238.

²²⁰ See the Constitution of India, 1950. Art 37.

²²¹ Constitution of India , Article 31C reads : ‘Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing *all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy*’. The italicized portions were respectively struck down by the Supreme Court of India as being invalid in *Minerva Mills v. Union of India*, (1980) 2 SCC 591 and *Keshavananda Bharti v. The State of Kerala* (1973) Supp. SCC 1, as cited in M Langford (Ed). Supra Note 84 above, at 104.

²²² M Langford (Ed), id, at 105.

²²³ (1950) SCR 88 as cited in M Langford (Ed), id, at 107.

²²⁴ M Langford (Ed), id.

It was not until 1978, after the Indian emergency period, that the Supreme Court of India breathed substantive life into directive principles and commenced their creative interpretation.²²⁵ In *Maneka Gandhi v. Union of India*,²²⁶ the Court, applying directive principles in its interpretation, found under the right to life and liberty the right to travel abroad by saying that the procedure cannot be arbitrary, unfair or unreasonable. Once the scope of article 21 had thus been explained, the door was open to its expansive interpretation to include various facets of life. Accordingly, in *Francis Coralie*,²²⁷ the Supreme Court held that the right to life is not limited to protecting life and limb but imports a comprehensive 'right to live with human dignity and all that goes along with it;' this included not only the bare necessities of life (such as adequate nutrition, clothing and shelter) and facilities for reading, writing, and expressing oneself in diverse forms and mixing with others. This expanding notion of the right to life enabled the court, in its Public Interest Litigation (PIL) jurisdiction, to overcome objections on the ground of justiciability to its adjudicating the enforceability of some of the socio-economic rights enumerated in the DPSP of Indian Constitution.²²⁸ Interestingly, so as to enforce the rights of the poor, the Court developed a liberalised procedure for public interest litigation (PIL) including relaxed standing rules, a more inquisitorial judicial approach often involving fact-gathering commissions, mandatory remedies and detailed supervision of enforcement.²²⁹

In *Unnikrishnan J.P. v. State of Andhra Pradesh*²³⁰ the court held that the right to education is implicit in and flows from the right to life guaranteed and that a child (citizen) has a fundamental right to free education up to the age of fourteen years. The State (respondent) responded by inserting, through an amendment to the Constitution, article 21-A, which provides for the fundamental right to education for children between the ages of 6 and 14.²³¹

²²⁵ I. Trispiotis. *Socio-Economic Rights: Legally Enforceable or Just Aspirational?* Opticon 1826, Issue 8 (2010) 5.

²²⁶ (1978) 1 SCC 248; see also S.Muralidhar. *The Expectations and Challenges of Judicial Enforcement of Social Rights* in M Langford (Ed). Supra Note 84 above, at 108.

²²⁷ *Francis Coralie v Union Territory of Delhi* AIR 1981 SC 746 as cited in T. Usher. *Adjudication of Socio-Economic Rights: One Size Does Not Fit All*; UCL Human Rights Review (2008)12.

²²⁸ See S. Muralidhar in F. Coomans(Ed.) Supra Note 194 Above, at 240.

²²⁹ *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802 especially Para 10-14; See also T. Usher, at 13; S. Muralidhar in F. Coomans (Ed.) Supra Note 194 Above, at 240.

²³⁰ (1993) 1 SCC 645, as cited in M Langford (Ed). Supra Note 84 above, at 109.

²³¹ M Langford (Ed). Id, Para 730.

The discussions so far made on the Indian Courts' model of review (which purports to give content to welfare rights and effectively holds up such rights as justiciable), shows that the value of socio-economic rights adjudication must primarily be assessed in terms of its use in drawing attention to unacceptable welfare standards and creating public pressure on the authorities to act.

CHAPTER FOUR

COMPETENCE AND LEGITIMACY OF ETHIOPIAN COURTS ON THE ADJUDICATION OF SOCIO-ECONOMIC RIGHTS

4.1 Entrenchment of Socio-Economic Rights in the Ethiopian Legal System

Before directly addressing the main issues regarding competence and legitimacy, it is imperative to assess first whether socio-economic rights have been recognized in the Ethiopian legal system, in the absence of such recognition the main issue will be less worthy of discussing.

The FDRE Constitution, among other things, is recognized for incorporation of fundamental rights of citizens. Almost one-third of the total constitutional provisions are devoted in providing CPs and ESCRs as well as group rights.²³² At least theoretically, the entrenchment of economic and social rights as fundamental norms of constitutional legal order in the bill of rights with stringent constitutional amendment procedures²³³ provides the basis for the protection of the said rights.²³⁴ Therefore, generally it is held that even if the provisions dedicated for ESCRs are small in number as compared to that of the civil and political rights, their incorporation in the constitution shows the protection provided for those rights.

As far as socio-economic rights are concerned, Art 41²³⁵ of the constitution is the basket upon which most socio-economic rights can be added or implied though some socio-economic rights are not directly indicated and are considered as part of the Directive Principles of State Policy (DPSP). For instance, Art 41 does not provide for all the rights falling within the realm of economic and social rights as one would hope by looking at its title. Its provisions are so crude that it is difficult to identify the rights guaranteed and the extent of protection afforded to them. Sub-articles 1, 2 and 3, which guarantee freedom to engage in economic activities,

²³² FDRE Constitution. Arts 13-44.

²³³ Adopting very stringent requirement, Article 105 of FDRE Constitution provides that all rights and freedoms specified in Chapter Three of this Constitution, ... can be amended only in the following manner:

(a) When all State Councils, by a majority vote, approve the proposed amendment;

(b) When the House of Peoples' Representatives, by a two-thirds majority vote, approves the proposed amendment; and

(c) When the House of the Federation, by a two-thirds majority vote, approves the proposed amendment.

²³⁴ A. Sisay. Supra Note 5 Above, at 139.

²³⁵ Article 41 of the Constitution under the caption "Economic, Social and Cultural Rights", provides that some socio-economic rights though in vague terms. See Art 41(1) through (9).

the right to choose such engagement and non-discriminatory access to publicly funded services are basic to all sorts of rights. Sub-article 4 imposes the state's obligation to progressively realize the rights through the allocation of ever-increasing resources. It also provides enumerations of certain socio-economic rights, which the state should realize progressively within the limits of its available resources. Of course, the phrase "*publicly funded social services*" allows us to add many of the socio-economic rights not clearly indicated in the constitution. Under Article 41(4), one may possibly say that the right to health and the right to education are guaranteed. The rights to housing, to social security, to safe and potable water, to food etc. can be also added from the open-ended phrase "...*and other social services*". Article 43(1) may be interpreted to include rights such as the rights to adequate food, clothing and housing that are listed to define "*adequate standard of living*" under Article 11(1) of the ICESCR which is part of Ethiopian laws pursuant to art 9(4) of the constitution. But, there still remains the problem of delimiting the scope of the rights that might be said to have been guaranteed. Talking about the right to health for example, can we say that the right to emergency medical services is guaranteed? Similarly, can we say that the right to free and compulsory primary education for all is guaranteed? What about the right against forced eviction? The letters of Articles 41 and 42 do not provide clear answers to these questions.²³⁶ A further close look at to the constitution dictates us that only rights to property²³⁷ and right of labor are given separate provisions. Article 40 of the FDRE constitution provides for the right to property. It ensures the ownership right of every Ethiopian citizen over private property. It also protects arbitrary deprivation of private property and the right to commensurate compensation to the value of the property where it is expropriated by the government for public purposes.²³⁸

The constitution also provides the right of Labor as one basic ESCR with its different manifestations.²³⁹ These include the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests though it

²³⁶ A. Sisay. Supra Note 5 Above, at 141.

²³⁷ The right to property is considered both as ESCR as well as CP right. Yet, both ICCPR and ICESCR do not clearly indicate this very right. For instance Coomans considers the right to property as an economic right; see F Coomans, *Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context*, in F Coomans (ed.) Supra Note 194 Above, at 4. But this right is also associated with civil liberties for its importance as a basis of freedom. See C. Krause, 'The Right to Property' in A. Eide et al (eds.) Supra Note 11 Above, at 197. But considering its relevance to the physical persons such rights as the right to housing and the right to food, the right to property can be perfectly treated as a socio-economic right as cited in A. Sisay, Supra Note 5 Above, at 135.

²³⁸ FDRE Constitution. Art.40.

²³⁹ FDRE Constitution. Art. 42.

permitted only for certain category of workers²⁴⁰; the right to express grievances, including the right to strike²⁴¹, the right to equal pay for equal work²⁴², and the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay and to remuneration for public holidays²⁴³. The right to work under healthy and safe work environment is also protected.²⁴⁴ The close reading of the provisions of Article 42 of the FDRE constitution shows that the rights are only for those who already have secured their job not for those who are unemployed. The possible outlet then could be opting for ICESCR, ACHPR and other relevant human rights treaties²⁴⁵ to which Ethiopia is a Party State.²⁴⁶ Ethiopia then is duty bound by these human rights instruments and its citizens are entitled to the socio-economic rights they provide for. Still the writer also believes that the provisions of Article 41(6) and (7) of the FDRE constitution has also some help with regard to the rights of unemployed for the fact that the government is imposed with an obligation on the state to take all necessary measures to expand job opportunities for them.

Other socio-economic rights that need discussion at this juncture include: the right of the child neither to be required nor permitted to perform work which may be hazardous or harmful to his or her education, health or well-being; ²⁴⁷women's right to Affirmative Action²⁴⁸ which are taken as necessary measures that raise the competence and participation of women in every aspect of their endeavor; right of orphans to get special protective measure.²⁴⁹ In addition to the specific provisions so far discussed, there are also other parts of the Constitution having importance to the discussion on socio-economic rights which are included in the National Policy Principles and Objectives²⁵⁰ equivalent to DPSP.²⁵¹ Many

²⁴⁰ FDRE Constitution, Article 42 (1a); the category of persons who are permitted to form trade unions and other associations are 'factory and service workers, farmers, farm laborers, other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility.'

²⁴¹ FDRE Constitution, Article 42 (1b); the right to express grievances, including the right to strike is also only allowed to the category of persons mentioned at note 10.

²⁴² FDRE Constitution, Art.42 (1d).

²⁴³ FDRE Constitution, Art.42 (2).

²⁴⁴ Id.

²⁴⁵ Ethiopia has acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 11 September 1993, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 10 October 1981, the Convention on the Rights of the Child (CRC) on 13 June 1991, the African Charter on Human and Peoples' Rights (ACHPR) on 15 June 1998, and the African Charter on the Rights and Welfare of the Child (ACRWC) on 27 December 2002.

²⁴⁶ A. Sisay. Supra Note 5 Above, at 140-141.

²⁴⁷ FDRE Constitution, Art. 36(1) (d).

²⁴⁸ FDRE Constitution, Art. 35 (3).

²⁴⁹ FDRE Constitution, Art. 36(5).

²⁵⁰ FDRE Constitution, Art. Article 89 -91.

²⁵¹ In India and other states the name is Directive Principles of State Policy (DPSP).

socio-economic rights can be included under this part are health, welfare and living standards, education, clean water, housing, food and social security though the issue of their justiciability might remain questionable.

4.1.1 Beneficiaries under the Protection

The right-holders (the beneficiaries) are under the rights in Chapter Three of the FDRE Constitution can be identified by the universality marking words such as “Everyone...”, “Every person,” “No one shall be...,” “All persons...” or particularity marking words such as “Every citizen...”, “Persons arrested...”, “Accused persons...”, “Women...”, “Every child...”, “Every nation, nationality, and people in Ethiopia”, “Ethiopian farmers and pastoralists”, “Workers...”, etc.²⁵²

Regarding the issue at hand, almost all socio-economic rights in Ethiopia under art.41 are formulated for the benefit of every Ethiopians, though some are designed for specific groups of beneficiaries, such as the physically and mentally disabled, the aged and children who are left without parents or guardian, Ethiopian farmers and pastoralists.²⁵³ Most of the socio-economic objectives and principles for State policy in are also formulated for the benefits of all Ethiopians, though some are groups such as nations, nationalities and people least advantaged, women, victims of disasters and the People.²⁵⁴ Non-citizens may be excluded from claiming the socioeconomic rights granted in developing countries. With regard to this, Art 2 (3) of the ICESCR, which is considered as Ethiopian bill of right via Art 9(4) of its Constitution, provides that *developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals*. Therefore, generally speaking the beneficiaries of the bill of rights therein are Ethiopian citizens.

This is the corollary duty for the state. The Constitution imposes a duty on the federal and state branches of the government, at all levels, to respect and enforce the provisions of Chapter which provides human rights to which socio-economic rights are parts.²⁵⁵ It can further be said that the wording of social, economic and cultural objectives and principles

²⁵² Having a look at the constitutional provisions affirms this fact.

²⁵³ FDRE Constitution. Arts 40 &41.

²⁵⁴ FDRE Constitution. Arts.89 – 91.

²⁵⁵ FDRE Constitution. Art 13(1).

place a duty on the State to respect, protect and fulfill the socio-economic needs of all Ethiopians.

If we focus on duty to respect, among the obligations, it implies an immediate obligation on the Ethiopian government to refrain from interventions in people's access to, or enjoyment of, socio-economic rights. This obligation is violated where the State deprives, for instance, people of the access they enjoy to these rights through legislation or conduct. If we take the example of art.41 (4), which imposes the obligation to allocate ever increasing resources to provide to the public health, and other social services, the government has the duty to abstain from arbitrary intervention by way of demolishing the only health care center in one area without providing other alternatives for the inhabitants who cannot afford to travel to the next center for health care services. Arbitrary forced evictions will also amount to violation of the State's obligation to respect the right to equal access to publicly funded social services, including housing as provided by art.41 (3) where alternative suitable solutions are not provided for.²⁵⁶ For instance, it may be argued that requiring excessive school fees amount to violation of socio-economic rights as it has an effect of denying poor children access to their right to education.²⁵⁷

4.2 Justiciability of Socio-Economic Rights under the FDRE Constitution

The term justiciability refers to the extent to which a matter is suitable for judicial decision and thus it is the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfill a person's right.²⁵⁸ Justiciability, according to Christian Curtis, is the possibility for people who claim to be victims of violations of these rights to file a complaint before an impartial body and request adequate remedies or redress if a violation has occurred or is likely to occur.²⁵⁹ Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties.²⁶⁰ The

²⁵⁶ M. Rakeb. *Enforcement of Human Rights in Ethiopia*; Action Professionals' Association for the People (2002) 30.

²⁵⁷ S Liebenberg. *Socio-economic Rights*; Constitutional Law of South Africa (1996: 3 rev 1998)3.

²⁵⁸ S.Craig and M.Patrick. *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*; University of Pennsylvania Law Review, Vol. 141, No. 1.at 17.

²⁵⁹ C. Curtis, Supra Note 1 above, 2.

²⁶⁰ C. Curtis. Id. at 6.

existence of a legal remedy is understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim are a defining features of a fully fledged right.²⁶¹ In this regard, R Tsegaye considered justiciability at a matter that one can take to court to assert them as concrete legal claims, rights that can be litigated and deserving remedies when the argument in their favor has won.²⁶² Some scholars²⁶³ create similarity between the notion of justiciability and the notion of enforceability. Clearly, the notion of enforceability is related to the notion of justiciability, but they are distinct: enforceability deals with the ability of the courts to fashion a remedy to protect or enforce the interests or entitlements it wishes to protect or enforce, while justiciability concerns the question of whether a matter is suitable for judicial resolution. Justiciability deals with the ‘subject matter jurisdiction’ before a court.²⁶⁴

Justiciability of socio-economic rights has become subject of debate for long years. One set of arguments against the justiciability socio-economic rights asserts that they are so vague or uncertain in character that their content cannot be adequately defined. It is frequently said, for example, that rights such as the ‘right to health’ or the ‘right to housing’ have no clear meaning, and that they offer no obvious standard by which one can determine whether an act or omission conforms to the right or diverges from it. However, the question of content and scope of a right is not a problem exclusively related to ESC right, because many legal rules are expressed in broad terms and, to a certain extent, unavoidably general wording.²⁶⁵ Thus, ‘classic’ rights such as the right to equal treatment, freedom of expression, or due process face this hurdle to the same extent as ESC rights. Yet, this has never led to the conclusion that these ‘classic’ rights are not judiciable. Focus shall be given to specify the content and limits of these rights, through a series of mechanisms aimed at defining their meaning (for instance,

²⁶¹ C. Courtis. Id, at 7.

²⁶² R. Tsegaye. Supra Note 8 above, at 289.

²⁶³ E.W Vierdag. *The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights*; Netherlands Yearbook of International Law 69, (1978) 9, he equates the two terms directly, and concludes that because the rights in ICESCR are unenforceable by individuals, they are also non-justiciable but currently the adoption of Optional protocol on Covenant on Economic, Social and Cultural Rights creates the possibility of bringing individual complaints; besides, within domestic jurisdictions individuals can lodge complaints before judicial or quasi-judicial National Human rights Institutions.

²⁶⁴ K. McLean. *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*; The Pretoria University Law Press (2009) 107.

²⁶⁵ International Commission of Jurists. Supra Note 36 above 15.

the development of statutory law-making, administrative regulation, case law and jurisprudence) than concluding non-justiciable.²⁶⁶

In many jurisdictions, both international and national, a sharp distinction is often drawn between civil and political and socio-economic rights, with the former enjoying justiciable status, and the latter are viewed merely as involving potentially legitimate aspirations or policy goals, sometimes, but just as often not, constitutionally recognized.²⁶⁷ Traditional human rights discourse was dominated by the misperception that CPs requires only negative duties while ESCRs require positive duties. In this view, the right to free speech is guaranteed when the state leaves people alone, whereas the state must take positive action to guarantee the right to health by building health clinics and providing immunization. This positive versus negative dichotomy has been discredited in favor of the understanding that all human rights have both positive and negative components. It is a matter of common sense that CPs, including free speech, requires the positive outlay of state resources in terms of providing a functioning judicial system and educating people about their rights. Conversely, all ESCR have negative aspects; some states prevent people from freely exercising ESCR, for example by blocking food or medical supplies to disfavored groups or regions.²⁶⁸

Some others argue that the inclusion of social rights in a written constitution to be enforceable by the judiciary is blending of judiciary with legislative power.²⁶⁹ Still others argue that the absence of strong enforcement mechanisms in the ICESCR unlike ICCPR is an indication that socio-economic rights are non-justiciable. This can be evidenced from the fact that the human rights committee can receive complaints regarding civil and political rights; the committee on socio-economic rights is not given such power.²⁷⁰ But nobody can fully persuade that the goals set forth in the ICESCR can be achieved more effectively only by means of an international adjudicative mechanism for individual complaints. In point of fact, the articulation function is already being performed by the Committee in its review of, and commentary on, implementation reports by states parties to the Covenant, as well as by the

²⁶⁶ International Commission of Jurists, id, at 16.

²⁶⁷ International Commission of Jurists, id, at 18.

²⁶⁸ Economic, Social and Cultural Rights: A Guide to Legal Frame Work, at 21.

²⁶⁹ Craig & M.Patrick. *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*; University of Pennsylvania Law Review, Vol. 141, No. 1, 19.

²⁷⁰ Craig and M.Patrick. Id, at 22.

relevant specialized agencies of the United Nations.²⁷¹ The author argues that their different treatment shall in no way disqualify ESCRs as relegated them to a lower hierarchical status. It did reflect an assessment of the practical difficulties that states would face in implementing generalized norms requiring substantial time and resources.²⁷² Also focus has to be given that all human rights are "*universal, indivisible, interdependent and interrelated*," which obligates granting equal protection according to which better enforcement mechanism is set via optional protocol to socio-economic rights. Yet for others, economic and social rights are incapable of being judicially determined.²⁷³ But this is an oversimplification. Some such rights (for example, the right to equal pay) are sufficiently precisely drafted to be judicially enforceable; and for some rights (such as equal pay) a judicial remedy is suitable.²⁷⁴

As far as justiciability is concerned, it rests on three normative preconditions: the claim, the setting and the consequence of the claim.²⁷⁵ The claim is related with the violations of the rights protected. The setting is the judicial or quasi-judicial body with a jurisdiction to hear and review violations of the rights protected. The consequence of the claim entails the ordering of remedies by the above organs.²⁷⁶

In light of the above parameters the justiciability of socio-economic rights under the FDRE Constitution is presented in the following manner. Of course, justiciability may take either of the two forms: directly using the socio-economic rights for litigation and indirectly by integrating through civil and political rights.

4.2.1 Direct Justiciability: Claims Using Entrenched Socio-Economic Rights

Constitutional protection of socio-economic rights may be direct one. A prominent example of the direct model of protection is the South African constitution, whose Bill of Rights, apart from civil and political, contains socio-economic rights as well. Besides, the theoretical tendency to accept today, for different reasons that socio-economic rights are justiciable,

²⁷¹ Dennis & P.Stewart. *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* The American Journal of International Law, Vol. 98 (2004) 483.

²⁷² Id. at 486.

²⁷³ R. R. Churchill & U. Khaliq. *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring: Compliance with Economic and Social Rights?* EJIL, Vol. 15 No. 3 (2004) 421.

²⁷⁴ Id. at 422.

²⁷⁵ F Viljoen. *National Legislation as a Source of Justiciable Socio-Economic Rights*; 6(3) WSR Review 6, (2006) 6 as cited in S. Takele. Supra Note 23 above, at 2-3.

²⁷⁶ S. Takele. Id, at 3-4.

similar analysis can be made in light of Ethiopian laws. As discussed above there are three prerequisite to be fulfilled as far as the direct justiciability of socio-economic rights is concerned in Ethiopia too. The first one is standing. So far we have seen that the FDRE Constitution has explicitly recognized socio-economic rights under its chapter three provisions, though in crude terms. Further, the constitution asserts the incorporation of international instruments ratified by Ethiopia as part and parcel of the law of the land which lays the ground for individuals to avail of such rights. This leads one to say that the first requirement (standing) which allows individuals to claim their rights when violated is rightly satisfied. Stated otherwise, individuals have got legal protection of their socio-economic rights under the FDRE Constitution.

The other important requirement that needs to be asserted is the existence of an institution having a judicial or quasi-judicial power to entertain cases of socio-economic rights. Of course, all organs of both the federal and regional governments owe obligation or protecting and respecting the constitution particularly the part of the constitution dealing with human rights to which these socio-economic rights belong.²⁷⁷ Obviously, one of basic organs of the government that owe this essential obligation is the courts. There fore, at this juncture understanding of the contents of the Constitution through the provisions that deal with the powers of the courts entails that courts are appropriately given the power to adjudicate different matters emanating from the constitution on any attempt short of interpretation of the constitutions which is purposely reserved to other organ.²⁷⁸ This analysis under the constitution indicates that courts are empowered to decide on socio-economic rights as their basic duties and obligations.

The third aspect of direct justiciability of socio-economic rights is the availability of remedies for their violations.²⁷⁹ Although remedies for the violations of individual rights are found in

²⁷⁷ FDRE Constitution, Article 13(1) of the provides that any organ of government has the responsibility and duty to respect and enforce the fundamental rights and freedoms; see also Art. 85(1) which imposes an obligation by stating that Any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under the constitution which obviously includes human rights (Emphasis added).

²⁷⁸ FDRE Constitution, Article 37(1) Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power, also Art. 78(1) states that judicial powers, both at Federal and State levels, are vested in the courts.

²⁷⁹ M Pieterse. Supra Note 93 above at 411; See also Article 9(1) of the FDRE Constitution that provides “any law, customary practice or a decision of an organ of state or a public official that contravenes the constitution has no effect.” It is argued that this provision is considered as remedy by itself for the fact that.

ordinary legislations, there are also constitutional remedies found in the constitution itself.²⁸⁰ The FDRE Constitution by providing that “*any law, customary practice or a decision of an organ of state or a public official that contravenes the constitution has no effect*,” it has provided remedy for the fact that any act that violates the constitution is null and void. Human rights violations which rightly include instances of violations of socio-economic rights are an act in violation of the constitution itself. In case, courts ignore to order remedy for cases loaded with socio-economic rights, it will be their failure to discharge obligations imposed on them the under Art 13(1) of the FDRE Constitution. However, regarding its practical application, some of the interviewed judges say that it is not common to see cases that base their claims directly attached with the provisions of the constitution. Yet, they believe that courts have the legal obligation to grant relief under the constitution.

The discussions so far made assert that the three prerequisites of direct justiciability are met in Ethiopian legal system too. Krause and Scheinin noted also that with the adoption of the Protocol on individual complaints under the ICESCR, the questions of justiciability of social and economic rights are now settled²⁸¹. Justiciability in the international arena can play an important role in the process of overcoming obstacles to the justiciability of social and economic rights at the domestic sphere²⁸². Individual cases under the communication procedures of the Optional Protocol can create influence on judges and decision-makers at the national level and thus helps in the direct application of the provisions of the constitution or other domestic laws.²⁸³ Thus socio-economic rights, under the FDRE Constitution are properly justiciable which will provide lessons for courts and the government to work on the proper application of these rights.

4.2.2 Indirect justiciability: Enforcement of Socio-Economic Rights through Civil and Political Rights (An Integrated Approach)

Whether it is attached with constitutional frame work, or the reluctance with the judiciary, direct justiciability of socio-economic rights in Ethiopia is not effective. The direct manifestation for the fact is the undoubtedly nonappearance of many cases loaded with socio-

²⁸⁰ M. Rakeb. Supra Note 256 above, at 22.

²⁸¹ . See E Riedel. Economic, Social and Cultural Rights, in C Krause and M Scheinin (eds.), *International Protection of Human Rights: A Textbook*, Abo Akademi University Institute for Human Rights, (2009)148-149.

²⁸² International Commission of Jurists. Supra Note 36 above, at 103.

²⁸³ E Riedel. At 148.

economic rights. This leads to the adoption of other way of enforcement (indirect approach). It is the protection of socio-economic rights through the application of other rights like the right to equality, due process of law and judicial protection.²⁸⁴ The indirect constitutional protection occurs through the application or interpretation of civil and political rights, most commonly through the application of equality and fair process norms.²⁸⁵ Examples of this are cited in Canada, United States and the United Kingdom. Countries whose constitutions contain directive principles as guidelines for human rights interpretation also fall under the indirect protection model. These directive principles have often been used to enrich civil and political rights with social elements, in India and Ireland, for example. Two main judicial approaches emerge from these constitutional models: the ‘reasonableness’ approach and the ‘minimum core’ approach.²⁸⁶

This kind of justiciability is basically applied in a country that does not incorporate socio-economic right in the substantive part of its constitution but want to provide minimal protection; and in a country that incorporate them as non-justiciable rights and mere guidelines for the functioning of the government.²⁸⁷ This can also be applied even in a country that has included socio-economic rights in the substantive part of its constitution but lack the necessary jurisprudence concerning their enforcement before court of law. It has importance to clarify the normative contents of the recognized socio-economic rights and in effect developing their jurisprudence by changing the attitudes towards their justiciability. Therefore, since these three cross-cutting rights are built-in the constitution and their applicability by the judiciary are not exposed to objection; the indirect justiciability can be applied by the Ethiopian courts due to the importance it provide in the enhancement of direct justiciability by clarifying the normative contents of the protected socio-economic rights.

While economic, social and cultural rights are often identified with substantive aspects, they also have procedural dimensions, which also constitute a solid basis for judicial adjudication. The idea of due process was originally devised for the protection of traditional civil rights. Yet, there is no conceptual impediment to extending procedural protections to economic, social and cultural rights.²⁸⁸ Procedural guarantees could be set as a prerequisite to the

²⁸⁴ S Takele , Supra Note 275 above, at 22.

²⁸⁵ E Riedel. At 61.

²⁸⁶ I Trispiotis. Socio-Economic Rights: Legally Enforceable Or Just Aspirational? *Opticon* 1826, Issue 8, (2010) 1.

²⁸⁷ C. Courtis, Supra Note 1 Above, at 5.

²⁸⁸ C. Courtis. Id, at 7.

adoption of certain general measures and policies by the State and help in establishing the basis for the administrative or judicial review of decisions adopted by administrative or and other political authorities.²⁸⁹

Even in the United States, where there has been overwhelming opposition to reading the Constitution in accordance with positive guarantees of social protection, following the success of *Brown v Board of Education of Topeka*,²⁹⁰ courts have held legislative provisions that deny basic assistance and welfare services to women and members of various religious communities to be unconstitutional.²⁹¹

The interview judges unanimously accept that when socio-economic rights are based on civil and political grounds such as discrimination or due process, courts usually entertain the cases without challenging its internal contents. This indirect way of enforcement of socio-economic rights shall be strengthened.

4.3 The Concept of Minimum Core and Its Relevance to Enhance Justiciability in Ethiopia

An important conceptual element concerning the determination of the responsibilities of a State in relation to ESCRs is the notion of core content (also called minimum core content, minimum core obligations, minimum threshold or 'essential content').²⁹² This notion entails the possibility of defining minimum levels of a right, without which that right would be unrecognizable or meaningless. The minimum core entitlement principle has received widespread support as a means of substantiating and refining economic, social and cultural rights claims. For example, UN Special Rapporteur on Economic, Social and Cultural Rights, Danilo Tfurk stressed that "*states are obliged, regard-less of the level of economic development, to ensure respect for minimum subsistence rights for all.*"²⁹³ A 1993 resolution of the UN Commission on Human Rights urges States to "consider identifying specific national bench-marks designed to give effect to the minimum core obligation to ensure the

²⁸⁹ C. Courtis, id.

²⁹⁰ See *Brown v Board of Education* (1954) 347 US 483, which concluded that segregated schools denied black Americans equal protection of the law.

²⁹¹ Id.

²⁹² See, for example, Maastricht Guidelines, Guideline 9; see also C. Courtis, Supra Note 1 Above, at 14.

²⁹³ Report of the Special Rapporteur on the Realization of Economic, Social and Cultural Rights, U.N. ESCOR, Comm'n on Hum. Rts. 43rd Sess., Agenda Item 8, at 18, I 52 (d), U.N. Doc. E/CN.4/Sub.2/1991/17 (1991).

satisfaction of minimum essential levels of each of the economic, social and cultural rights."

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It is important to emphasize that there have been also conceptual efforts to develop the contents of specific economic, social and cultural rights – such as the right to health, the right to food, the right to housing, the right to education or the right to social security.²⁹⁵ General Comment No. 3 of the Committee on ESCRs asserts that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights are incumbent upon every State party. It is thus confirmed that minimum core obligations are "non-derogable".²⁹⁶ Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.²⁹⁷ If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.²⁹⁸ In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.²⁹⁹

Having the right to food in its minima sense, for instance, does not mean a right to rice when yams would be enough. International interpretations would suggest that the food must be adequate in quantity and in nutritional value, accessible and available, and also culturally acceptable (for example, it would not be right to damage the mutton industry, leaving Muslims with no meat option except pork). The idea of 'education' is the right to get primary education of appropriate quality. And the right to health does not mean a right to be healthy – but it would include a right to health care that is reasonably accessible (geographically and financially) and of reasonable quality, as well as culturally (and in other ways) acceptable.³⁰⁰

²⁹⁴ S Leckie. *Supra* Note 31 above, at 101.

²⁹⁵ The Committee on ESCRs has devoted several General Comments to specific rights contained in the International Covenant on economic, social and cultural Rights, offering useful guidance for their interpretation, either by international bodies or by domestic courts as indicated in chapter three.

²⁹⁶ CESCR General Comment No. 14; Para. 47.

²⁹⁷ CESCR General Comment 3; Para. 10.

²⁹⁸ CESCR General Comment 3; *Id.*

²⁹⁹ CESCR General Comment 3. Para 43.

³⁰⁰ CESCR General Comment No. 14; Para 8-12.

In connection with minimum core obligations, the Committee on ESCRs has stressed that lack of resources does not mean that a State may postpone beginning the process of realizing rights. The obligation is immediate, though the progress may be dictated partly by resources.³⁰¹ It is well known that countries with comparable resources often have widely differing levels of achievement in terms of human development (this realization inspired the creation of the Human Development Index, used in the United Nations Development Programme (UNDP) 'Human Development Reports'). Countries that do poorly are violating their human rights obligations, probably because they have their priorities oriented away from human rights towards other concerns such as national defence, national prestige or even personal benefit of rulers.³⁰²

Statutory regulations, case law and jurisprudential concepts, all contribute to interpreting and clarifying the content and scope of rights. Nevertheless, in their absence, there are other ways to give a degree of substance to the content of ESC rights and guaranteeing that they are respected, protected and fulfilled. For example, the right to enjoy the highest possible attainable standard of health, access to medical treatment, vaccination or provision of medicines, can provide a set of standards against which to judge whether the right has been implemented. Courts have taken into consideration the previous conduct of the State in order to decide whether there has been a breach of the right; for example, by preventing the State from arbitrarily stopping the production of a vaccine or failing to provide medicine to a seriously ill infant.³⁰³

When judges examine an allegation that a right has been violated, they do not necessarily focus on the determination of a specific obligation to be imposed on the State or on an individual. Judges usually assess the course of action undertaken by the duty-bearer in terms of legal standards such as 'reasonableness', 'proportionality', 'adequacy', 'appropriateness' or 'progression'.³⁰⁴ Of course, Liebenberg suggested that acceptance of the minimum core does not require the court to define, in the abstract, the basket of goods and services that must be provided in applying one or more of the above acceptable standards. Instead, the court could define the general principles underlying the concept of minimum core obligations in

³⁰¹ S. Shetty and N. Rosellini. *The MDGs through Socio-Economic Rights: Constitution Making and Implementation Handbook (Excerpt)*; United Nations Millennium Campaign (2009) 9-10.

³⁰² S. Shetty and N. Rosellini, *id.*, at 10.

³⁰³ International Commission of Jurists. *Supra* Note 36 above, at 21.

³⁰⁴ International Commission of Jurists. *Id.*, at 22.

relation to socio-economic rights. These principles, so she argues, would then be applied by the courts on a case-by-case basis to define the content of the rights in the circumstances.³⁰⁵

The court would indicate the general principles of what is required to remedy the breach while leaving a margin of discretion to the state to decide the most appropriate means of fulfilling the minimum core. Liebenberg has given as an example a community suffering from starvation. It would be for the state to decide whether it fulfils their minimum core by cash grants, food vouchers or direct delivery of foodstuffs.³⁰⁶ Indeed, ‘the recognition and enforcement of socio-economic entitlements need not take the form of a once-off and comprehensive determination of need, coupled with a rigid insistence on adherence to a contextual standards’.

For instance, courts in South Africa are not prohibited from incrementally awarding context-sensitive and need-specific, enforceable minimum content to socio-economic rights on a case-by-case basis’.³⁰⁷ True, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles³⁰⁸ from paragraphs 25-28, and confirmed by the developing jurisprudence of the Committee on ESCRs, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.³⁰⁹

Regarding Ethiopia, all the interviewed judges confirmed that the concept of minimum core is not totally known in practice nor is adopted from other countries’ experience. This judicial reluctance to incorporate International Human Rights (IHR) treaties into domestic laws raises criticism by academicians for the fact that applying IHR law as an influential interpretive tool helps in clarifying the contents of vague socio-economic rights recognized in constitutions. In particular, it is argued, of course, that first IHR treaties require states to integrate IHR law into all facets of domestic law.³¹⁰ A state’s failure to integrate IHR law into domestic law might thus lead to a breach of its international obligations. Second, a host

³⁰⁵ S Liebenberg ‘*South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty*’; *Law, Democracy and Development* 6 (2002) at, 158.

³⁰⁶ S. Liebenberg, *id* at 159.

³⁰⁷ C. Mbazira. *Litigating Socio-economic Rights in South Africa: A choice between Corrective and Distributive Justice*; Pretoria University Law Press (2009) 74-76.

³⁰⁸ Limburg Principles. Para. 25-28.

³⁰⁹ Y. Shany. How Supreme Is the Supreme Law of The Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts. *BROOK. J. INT’L L*, Vol. 31:2 (2006) 344-347.

³¹⁰ Y. Shany *id*, at 346.

of substantive moral, social, and legal policy considerations support, even from a domestic law perspective, the need to increase the influence of constitutional like IHR norms within domestic application.³¹¹ Thus incorporation and application IHR particularly the elaboration made on minimum core shall be inferred by Ethiopian courts too.

The interviewed judges manifest also that *even there are judges who do not have knowledge of the concept let alone practicing it through their judgments*. This necessitates for the adoption of the minimum core concept in Ethiopian courts and the application of the different standards as the case by case basis: the ‘reasonableness’, ‘proportionality’, ‘adequacy’, ‘appropriateness’ or ‘progression’ tests.

4.4. Assessment on Actual Competence and Legitimacy of Ethiopian Courts in Handling Socio-Economic Rights: Practical Overview

Normally individuals can get access to court via two channels: using domestic laws and /or international instruments to which their states have adopted or ratified. Legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. For international human rights treaties, including those protecting ESCRs, to be effective at a national level, state obligations must be ‘reflected in the content of the domestic law’. This is mainly because it is often through domestic law and domestic institutions such as courts that international law are most easily enforced. This is because domestic institutions are relatively more accessible than international institutions; there is also a lack of significant enforcement measures in international law especially with respect to ESCRs.³¹²

Courts are the principal institutions whereby individuals and those whose rights have been violated get remedies. The existence of the judiciary protects individuals from being victims of unlawful acts of officials. In case one acted beyond its limits, courts are helpful to make government to exercise its power within the constitution. The judicial judgments can provide fertile sources for giving meaning to broad and vague socio-economic rights.³¹³

³¹¹ Y. Shany, id, at 346-347.

³¹² A Rosas and M Scheinin. *Implementation Mechanisms and Remedies* in A Eide et al, Supra Note 11 above, at 452; See also M. Ssenyonjo, Supra Note 67 above, 149.

³¹³ M Gomez, *Social Economic Rights and Human Rights Commissions*; 17 Human rights Quarterly (1995)157.

This section is devoted to explore the practice of Ethiopian courts so that one can have the insight to what extent courts are applying rights of individuals especially the socio-economic aspects. We have to remember that government has three basic duties (respect, protect and fulfill) regarding these sets of rights the failure of which tantamount to violation of the rights. As discussed in chapter two, if a state wishes to avoid adjudication of socio-economic violations before international or regional bodies (such as African Commission, or Committee on ESCRs), its own domestic court system will have to be able to enforce socio-economic rights. Even aside from merely being able to hear socio-economic rights disputes, domestic courts should be in a position to provide an effective remedy for their violation.³¹⁴

Accordingly, the researcher has made intensive and in-depth interview with 11 judges and 2 assistant judges from the three tiers of courts at Federal level (4 judges from the Supreme Court (from Supreme Court and Cassation Division), 4 from High Court, 3 from first instance court, and 2 assistant judges.)

The responses of the interviewed judges regarding the practical application of socio-economic rights before court of law are different. At this juncture, notice has to be made that only few real cases appear before courts for adjudication. These theoretical and practical challenges are separately discussed in the sections following this sub-topic.

Even within this small number of cases appeared before the courts, the attitude and practical application on the part of the judges differ from judge to judge. According to Ato Menberetsehay Taddesse³¹⁵ and few others³¹⁶ socio-economic rights are not justiciable and are not appropriate to the judiciary hence are not capable of appearing before courts pursuant to art 37 of the FDRE Constitution.³¹⁷ For them the judiciary should not be taken as solution for socio-economic aspects of individuals. On the other side most of the judges³¹⁸ (10 out of 13) believe that courts are appropriate fora for the enforcement of socio-economic rights.

³¹⁴ M Brennan, *supra* Note 112 above, at 65.

³¹⁵ Interview with Ato Menberetsehay Taddesse who had been Vice President of the Federal Supreme Court, Vice Chairperson of the Council of Constitutional Inquiry. He had been working in the Cassation Division of the Supreme Court. Interviewed on 26 October, 2010.

³¹⁶ Interview with Ato Aysheshim Melese who is currently working as judge in Federal High Court. He has been a judge at Supreme Court of Benishangul Regional State, Interviewed on 24 October, 2010.

³¹⁷ FDRE Constitution, Art 37(1) under the caption, Right of Access to Justice provides: "Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."

³¹⁸ Interview with Ato Zerihun Bodie who is currently working as judge in Federal High Court. He has been public prosecutor in SNNP, Interviewed on 28 October, 2010. See also interview with Wubshet Shiferaw who is currently the President of Federal High Court. He had been working as the President of Supreme Court of Amhara Regional State, interviewed on 27 October, 2010.

Judges³¹⁹ on this side have the stand that the rights are perfectly justiciable and what lacks according to them is a committed judiciary that can properly apply the rights under consideration. They also noted that the legal environments and practical challenges shall be considered for proper application. However, most of the interviewed judges concluded that socio-economic rights do not actually get the protections they deserve under the constitution and other international human rights instruments which Ethiopia ratifies.

Lack of domestic laws that elaborate the rights which are recognized in the constitution in crude terms, inability to limit contents of the socio-economic rights under consideration, ambiguity on the proper status of international instruments, lack of awareness by part of the society, lack of motivation by the judges towards developing jurisprudence are the mentioned obstacles regarding against the enforcement of these sets of rights. In the presence of better legal environment, the courts can properly handle such cases as well. The traditional competence and legitimacy objections are irrelevant for them. In this regard, Ato Zerihun made the following relevant statement: *“There is no reason for Ethiopian courts not to pass remarkable judgments like the experiences of South Africa and India. Maladministration might be exercised even within the available resources. In human rights protection we have to learn from better experience of other countries”*³²⁰

Emphasis has to be given that the enforcement of socio-economic rights before courts of law will have positive implications towards the living standards of the marginalized sectors of the society. In this connection, current available and reliable data, for instance in South Africa, show that after judgments in socio-economic rights an increase in available housing, medical clinics, and school enrollment, social security, etc. is recorded.

In the presence of the arguments, practically, few cases appeared before courts and got decision which is indications for the possibility to litigate socioeconomic rights before Ethiopian Courts. As the discussions in the previous chapter clearly reveals, even in other countries which are known in enforcing socio-economic rights before regular courts like

³¹⁹Interview with Ato Ali Mohamed Ali who is currently a judge at Federal Supreme Court, Cassation Division. He had been working as a judge at Supreme Court of Amhara Regional State. He was also Anti- Corruption Commission commissioner. Also he had been teaching at Bahir Dar University, Law Faculty, interviewed on 02 November, 2010. See also interview with Zerihun Bodie.

³²⁰ Interview with Ato Zerihun Bodie. Supra Note 318 above. See also interview with Berihun Aragaw who is currently a judge at Federal First Instance Court, interviewed on 28 October, 2010.

Republic of South Africa and India, there exist strong challenge and hence adjudication on the rights is not as proliferated as CPRs counter parts.

The following section show actually decided socio-economic rights based litigations before Ethiopian Courts. In *Ato Mubarek Sherefedin v. Bole Sub-City Land Administration Authority case*,³²¹ the Federal Supreme Court, Cassation Division, in reversing the decision passed by the Addis Ababa City Appellate Court and remanding the case back to the same court reasoned that individuals have the right to claim compensations of monetary aspects or lands, as the case may be, before the respective regular courts pursuant to Re-Enactment of Urban Lands Lease Holding Proclamation.³²²

On the other hand, the Federal Supreme Court, Cassation Division, in *Agency for Government Houses v. Ato Mersie Menberu's Successors case*,³²³ decided by majority that the respondents cannot bring their case to get title deeds on houses possessed by them. The court held that the matter is not justiciable and reversed the decision of the lower court. Yet the dissenting judgment has provided that title deed can be perfectly justiciable for the fact that the responsible administrative organ might deny individuals to grant the right when in fact the all the requirements of the law are satisfied.³²⁴

Even there are few cases entertained before Ethiopian courts based on the constitutional provisions and/or international human rights instruments ratified by Ethiopia. But this does not mean that courts are applying the constitutional provisions and international instruments up to what is expected of them. In *Public prosecutor v. Habtom Gabremedhin case*,³²⁵ the dissenting judgment provides that all persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity under Art 21(1) of the FDRE Constitution as well as art 10(1) of ICCPR. The importance of this reasoning is that courts by applying the provisions of the constitution and ICCPR are indirectly enforcing socioeconomic aspects of persons for the fact that human dignity among

³²¹ *Ato Mubarek Sherefedin v. Bole Sub-City Land Administration Authority*, Federal Supreme Court, Cassation division, F/No. 42447, Decided on 12 Tir, 2002 E.C.

³²² See Re-Enactment of Urban Lands Lease Holding Proclamation, Proclamation No. 272/2002, art 11(2), Federal Negarit Gazeta No. 19, 14th May, 2002; see also, the Addis Ababa City administration Re-Enactment of Urban Lands Lease Holding Regulation, Regulation No. 29/2002, art 2(8) cum (9).

³²³, Federal Supreme Court, Cassation division, F/No. 31906, Decided on 04 Hidar, 2001 E.C.

³²⁴ *Government Houses Renting Agency v. Ato Mersie Menberu's Successors*. at 3.

³²⁵ *Public Prosecutor v. Habtom Gabremedhin*, Federal High Court, Cr/F/No. 10063, as cited in B Makdem. *Litigating Human Rights Issues Using international Instruments before Ethiopian Courts*; LL.M Dissertation, AAU (2008) Attachment.

others requires the right to health for instance. Similarly, the court directly referred art 19(4) of FDRE Constitution and art 9(2) of ICCPR in deciding the case *Federal Police Crime Investigation Director V. Naid Misalie and others*³²⁶ concluded that arrested persons have the right to a speedy trial.³²⁷

More interestingly, in *W/rt Tsedale Demissie v. Ato Kiflie Demissie*,³²⁸ the Federal Supreme Court, Cassation Division, has referred the relevant laws that guarantee the best interest of the child. Accordingly, the court directly applied Art 36(2) of the FDRE Constitution and Art 3(1) of the Convention on the Rights of the Child which have direct relevance to protect the child under consideration which obviously the have socio-economic rights implication for the child.

The above discussions show that although there is no uniform application of socio-economic rights and only few cases are entertained, it can pave the way for courts to entertain such cases. In the above decisions, competence and legitimacy based objections were not forwarded both on the side of litigants, the courts or other organs. This shows that if conditions are fulfilled, there is no reason for the Ethiopian courts not to pass interesting decisions and make the government responsible for violations on socio-economic rights.

4. 5 Competence and Legitimacy Based Challenges that Face the Ethiopian Courts on the adjudication of Socio-Economic Rights

4.5.1 Judicial Competence and Legitimacy Issues in the Ethiopian Context

Like we discussed in Chapter Three, proponents against the involvement of courts argue that in a democracy a Court, particularly an unelected Court, should not make policy decisions that bind citizens. Economic rights should be a political decision, not a legal one. For them states have limited resources which are best directed by policy-makers, the democratically elected legislatures not by courts. They further say that the courts are not in the best position and do not have the authority to make controversial policy decisions, especially when state

³²⁶ *Federal Police Crime Investigation Director V. Naid Misalie and others*, Federal High Court, Cr/F/No. 17705 as cited in B Makdem.

³²⁷ See art 19(4) of FDRE Constitution and art 9(2) of ICCPR.

³²⁸ *W/rt Tsedale Demissie v. Ato Kiflie Demissie*, Federal Supreme Court, Cassation division, C/F/No. 23632, Decided on 26 Tikimt, 2001 E.C.

funding decisions are at issue.³²⁹ In this connection, Ato Ali has made relevant statements here:

*Courts provide solutions based on the available claims (i.e. when individuals or groups of individuals submit their cases saying that their socioeconomic rights have been violated, not on the initiations of the court itself; this undoubtedly will affect those individuals who did not bring their case even in the presence of violations; to add more when the government is imposed to provide remedy to the winners, the compensation aspect usually is covered from public treasury which is the common property of those who did not participate in the proceedings.*³³⁰

Scholars also fear that courts decision may distort policy because the legislatures may “tailor statutes to judicially articulated norms of constitutional meaning; may believe mistakenly that the preferred policy is outside the available range; or may modify their laws before a final appellate court decision, where the threat of constitutional reversal exists. Dialogue of this sort may debilitate democracy because it entails legislative subordination to the courts’ monopoly over the correct interpretation of the constitution.”³³¹ Some others still argue that judges are conservative and should not be entrusted with this task. The reasons that lead to this skepticism differ in each country where this concern is raised: in the UK for instance, it is commonly said that the top judges are middle or upper-class, white males, educated at elitist institutions. This is problematic because courts are not representative of the interests of the society at large, and have no understanding or sympathy for the needy. Due to their background, the decisions they reach are likely to be hostile to the pleas of necessitous people.³³²

Close look at the above arguments, it can be challenged easily in the following manner. To begin with, when dealing with socio-economic rights, courts will limit their scrutiny to determinations of whether government policies or legislation contribute to a violation of fundamental rights. They will not prescribe how a new policy should look like in detail or the manner to be followed in achieving compliance with ESCRs. Allowing recourse for socio-economic rights will help people to determine whether a certain policy or legislation is in conformity with international human rights standards. If a violation or breach has been found,

³²⁹ The Debate on Including Economic and Social Rights in a Constitution: A Memo Prepared by the American Jewish Congress Office of Legal Counsel (Available at: <http://www.cfisrael.org/a640.html?rsID=119> Accessed on 23 October 2010).

³³⁰ Ato Ali Mohamed Ali. Supra Note 319 above.

³³¹ L. B. Tremblay. The legitimacy of judicial review: The limits of dialogue between courts and legislatures Oxford University Press and New York University School of Law I·CON, Volume 3, No. 4(2005) 628.

³³² J Griffith. The Politics of the Judiciary; London, Fontana Press, (1970) as cited in V Mantouvalou, The Case for Social Rights; Georgetown Law Faculty Publications and Other Works. Paper 331, (2010) 17.

the government has a myriad of ways to react and to design new policies.³³³ For example, the traditional role assigned to the judiciary that of applying the law, may include making judgments about the validity and applicability of a particular law within the context of several superior layers of the legal system. Where there is a contradiction between superior and inferior laws or norms, the superior norm displaces the inferior. This role of the judiciary in making such decisions is typical of those legal systems which allow judges the function of constitutional review, and which also allow judicial control of the activity of the executive and the administration under statutory norms. It is meant to preserve the integrity and coherence of the legal system, and has traditionally been accepted in the area of civil and political rights. The same reasoning could be extended to the area of Socio-economic rights.³³⁴

To legitimize the exercise of power in a democracy, the constitution shall establish mechanism of imposing accountability and culture of justification which can be strengthened in real cases than on mere command. This will promote accountability, transparency, openness and culture of justification. Note has to be given that separation of power is aimed at enhancing democracy, accountability, and protecting fundamental rights. There shall also exist, *check and balance*, one instance of which is the judicial review of legislative laws and executive action.³³⁵

Judges can and should certainly play a role in the executive's application of and compliance with statutory provisions. In 1959, the International Commission of Jurists (ICJ) on the subordination of the executive branch and the administration to the rule of law emphasized that “. . . . *The acts of the executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the courts.* . . . ”³³⁶

It is undeniable that the legislature is the most directly accountable branch and should have primary role in providing contents to laws including socio-economic rights. But this branch is mostly made up of *laymen* who often lack the expertise necessary for effective socio-economic policy-making. The Ethiopian parliament, with its infant history, cannot be an

³³³ Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: (Available at: <http://www.choike.org/2009/eng/informes/1728.html>).

³³⁴ International Commission of Jurists. Supra Note 36 Above, at 75.

³³⁵ M. Pieterse. Supra Note 93 above, at; 20 S.Afr. on Hum. Rts (2004) 386.

³³⁶ See S Liebenberg. Supra Note 189 above, at 78.

exception to this. On top of this, the variation in legislative membership complicates the consistent formulation and enforcement of rights through legislation process. There is also a danger that politicians will favor demands of the powerful members of the society at the cost of survival requirements of marginalized groups.³³⁷ Besides, judicial review is justified when the legislative branch remains idle to react on fundamental human rights violations which are a breach of democratic principles.³³⁸

For instance, although the South African and Indian populations suffer from some of the same problems with regard to poverty and are likely to display strong popular support for welfare transfers, in the case of India, the legitimacy of the legislature and executive has been tarnished by corruption and bureaucratic inefficiency which obviously requires the intervention of the judiciary.³³⁹ In this regard, the South African Constitutional Court appears to be more progressive in developing jurisprudence on socio-economic rights adjudication. It has produced a body of jurisprudence that not only recognizes the actionability of socio-economic rights, but also contains a consistent methodology for paring away the usual conceptual barriers underlying non-justiciability of socio-economic rights, such as resource constraints.³⁴⁰

The issues of competency and legitimacy have been fully addressed in chapter three of this dissertation. The importance here is to show that Ethiopian courts, like others are subjected to criticisms for they are not representative of the different nations, nationalities and peoples of Ethiopia. However, the issues of technical competence and legitimacy were not actually raised in practical applications of socio-economic rights as indicated above. What is problematic according to the interviewed judges is the legal incompetence-that basically emanates from FDRE Constitution itself and other laws that takes away the power of courts, accompanied by the perception of the people towards the judiciary, which will be separately discussed in the sections ahead.

³³⁷ M.Pieterse. at 389.

³³⁸ M.Pieterse. at 392.

³³⁹ See V Sripathi. *Towards Fifty Years of Constitutional and Fundamental Rights in India: Looking Back to See Ahead 1950-2000*; Am Univ Int'l L Rev (1998) 14, at 450.

³⁴⁰ D. A. Desierto. *Justiciability Of Socio-Economic Rights: Comparative Powers, Roles, And Practices In The Philippines And South Africa* (Available at: <http://ssrn.com/abstract=1485555> (accessed on 23 September,2010)

4.5.2 Challenges Emanating from the FDRE Constitution: Constitutional Power Arrangement

Though there exists consensus on the ultimate power of the House of Federation (hereinafter HOF) to interpret the Constitution and rule on the constitutionality of legislation, there is an argument that has been going on for a while to the effect that the courts still have the power to interpret the Constitution and refuse to apply legislation on the ground that it is not in conformity with the Constitution.

Yonatan³⁴¹ rightly argued that posing arguments in favor of inherent judicial review does not work in Ethiopia. The constitution clearly vested the power to political body.³⁴² But this shouldn't be understood to mean that courts are totally excluded from interpreting constitutional provisions. It is said that to the extent that the courts enforce the rights and freedoms enshrined in the Constitution, they can exercise the power of interpreting the Constitution.³⁴³ It can also be argued that the mandate of the Council of Constitutional Inquiry and the HOF³⁴⁴ 'to interpret' the Constitution, as the title of article 83 shows, does not exclude courts from enforcing constitutional provisions on fundamental rights and freedoms. The provisions of article 84 of the Constitution and articles 6, 17 and 21 of the Council of Constitutional Inquiry Proclamation show clearly that 'constitutional disputes' are those in which the constitutionality of laws or decisions is contested and those which make the interpretation of some constitutional provisions necessary.³⁴⁵

³⁴¹ T F Yonatan. *Who Interprets the Constitution: A Descriptive and Normative Discourse on the Ethiopian Approach to Constitutional Review*; The Faculty of Law of the University of Pretoria (LL.M Dissertation in Human Rights and Democratization in Africa), (2004) at 14-18. Available online at: http://www.up.ac.za/dspace/bitstream/2263/1079/1/fisseha_yt_1.pdf (Accessed on 25 Oct, 2010).

³⁴² See FDRE Constitution, Arts 62 and 84.

³⁴³ See F Assefa, *Supra* Note 12 above, at 6.

³⁴⁴ The authoritative power to interpret the constitution is given to the *House of Federation* through the assistance of the Council of Constitutional Inquiry; see Article 84(2) of the FDRE Constitution. Article 17(2) of The Proclamation on *Council of Constitutional Inquiry* (Proclamation No. 250/2001) seems to have granted the *Council* power to deal even with laws enacted by the proper law-making bodies, and decisions of any government body that is alleged to contradict with the Constitution. This appears to negate the spirit of the *Constitution* that limits the power of the *Council of Constitutional Inquiry* to only laws enacted by law-making body(i.e., Parliament) at both the Federal and regional levels and excludes secondary legislation and decisions of government bodies from falling within the competence of the *House of Federation* and the Council

³⁴⁵ Council of Constitutional Inquiry Proclamation, Proclamation 250/2001, Federal Negarit Gazeta 7th Year 40, 6 July 2001. See also Proclamation to Consolidate the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities, Proclamation 251/2001, Federal Negarit Gazeta, 7th Year 41, 6 July 2001. According to arts 6 and 17 of Proclamation 250/2001, the power of the Council is to investigate constitutional disputes (including disputes relating to the constitutionality of laws) and submit recommendations to the House of Federation if it finds that it is necessary to interpret the Constitution.

Some times, it may happen that the precise meaning and scope of a constitutional provision is disputed or that legislation invoked by parties or relied on by the court, or a decision given by a government organ or official is contested as inconsistent with the Constitution. Such instances may give rise to ‘constitutional disputes’ that make constitutional interpretation necessary. When such disputes arise in a case already before a court of law, the court is not precluded from deciding the case. In analyzing the case, the language of a constitution that answers the question at issue might be provided a plain, clear meaning; the court has to apply the plain meaning of the language without judicial construction. Stated otherwise, if the court believes that the constitutional provision in question is clear, it can apply it without referral to the Council.³⁴⁶ The court will submit a legal issue to the Council of Constitutional Inquiry only if it believes that there is a need for constitutional interpretation in deciding the case. .³⁴⁷

It is of the opinion of the author that, when the court find out that a certain law or act is in contrary to the FDRE Constitution, it has to pass a decision by disregarding the act/ law which is in contradiction to the constitution for the constitution provides that *any law, customary practice or decision of an organ of the state or public official contravenes the constitution shall be of no effect.*³⁴⁸ Otherwise, how can one darley say that courts will discharge their obligations of protecting and enforcing the constitution? In refusing to apply a law or decision on the ground of its contradiction with the Constitution, courts need no interpretation of the constitution. What they are doing is mere declaration of repeal for such law or decision is void *ab initio* from the beginning. Of course even before declaration by the judiciary, the law or decision was invalid and non working for it cannot have life in clear contradiction with the supreme law of the land. Thus courts with out interpreting the constitution can decide on socio-economic rights.

At this juncture, important will be, the wordings of Assefa Fisseha who argues that the judiciary’s role in ‘respecting and enforcing’ fundamental rights and freedoms is clearly enshrined in Article 13 and this role of ‘respecting and enforcing’ fundamental rights and freedoms is illusionary unless the judiciary is, in one way or another, involved in interpreting

³⁴⁶ T Yonatan, Supra Note 341 above, at 18.

³⁴⁷ A Y Sisay. The justiciability of Human Rights in the Federal Democratic Republic of Ethiopia. Available at: <http://ssrn.com/abstract=1530825> (accessed on 25 November, 2010).

³⁴⁸ See FDRE Constitution. Art 9(1).

the scope and limitation of those rights and freedoms for which it is duty bound to ‘respect and enforce.’³⁴⁹ The author also shares his views.

However, practically most interviewed judges hold that, in case a provision in Chapter three of the Constitution needs interpretation, the role of the courts is limited.³⁵⁰ Yet, some others have the view that human rights issues shall be allowed to courts for most of them are recognized by instruments which are in one way or another adopted or ratified by Ethiopian government. This is clearly manifested by the appreciation of only few cases appearing before them. Although courts do not have the authoritative power to test the constitutionality of legislation enacted parliament, as laid down under Article 84(2), this does not imply that they do not have a role in the interpretation of and application of human rights norms, including social and economic rights, enshrined under the constitution. The role of the courts in the application of human rights provisions of the constitution is indicated under Article 13(1) of the constitution and one need not go in-depth to indicate and establish that courts have a role in enforcing human rights norms of the constitution³⁵¹.

The purpose of the above discussion is to show that judges are under confusion regarding their powers of enforcing human rights including socio-economic rights which undoubtedly will create less judicial role on their enforcement as also indicated during the interview with the judges.

Therefore, in the presence of the above arguments against the role of the judiciary in the interpretation of constitutional provisions, it will be wise for courts to resort to use the ICESCR, ACHPRs provisions in instances of ambiguity and uncertainty of the provisions of the Constitution on these rights. This is justified on the basis of the fact that the treaty is ratified by the country, making it part of the law of the land under Article 9(4), and that the provisions of the Constitution on human rights generally should be interpreted in conformity with international treaties and, that courts are obliged to use international law and treaties as a source of law in resolving disputes brought to their attention.

³⁴⁹ T F Yonatan. Supra Note 341 above, at 15.

³⁵⁰ Interview with Ato Aysheshim Melese, Supra Note 316 above; see also the research conducted by Assefa Fisseha which showed that most judges at the three tiers think that they have limited or no role in enforcing and interpreting chapter three of the Constitution in F Assefa, Supra Note 12 above, at 122.

³⁵¹ The reading of the provisions of the Proclamation giving the authoritative power to interpret the constitution to the *House of Federation* as well as the provisions dealing with the powers of the *Constitution Inquiry Council*, *Proclamation 250/2001* and *Proclamation No. 251/2001* respectively do not exclude the role of courts in interpreting the constitution

This will help courts enforce social and economic rights regardless of the diminished position given to these rights under the constitution and irrespective of the constraints in the incorporation of treaties in domestic law. Thus, even if the Constitution has given the final power of interpretation of the constitution to the political body, courts have the competency and the legitimacy to involve in the enforcement of human rights under the constitution. This is more vivid and less challengeable in the application of international instruments ratified by Ethiopia.

4. 5.3 Ouster Clauses against Powers of Courts

We have seen that courts are important organs to settle disputes and provide remedies in various aspects of individual lives. The Ethiopian courts are thus required to discharge their obligations imposed under the FDRE Constitution to assure the supremacy of the constitution. In this regard, they need to maintain their integrity and independence. One instance of which is the preservation of judicial power vested on them by the constitution.

Currently, however, in Ethiopia, there is an increased tendency of establishing by law administrative agencies and tribunals outside the regular judiciary with some adjudicatory powers that takes away the powers of courts.³⁵² In Ethiopia there are specialized administrative tribunals that engage in quasi-judicial activities at the federal and state levels. To mention some are the Civil Service Tribunal,³⁵³ the Labour Relations Board,³⁵⁴ the Tax Appeal Commission,³⁵⁵ and the Urban Land Clearance Matters Appeal Commission.³⁵⁶ The essential common feature of tribunals is that their decisions on questions of fact are final and non-appealable, while their decisions on questions of law are appealable to the regular courts (to the High Court or the Supreme Court, or to the Cassation Division of the Supreme Court as the case may be.)³⁵⁷

There is an expectation that administrative tribunal decisions and decision-making have a role to play in ensuring that there is fairness and consistency in the treatment of individuals by government; that there is an improvement in the quality and consistency of agency decision-making beyond the individual case; and that there is an improvement in administration

³⁵² F Assefa. Supra Note 12 Above, at 114.

³⁵³ See the Civil Servants Proclamation No. 515/2007; Articles 74-78.

³⁵⁴ The Labour Proclamation No. 377/2003; Articles 144-156.

³⁵⁵ The Income Tax Proclamation No. 286/2002, Articles 104- 117.

³⁵⁶ Proclamation No. 27/96, Articles 25-36.

³⁵⁷ See Independence, Transparency and Accountability in the Judiciary of Ethiopia; Prepared by the National Judicial Institute For the Canadian International Development Agency (2008) ,110-111.

generally through the adoption of the values inherent in administrative review.³⁵⁸ Yet, tribunals are clearly part of the executive branch and are accountable to the courts in the same way as other executive decision makers. Though tribunals are independent of the decision-making structure within which primary administrative decisions are made, they are still part of that structure³⁵⁹ – and there is no guarantee whether they do not side with the executive.

Most of these laws that are under the jurisdiction of such tribunals are related with the socio-economic rights of individuals and hence obstacles which add additional weight to the argument that socio-economic right should not be justiciable. These kinds of laws are not, at least to the opinion of the researcher and Assefa Fiseha too, in light of the sprits of the constitution for the fact that the constitution under art 78(4) states: “*Special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established.*”³⁶⁰

This reliance on the administrative complaint system and the quasi-judicial powers within the executive should not be encouraged for they lack the security of tenure, legally binding procedures, expertise enjoyed by the judiciary, the impartiality and due process that constitute the cores of the judicial process.³⁶¹

The interviewed judges also share the view that the executive organ has shown a tendency to take away the normal power of courts. According to some of the judges³⁶² this is the direct implication of the weak performance of the judiciary. Unless the judiciary can expand its powers and can create meaningful challenge on the acts of the executive, most powers will be ousted and the courts will remain only in handling private litigations. In this regard, the Council of Constitutional Inquiry (CCI) with its powers³⁶³ to investigate constitutional

³⁵⁸ G Fleming. Administrative Review and the Normative Goal: Is Anybody Out There? 28 Federal Law Review (2000) 63.

³⁵⁹ L. Pearson. The Impact of External Administrative Law Review: Tribunals; Available on line at: <http://ssrn.com/abstract=1358701> (Accessed on 12 November, 2010.).

³⁶⁰ See FDRE Constitution, Art 78(4).

³⁶¹ F Assefa, Supra Note 12 above, at 115; see also M Yoseph, Supra Note 143 above, at 46. Interview with Ato Ali Mohammed Ali. Supra Note 319 above.

³⁶² Interview with Ato Sultan Abatemam who is currently a judge at Federal Supreme Court, at filtration Bench of the Cassation Division, interviewed on 04 November, 2010. See also interview with Belachew Anshiso who is currently a judge at Federal Supreme Court. He had been V/ President of the Supreme Court at SNNP, interviewed on 06 November, 2010

³⁶³ Article 84 (1) of the FDRE Constitution provides: the Council of Constitutional Inquiry shall have powers to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of the Federation. See the

disputes and submit its recommendations thereon to the HOF held that the House of Peoples Representatives can determine which matter shall be justiceable and which is not; it is also admitted that this act of the takes away the power of courts. One manifestation of which as said above is giving the power to administrative tribunals.

According to some interviewed judges³⁶⁴ and Asseffa Fisseha,³⁶⁵ the judiciary by itself has been assisting the legislature in taking away its powers and granting it to administrative tribunals. In number of cases the Cassation Bench of the Supreme Court has quashed the decisions of the lower courts rendered on the review by declaring the decisions of the administrative tribunals as final and hence are not subject to judicial review.³⁶⁶

The discussion reveals that the different laws establishing administrative tribunals actually are narrowing down the roles of courts. Of course, their establishment will assist the development of the state for individuals can get immediate solutions; even there is the possibility of correcting the wrongs made before such tribunals. The question here is why these organs should get final say? As indicated above they are part of the administrative (executive) organ which is at forefront in the violation of human rights and as part of it, there is high possibility to favor the government over private individuals. These tribunals shall have power only to handle conflicts in intermediary basis. On the other side, we have said that courts should get the legal competency and are legitimate if involved in the adjudication of socio-economic rights. The abuse of power might prevent individuals not to enjoy their legal rights indifferent laws of the country. Taking one instance will suffice: an individual might be ordered to clear his property or leave his land under the guise of public interest, how can he challenge the clearance and get sound remedy (which might include reinstitution to the land)? The only option is to challenge in appeal before Urban Land Clearance Appeals

recommendations of the CCI on the application, for constitutional interpretation by Federal *Civil Servants Agency administrative Tribunal*, F/No.CCI/101/12/2001, at 3. Of course, as manifested in most its recommendation, it is likely that most recommendations get approval by HOF.

³⁶⁴ Interview with Ato Ali Mohammed Ali. Supra Note 319 above. See also interview with Eyob Silesh who is Assistant judge at Federal First instance Court; interviewed on 02 November, 2010. Mesfint Ashenef who is currently a Assistant judge at Federal Supreme Court interviewed on 03 November, 2010

³⁶⁵ F Assefa. Supra Note 12 above, 113-116.

³⁶⁶ *Government Houses Renting Agency v. Ato Mersie Menberu's Successors*, Federal Supreme Court, Cassation division, F/No. 31906, Decided on 04 Hidar, 2001 E.C.; See also *Gedera Hotel PLC V. Commercial bank of Ethiopia*, Federal Supreme Court, Cassation division, F/No. 33552, Decided on 24 Hamle 2000 E.C.; *Mahberawi Wastina Belesiltan v.ato Bahiru Hiruy and Ato Kebede G/Mariam* Federal Supreme Court, Cassation division, F/No. 18342, Decided on 17 Tahsas 1998 E. C, as cited in FAseefa, Supra Note 12 above at 116.

Commission.³⁶⁷ The problem is more aggravated in the Agency for Government Houses Establishment Proclamation,³⁶⁸ in which case there is no remedy if the agency violates the terms of the contract and individuals are ordered to hand the house in which they reside. Thus the socio-economic right of individuals which has got constitutional guarantee is finally decided neither by the HOF nor by judiciary.

4.5.3 Perception of the People towards the Judiciary

Public perception of the courts as impartial and accountable is undoubtedly the best indicator of overall judicial integrity, and positive changes to this perception would constitute one of the best measures of progress.³⁶⁹ It is accepted that in developing countries, where there is infant democracy, the socio-political system is unsuitable to an independent and vibrant judicial system.³⁷⁰ This undoubtedly will have an impact on the role of courts to promote universal protection of human rights within the country. It is further asserted that the Ethiopian judiciary is actually weak and backward which is not in a position to stop human rights violations.³⁷¹ The judiciary has not yet asserted its pure independence and compromised its efficiency to deliver qualified justice.³⁷²

It is easier to conclude that this actual trend has strong effect on the negative perception of the public at large towards the judiciary especially on socio-economic rights based litigation for the fact that the respondent here is the government, directly or indirectly through its branches or administrative agencies. Of course, history also evidenced that in Ethiopian history there has always been an underlying rationale for people to consider the judiciary as an instrument of the executive organ of the government. This is strengthened by the open

³⁶⁷ See art 16(3) of Re-Enactment of Urban Lands Lease Holding Proclamation, Proc. No. 272/2002 which provides that It is only before the following bodies that any justifiable claim relating to a clearance order or a warning notice may be invoked: primarily only before the body which has issued the order, on appeal before Urban Land Clearance Appeals Commission, and, on appeal concerning compensation claims only, before the High Court having jurisdiction over the place where the property is situated or before the Municipal Appellate Court.

³⁶⁸ Looking the contents of Agency for Government Houses Establishment Proclamation, Proclamation No. 555/2007, Federal Negarit Gazeta No. 2 13th December, 2007, provides no remedy for individuals.

³⁶⁹ Independence, Transparency and Accountability in the Judiciary of Ethiopia: Prepared by National Judicial Institute for the Canadian International Development Agency (2008) 175. Available at: www.nij.ethiopian-judiciary-assessment.pdf (Accessed on 29 October, 2009).

³⁷⁰ This idea is supported by most of the interview judges who assert that due to the weak jurisprudence of the judiciary regarding enforcement of human rights, most of the cases brought before the court are among private individuals which are based on domestic laws of the country that governing private relationships such as contract, family, succession etc.

³⁷¹ Human rights watch, 2003 Country Report (Available on line at: www.hrw.org/doc (Accessed on August 10, 2010.))

³⁷² Most of the interviewed judges share this concept. They further held that in the Ethiopian judiciary, the accountability of judges is by far greater than their personal and institutional independence.

practice of every new regime in setting up its own version of the judiciary to suit its mission.³⁷³ According to some of the interviewees³⁷⁴ the negative perception of the public exists in reality one instance of manifestation is the ignorance of society to consider courts as solution givers in socio-economic litigations. The cases appearing before courts are mostly limited with criminal and civil litigations having private nature. Attached with disregarding of courts by society shows that they are not appropriate fora to solve socio-economic cases—hence lacks competence and legitimacy (to the views of the public). The interviewed judges, however, strongly advised the society not to conclude in advance. Particularly, Ato Wubshet emphasized that the current trend is different from the previous regimes for the fact that the previous laws themselves did not establish the judiciary for long period. In the current structure judges have security of tenure for up to retirement age and thus there is no means to conclude that the judiciary is highly influenced by the executive. However, as most interviewees accept, his assertion seems more of theoretical and the practice is the otherwise. In this connection, they assert that the judges are imposed with high accountability to their decisions than the institutional and personal independence of judges. Their assertion is supported by the research conducted by Ministry of Capacity Building which reached to the conclusion that *the general public does not believe that the judiciary is free from the influence of the executive organ of the government.*³⁷⁵ According to the interviewed judges, the practical problems on the operations of the judiciary are serious and shall get genuine solution. Yet, they also emphasised that there should exist strong judges who can really challenge the malpractice by the part of rulers mentioning the instance of judgments on suspects of corruption.

Yet, courts could actually handle socio-economic right based litigations as evidenced from the decision attached in this dissertation. (Find the attachment.) We have to note also that practical problems can be rectified if the government and the judiciary are committed to provide their full protection through the involvement of courts.

³⁷³ F. Asssefa. Federalism and the adjudication of Constitutional Issues: the Ethiopian experience; *The Netherlands International Law Review* (2005) 125.

³⁷⁴ Interview with Wubshet Shiferaw. Supra Note 318 above; See also interview with Zenebech Kibrtie who is a judge at Federal First instance Court, interviewed on 05 November, 2010.

³⁷⁵ FDRE General Justice Research Programme Research Report: Ministry of Capacity Building, Justice Research Programme Research Office, (2005) 170. (Translation: Author)

4.6 Other Major Impediments on the Performance of the Judiciary in the Adjudication of Socio-Economic Rights

4. 6.1 Ambiguity on Status of International Instruments in the FDRE Constitution

The Status of international human rights instruments in Ethiopian law has always been controversial. Thus this area poses challenges on the appropriate role of courts as far as their enforcement is concerned. Of course, the problem exists in almost all international instruments ratified or adopted by Ethiopia. Most scholars and judges in Ethiopia unanimously agree that the problem emanates from the poor drafting of the FDRE Constitution itself. The constitution at some part³⁷⁶ declares its supremacy over any law including international instruments-to which socio-economic rights instruments belong. The Constitution further provides, under Article 9(4), that international conventions ratified by Ethiopia are part of Ethiopian law. The same constitution which declares its absolute supremacy provides under art 13(2) that: *“The fundamental rights and freedoms specified in chapter three of the constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.”*³⁷⁷

The insertion of the phrase “... in a manner conforming to...” shows that the constitution is not supreme to the above human rights instruments. Thus the above wordings of the constitution itself leads one most notable scholars and judges³⁷⁸ to consider the constitution as subordinate in hierarchy to international human rights instruments –something directly contravening what is stated in art 9(1).³⁷⁹ This creates problem on the part of the judiciary while handling cases involving conflicts between the constitution and international instruments. Taking the stand followed in right to life as derogable³⁸⁰ in the FDRE and non-derogable in ICCPR and ACHPRs suffice.

³⁷⁶ FDRE Constitution. Art 9(1) cum 9(4) provides that the constitution is above any law including international instruments ratified by Ethiopia.

³⁷⁷ See FDRE Constitution, Art. 13(2)

³⁷⁸ Interview with Ato Ali Mohammed Ali, Supra Note 319 Above.

³⁷⁹ In this regard the 1955 revised Constitution of Ethiopia clearly provides that international treaties and instruments have equal status with the then constitution and hence better in drafting.

³⁸⁰ In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Articles 1, 18, 25 and sub-Articles 1 and 2 of Article 39 of this Constitution. *Accontrario* reasoning implies that right to life is derogable under the FDRE Constitution.

According to Ato Ali courts should apply and interpret international instruments even in the presence of actual conflict with the constitution-hence they can interpret the constitution to the extent it relates to these sets of instruments. Here, raising the duties of states under Vienna Convention law of treaties³⁸¹ which provides that domestic laws, including constitutions, cannot serve as defence for failure to discharge international obligations.

Other interviewed judges³⁸² strongly oppose the above justifications saying that in every aspect the supremacy of the constitution shall be preserved. They added that, international instruments, most of the time, if not always, are manifestations of the Western developed states. Thus in case of conflict between these instruments and the constitution the latter shall prevail.

The above discussions are made to show to what extent judges are confused to apply international human rights instruments including provisions of ICESCR and ACHPRs. It is more problematic when the conflict is between the constitutions and the instruments, the power of which according to those who stick with constitutional supremacy clause even in human rights cases, shall be vested only to HOF. The ultimate effect as the practice evidenced is disregarding in applying international instruments before courts. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country engages for the purposes of removing ambiguity or uncertainty from national constitution, legislation, etc irrespective of whether or not they have not been incorporated into domestic law.³⁸³

Generally, the attitude and related practice of the judiciary towards its appropriate role is weak. This is attached mostly not with the academic debates rather on the weak judicial jurisprudence.³⁸⁴

4. 6.2 Problems Emanating from the Non-publication of International Instruments

Without clearly providing the requirements for publication, the FDRE Constitution under its Art 9(4) provides that international treaties will be part and parcel of the domestic law upon ratification. This creates different understanding and ambiguity among lawyers and judges.

³⁸¹ Vienna Convention on Law of Treaties, Art 26.

³⁸² Interview with Ato Menberetsehay Tadesse, Supra Note 315 above; See also interview with Aysheshim Melese, Supra Note 316 Above.

³⁸³ *Bangalore Declaration and Plan of Action*, Bangalore, India, in 1995, principle 7.

³⁸⁴ Interview with Ato Zerihun Bodie, Supra Note 318 above,

While some consider publication with official translation in Negarette Gazette as essential requirement for judicial notice, others argue that mere ratification suffices. This in one way or another, poses challenges on the domestic application of international instruments ratified by Ethiopia to which socio-economic right instruments belong. This has created confusion and has become a setback to the implementation of these instruments by courts.

Those in favor of publication posit that the Constitution mentions that federal laws or international agreements should be published in the Negarit Gazette to be implemented at court of law.³⁸⁵ They strengthen their views for the fact that the Constitution provides that the President of the country shall proclaim international agreements approved by the House of Peoples' Representatives in the Negarit Gazette.³⁸⁶ The problem in this regard is that, except for The Child Rights Convention, others including ICCPR, ICESCR, CEDAW, etc. are not published in the Negarit Gazette. To that end, most international treaties including ICESCR are not published even with their crudity let alone translations to Amharic language. However, assurance for ratifications has been submitted to respective international bodies. In effect, whether or not courts could invoke international instruments to adjudicate cases is still debatable. The fact that the documents are not translated in to the working language of the Federal government and other vernacular language is another problem to enforce international human rights instrument in domestic courts.

Strengthening this view, some of the interviewed judges³⁸⁷ argue that non-publication of international human rights instruments shall be seen in light of the language capacity of judges particularly of in the first tier of the courts which will cause them to disregard to entertain petitions that base themselves from international human rights instruments. It has to be underscored that the instruments particularly ICESCRs and other Socio-economic rights that provide the rights in more detailed manner are vital for Ethiopians as the constitution provides these set of rights in crude forms comparatively. At this juncture, the role of the Committee on ESCRs, in elaborating the contents of the rights through its interpretative mandate shall be considered as far as domestic application of the rights is taken in to account.

³⁸⁵ APAP. *Problems and Prospects in Enforcing Economic, Social and Cultural Rights in Ethiopian Courts; Vol. 5, Issue 1, 2001 as cited in* Collected Articles from bi-annual English language Newsletter of APAP "AWARENESS" (2006) Available at <http://www.apapeth.org/Articles/ProblemsEnforcingESCRights.html> (Accessed on 12 Oct. 2010)

³⁸⁶ See FDRE Constitution, art 71(2).

³⁸⁷ In this category belong Ato Ali Mohammed Ali , Supra Note 319 Above and Ato Aysheshim Melese. Supra Note 316 Above.

4. 6.3 Absence of Domestic Legislation on the Contents of Socio-economic Rights

Article 2(1) of the *ICESCR* gives due emphasis to the adoption of legislative measures in order to achieve the realization of the rights enshrined under the Covenant at the domestic level and the same is emphasized by the Committee on Social, Economic, and Cultural Rights³⁸⁸. Domestic legislation is the key instrument in the sense that the justiciability of social and economic rights is largely dependent on the existence of legislation that relates to the implementation of particular right.

Besides, legislation plays pivotal role in coordinating and organizing state organs and non state-actors while enforcing these sets of rights. Also, the roles and responsibilities of such actors may be precisely stated through legislation which can assist in discharging their duties towards same.³⁸⁹ Legislations have a significant purpose in putting forth the detailed content and scope of socio-economic rights. It tends to be more precisely formulated than constitutional standards and international treaties. It helps to reduce the strong argument that these rights are not justiciable. Thus, by making the content and scope of socio-economic right more specific through legislation, it is possible to make it easier for courts and other institutions in enforcing and protecting these rights.³⁹⁰

All of the interviewed judges are of the opinion that the existing specific laws³⁹¹ are not sufficient to apply socio-economic rights before courts of law. As discussed above, direct application of socioeconomic rights under the constitution and /or other instruments is not actually effective which could be evidenced from the absence of huge number of cases in relation to their civil and political counterparts. At the same time using and applying different proclamations and regulations is accepted as normal business of courts. Thus, it will be easier for individuals to base their cases from such laws and for courts to pass decisions thereby the question of justiciability will no more be subject of debate.

³⁸⁸ CESCR General Comment 3. Para 3.

³⁸⁹ See also interview with Mekonnen G/Hiwot, a judge at Federal high Court, interviewed on 24 October, 2010 and most the interviewed judges share this idea.

³⁹⁰ W Teklegzi. Enforcement of Socio-Economic Rights in Federal Courts: In Addis Ababa, Senior Essay. AAU (2009) 25 (unpublished).

³⁹¹ Labour Proclamation 377/2003); (Environmental Protection Proclamation 295/2002; Environmental Pollution Control Proclamation 300/2002; and Environmental Impact Assessment Proclamation 299/2002). Yet, they are not sufficient to cover and some others are policies than specific laws.

4.6.4 Absence of Public Interest Litigation (PIL)

Public interest litigation according to Black's Law Dictionary is "*a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.*"³⁹²

The emphasis placed in the above definition seems to be more on the legal rights and liabilities of the class or group. Yet, public interest litigation goes to the extent of creating legal and social norms that could be used to shape future actions.³⁹³ One of the means of assisting victims and claimants of rights is, realizing their rights through public interest litigation. Public interest litigation helps in lodging cases before courts and in raising the quality of legal arguments presented in litigation, which may lead to winning a case before courts and other law-applying bodies³⁹⁴. In a growing number of countries public interest litigation is used – and proposed – as a strategy to influence social policy in fields such as health, environment, housing, land, education and gender. Activists see it as a channel through which the voice of the marginalized can be articulated into the legal-political system and as a mechanism to make the state more responsive and accountable to their rights.³⁹⁵ The experiences of India and South Africa manifest good example. In India, public interest litigation has been developed over years and in South Africa community based organizations initiate cases on behalf of victims and legal resource centers intervene through *amicus curie* briefs.³⁹⁶

In Ethiopia, too, it is submitted that effective enforcement of constitutionally guaranteed rights and freedoms in Ethiopia can greatly enhance the process of democratization and societal transformation. The Constitution has yet to become a living document that affects the daily lives of Ethiopians in a meaningful way as it is declared to be an expression of Ethiopian citizen's strong commitment to build a political community founded on the rule of law and guaranteeing a democratic order and advancing economic and social

³⁹² Black's Law Dictionary, 1990.

³⁹³ M Yoseph, Public Interest Litigation As Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia? LL.M Thesis, Human Rights And Democratization In Africa, Faculty Of Law, Centre For Human Rights, University Of Pretoria ,(2005) 7.

³⁹⁴ Fons Commans, in Fons Coomans ed, Supra Note 237 Above, at 8.

³⁹⁵ S Gloppen, Public Interest Litigation, Social Rights and Social Policy: New Frontiers of Social Policy conference paper, Christian Michelsen Institute (2005)2.

³⁹⁶ S Gloppen, Id.

development.³⁹⁷The prevalence of the rule of law requires an increased respect and protection of human rights as constitutional and statutory guarantees in a manner that makes them applicable to a wider section of the public at large.³⁹⁸

In Ethiopia, taking into account lack of awareness on the part of majority of the people³⁹⁹ accompanied with the financial inability to follow up their cases, PIL will have irreplaceable role in the litigation of socio-economic rights. The judges further held that there is no specific law that allows individuals or group of individuals or NGOs to bring cases of public interest and litigate on behalf of others. Some of them⁴⁰⁰ and concluded that, courts actually will disregard PIL for lack of vested interest under the Art 33 of the civil procedure code and thus on the ground of lack of standing. At this juncture, the prohibition of NGOs under the new Ethiopian Charities and Societies Proclamation⁴⁰¹ not to engage in the advancement of human rights shall be taken as imposes additional impediment on PIL.

Some laws such as the Environmental Pollution Control Proclamation provide broad application of standing.⁴⁰² This is manifested in *Action Professionals Association for the people (APAP) v. Environmental Protection Authority(EPA)* case,⁴⁰³ which is directly related with environmental pollution released from industries to Akaki and Mojo rivers, the Federal First Instance Court rejected the application on the ground that EPA is not proper authority to be sued. Of course, the decision has been affirmed both before the Federal High Court and Supreme Court. Though the court failed to acknowledge the duty of the Authority to discharge its duty of protection from the intervention of non-state actors as well, it is also relevant in that, at least impliedly the standing of APAP was not challenged for it can sue the actual industry, on behalf of the peoples of Akaki that causes the pollution.

A broader application of the term “everyone” under art 37(1)⁴⁰⁴ of the Constitution implies that it could also be applied to include persons (natural or juristic), who seek to litigate in

³⁹⁷ FDRE Constitution. Preamble, Para 1.

³⁹⁸ M Yoseph, Supra Note 393 above, at 8.

³⁹⁹ All the interviewed judges have the view that lack of awareness by the part of the society is one factor that should be considered if we need proliferation of cases loaded with socio-economic aspects.

⁴⁰⁰ Interview with Aysheshim Melesse, Supra Note 316 Above; see also interview with Sultan Abatemam, Supra Note 393 above.

⁴⁰¹ See Charities and Societies Proclamation, Proclamation No. 621/2009, Federal Negarit Gazeta No. 25 13th February, 2009, Art 14(2) (j) and 14(5).

⁴⁰² Environmental Pollution Control Proclamation, Proc. No. 300/2002, Federal Negarit Gazeta - No. 12 3, December, 2002 under Art 11(1) Provides that any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment.

⁴⁰³ *Action Professionals Association for the people (APAP) v. Environmental Protection Authority*, Federal First Instance Court, Arada Bench, F/No. 64902, 21 Tikimt, and 1999 E.C. as cited in W Teklezgi Supra Note 39, at 42.

⁴⁰⁴ See FDRE Constitution, Art 37(1).

pursuit of interests of others.⁴⁰⁵ The other possible outlet is exploring the role of federal advocates before court of law. Every advocate is required to provide minimum of fifty hours a year legal service free of charge or upon minimal payment to: 1) persons who can not afford to pay 2) charity organizations, civic organizations, community institutions 3) persons for whom a court requests legal services and 4) committees and institutions that work for improving the law, the legal profession and the legal system.⁴⁰⁶ The fact that the overwhelming powers of licensing, supervision and regulation of the conduct of advocates are exclusively exercised by a government organ may have the effect of discouraging advocates from taking up cases against the government. Yet, holders of special advocacy license who seek to defend the general interests and rights of the society can create substantial influence.⁴⁰⁷ The provision of a special license scheme for public interest advocates and the mandatory requirement of pro bono service could be taken as a positive gesture to assist the efforts of those who would seek to litigate in the public interest.⁴⁰⁸

Coming to the practice, the interviewed judges informed me that there is no practice of bringing the cases of others under socio-economic litigations.

⁴⁰⁵ M Yoseph, Supra Note 393 above, at 40.

⁴⁰⁶ Federal Court Advocates' Code of Conduct Regulations No. 57/1999, article 49.

⁴⁰⁷ M Yoseph. Supra Note 393 above, at 46.

⁴⁰⁸ M Yoseph. id.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Socio-economic rights are rights that provide conditions in which people live and work. They give people a claim to an adequate standard of living and stress the quality of life in both a material and moral sense. Socio-economic rights are also those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water, and shelter, education, health care and housing. They are also related to aspects of employment, particularly the protection of workers and the conditions in which people lead their lives. They provide particular protections to the poor and marginalized groups in societies and hence survival rights. The research shows that these rights have got recognition under ICESCR, ACHPRs and other international instruments to which Ethiopia is a party.

However, it has been argued that there are fundamental differences between ESCR and Civil and Political Rights (CPR). These two categories of rights have been considered as two different concepts and their differences were taken as a dichotomy and lots of arguments are forwarded in this regard. Whatever arguments are forwarded, the general accepted position today is that the two concepts and set of rights are, in the words adopted by the second world conference on Human Rights in Vienna, “*universal, indivisible and interdependent and inter related.*”

Courts are the central organs in the application of socio-economic rights. Yet, strong objections are forwarded against the role of regular courts. Competence and the legitimacy are the central question against the judicial involvement in the enforcement of ESCRs in democratic societies. However, in the last few years even democratically-oriented scholars have begun to focus on socio-economic rights to look for their justification in the moral obligations of the state, solidarity of social groups, and the principles of equality, dignity and justice proposing that the role of courts in such socio-economic rights should extremely be vital and thus courts are accepted as appropriate organs regarding socio-economic rights like they do in other sets of rights.

Regarding the issue, UN has the stand that in the context of International Human Rights (IHR) treaties, there can be little doubt that enforcement of IHR norms through domestic

courts could be far more effective than methods of enforcement available at the international level (e.g., through treaty bodies such as UN Committees, or inter-state communications), which are less accessible to individual victims and less likely to generate compliance by the state in question. The Committee on ESCRs held that any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial remedies. The Committee on ESCRs in its General Comment 9 emphasised on the essence of domestic courts in the enforcement of socio-economic rights. The adoption of optional protocol on ESCRs is also basic and interesting evidence that dictates the stand of UN towards the justiciability of socio-economic rights. Though the terms competency and legitimacy are not directly touched, the implied assertion of the above stand is acceptance of the competence and legitimacy of domestic courts to which Ethiopian courts as well belong.

The experiences of the regional arrangements under the European, Inter-American and African Human Rights Systems showed similar stand with the United Nations though the applicability and enforcement of socio-economic rights is at its infancy when compared to their civil and political counterparts. The endeavors in each regional arrangement are encouraging for the volume of practical cases appearing before regular courts are increasing from time to time. For instance, the jurisprudence of the African Commission shows that socio-economic rights are justiciable for they have been included in a single document.

Coming to the selected domestic jurisdictions, which shows best practices towards the judicial scrutiny of socio-economic rights and hence are pivotal for Ethiopian aspect, for instance, the Constitution of Republic of South Africa has recognized many sets of socio-economic rights as equally justiciable as CPRs. Accordingly, individuals have brought violations of these rights and courts have passed decisions against the government in interesting decisions that even could attract the attentions of lawyers and scholars across the globe. Researches also show that following these judgments, the living conditions of many marginalized groups in South Africa has been improved in many aspects.

In India, on the other hand, though the Constitutions has provided socio-economic rights under its DPSP-hence non-justiciable, the courts have considered them justiciable by broadly interpreting civil and political rights such as right to life as they include socio-economic rights in them.

The above illustrations are indications that socio-economic rights in international, regional and selected domestic jurisprudence are subject of judicial scrutiny which can share strong lesson to Ethiopian infant practice on handling these sets of rights.

Regarding the appropriate role of courts on the adjudication of socio-economic rights before Ethiopian Courts, there are many theoretical and practical challenges. Ethiopian courts are subjected to criticisms for judges are not representative of the different Nations, Nationalities and Peoples of Ethiopia. However, the issues of technical competence were not peculiar to only socio-economic rights; they are also challenges to adjudication in CPRs. What is more problematic according to the interviewed judges is legal incompetence-that basically emanates from the FDRE Constitution. The fact that interpretation of constitutional dispute is vested upon HOF creates confusion on judges themselves whether they have power of interpretation of human rights provisions under Chapter Three of the FDRE constitution. Of course, this research shows that most of the interviewed judges have the stand that they have almost no role in the interpretation of Human Rights provisions of the Constitution. This is further aggravated by the recognition of socio-economic rights in crude terms which necessitate interpretation. Yet, when the provisions are clear, courts can directly apply them and order appropriate remedy for the victims of violations. Still close look at the constitution, the out let is to opt for international instruments which are ratified by Ethiopia for they form part and parcel of the domestic laws like proclamations and regulations the application of which is directly vested on courts. Interestingly, these international instruments provide more detailed enumerations and further elaborations through the assistance of established bodies (such as Committee on ESCRs). Therefore, in the presence of legal impediments, reference to these sets of instruments is the best viable option if we need the proper enforcement of socio-economic rights before Ethiopian Courts.

The other area of challenge regarding competence and legitimacy in Ethiopia is establishment of administrative tribunals. Currently, in Ethiopia, there is an increased tendency of establishing by law administrative agencies and tribunals outside the regular judiciary with some adjudicatory powers that takes away the powers of courts. This reliance on the administrative complaint system and the quasi-judicial powers within the executive should not be encouraged for they lack the security of tenure, legally binding procedures, expertise enjoyed by the judiciary, the impartiality and due process that constitute the cores of the judicial process. Moreover, though tribunals are independent of the decision-making structure

within which primary administrative decisions are made, they are still part of that structure – and there is no guarantee whether they do not side with the executive.

Negative perception of the public towards the judiciary also became other ground for the appearance of few cases before regular courts. It is argued that in developing countries like Ethiopia, where there is infant democracy, the socio-political system is unsuitable to an independent and vibrant judicial system. This actual trend has strong effect on the negative perception of the public at large towards the judiciary especially on socio-economic rights based litigation for the fact that the respondent is the government, directly or indirectly through its branches or administrative agencies. The interviews further assert that the judges are imposed with high accountability to their decisions than the institutional and personal independence of judges. Yet these problems can be rectified if the government and the judiciary are committed to provide their full protection through the involvement of courts. Generally, all these are not sufficient grounds to prevent courts in their involvement in the enforcement of socio-economic rights.

The other impediments for the enforcement of socio-economic rights by the part of courts that are manifested during interview includes: ambiguity on status of international instruments in the FDRE Constitution, problems emanating from the non-publication of international instruments, absence of domestic legislation on the contents of socio-economic rights and absence of public interest litigation (PIL).

Yet, all the problems are at the hand of the judiciary, the legislative and the executive branches of the government and this cannot be taken as an absolute hinderance to courts involvement in socio-economic rights. The problem also lies on the judiciary itself for the attitude and related practice of the judiciary towards its appropriate role is unsatisfactory owing to the weak judicial jurisprudence. Thus, Ethiopian courts are competent and have the legitimacy in handling these sets of rights when the problems are rectified by joint actions of the judiciary and the government.

5.2 Recommendations

Based on the findings of the research, the author forwards the following recommendations because, at least to the opinion of the researcher and most of the interviewed judges, the solutions are in the hands of the judiciary in particular and the government at large.

1. Developing Habit of Applying Constitutional Provisions

The research reveals that courts are reluctant to apply constitutional provisions even when are directly stated and needs no further interpretations. What is arguable in the Ethiopian constitution is interpretation of the constitutions. The practice, however, shows that no body opposes courts in applying constitutional provisions and thus they have to develop this habit of application of the constitution to grant remedies on socio-economic rights. Interestingly, indirect application of socio-economic rights by combining them with traditional civil and political rights is the most feasible way of enforcing these sets of rights.

2. Reliance on International Instruments Ratified by Ethiopia

The research reveals that international instruments particularly those loaded with socio-economic rights do not get their appropriate referral they deserve under Ethiopian Courts. These instruments are more specific and elaborated when compared with the recognitions under the FDRE constitution. The related arguments lie on the ambiguity on their status and non-publications under Negarit Gazette. However, the application of international instruments is the sole jurisdiction of the federal Courts which are filled with judges having better experience and training. The translation of English-based instruments to Amharic is not found to be as such challenging. Of course, formal publication will ease the functioning of the judges. Hence, courts should apply them directly rather than ignoring them owing to language problems.

3. Raising Awareness of the Judges and the Public

A number of the interviewed judges have no basic knowledge on the features of socio-economic rights. Like any lay men they assimilate socio-economic rights as rights that should totally be left to the discretion of the executive branch believing that they are usually resource demanding not considering rights per se. There are judges who do not know the concept of minimum core let alone its application to real cases. On the other hand, the judges themselves admit that the society even do not consider them as rights that can be claimed before regular courts. This undoubtedly necessitated the basic stake-holders such as Human rights Commission, the Institute of Ombudsman, Ministry of Justice, and Civic Societies to engage in raising the awareness of judges and the public at large to have better Ethiopia where individuals can claim their socio-economic rights upon violation.

4. Active Involvement of the Judiciary

The research reveals that the judiciary, even in the few appeared cases, does not show consistency; even there are also situations where the Cassation Bench reversed the decisions of lower courts on the ground that courts have no jurisdiction to review the decisions of the administrative tribunals. Thus, Courts particularly, the cassation bench shall be strong enough to maintain the appropriate role of courts regarding socio-economic rights for its interpretation of laws has binding force on lower courts. On the other hand, the experience of India showed that courts using their activism today stand as protector of socio-economic rights that were considered non-justiciable at the beginning.

5. Revising the Existing Legislations and Enacting New Legislations

Obviously, one basic challenge for the proper role of courts on socio-economic rights by the part of Ethiopian Courts is the act of the legislator that takes away the power of regular courts on certain socio-economic rights of individuals and vested on administrative tribunals. While administrative tribunals are considered part of the executive and hence susceptible, at least arguably, to impartiality, regular courts are neutral and watch dog of the people and they should not be barred from enforcing these sets of rights. This requires the legislative organ to reconsider and amend the specific laws mentioned in this research.

On the other side of the coin, the constitution, which is the mother for other legislations, recognized these rights in crude forms. The enactment of specific laws that elaborate these rights is essential if we need individuals to get remedies before regular courts.

6. Conducting Research

It is common in Ethiopia that certain human rights researches are conducted by judges, University instructors, NGOs and other researchers. Yet, these researches are mostly devoted to find solutions on problems related to civil and political rights. Thus, this author begs different stake-holders to devote their time and resource (e.g. in assessing the real perception of the people towards the judiciary) in the realization of socio-economic rights in Ethiopia.

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Interview with Belachew Anshiso, a judge at Federal Supreme Court, 06 November, 2010.

Interview with Mesfint Ashenef, Assistant judge at Federal Supreme Court, 03 November, 2010.

Interview with Wubshet Shiferaw, President of Federal High Court, 27 October, 2010.

Interview with Ato Aysheshim Melese, a judge in Federal High Court, 24 October, 2010.

Interview with Ato Zerihun Bodie, a judge in Federal High Court, 28 October, 2010.

Interview with Mekonnen G/Hiwot, a judge at Federal high Court, 24 October, 2010.

Interview with Zenebech Kibrtie who is a judge at Federal First instance Court, 05 November, 2010.

Interview with Hussein Yimer, a judge at Federal First Instance Court, 05 November, 2010.

Interview with Berihun Aragaw, who is currently a judge at Federal First Instance Court, 28 October, 2010.

Interview with Eyob Silesh, Assistant judge at Federal First instance Court, 02 November, 2010.

APPENDIX-A

INTERVIEW GUIDE

I am Sisay Bogale, LL.M student at Law School, AAU. I am doing my LL.M thesis on a topic entitled: **Competence and Legitimacy of Ethiopian Courts in the Adjudication of Socio-economic Rights: An Appraisal of the Challenges and Prospects.** The purpose of the interview is to get deep insight on whether the Ethiopian courts are competent and legitimate to decide on socio-economic rights; and to identify other impediments against judicial enforcement of socio-economic rights in Ethiopia. Accordingly, the actual problems will be identified and solution will be suggested for better future endeavor.

Thanks in Advance!!!

1. Would you introduce yourself, occupation, position? _____

2. What are ESCRs for you? What differentiates them from CPRs? _____

3. What is the role of courts in the adjudication of ESCRs under the FDRE Constitution and other ratified human rights instruments? _____

4. Do you think that courts are competent (Legal competency, Technical and institutional competency) and are appropriate fora to adjudicate on ESCRs? _____

5. What other impediments faced on judicial enforcement of ESCRs in Ethiopia? What solution do you propose? _____

6. In case, the answer to Q4 is negative, what measures do you think should be taken on the part of the government? _____

APPENDIX-B

CASES

