

**THE INTEGRATED APPROACH: A QUEST FOR ENHANCING JUSTICIABILITY
OF SOCIO-ECONOMIC RIGHTS UNDER THE ETHIOPIAN CONSTITUTION**

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DECLARATION

I, Amsalu Darge Mayessa, hereby declare that the work submitted for this dissertation is the result of my personal effort and original work that, this work has not been submitted for any degree in any other University. Where any Sources, secondary or primary have been consulted, it has been duly acknowledged.

Signed

Date.....

Amsalu Darge Mayessa

I, Yared Legesse, have read this dissertation and approved it for examination.

Signed

Date.....

Yared Legesse

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ABSATRACTS

Socio-economic rights are newly emerging areas of human rights. These rights are forgotten for many decades at the global, regional and even primarily on the national fora compared to civil and political rights. This research is aimed at enhancing the justiciability of socio-economic rights enunciated in the FDRE Constitution by operationalizing the notion of indivisibility, interdependency and interrelatedness of the two grand categories of human rights through integrated approach. It looks at whether the same Constitution creates a workable environment for the integrated approach to give impetus to the enhanced justiciability of these forgotten rights on our national fora. This aspect of justiciability views socio-economic rights from civil and political rights dimensions for the latter rights are precise and not contended on their justiciability at the domestic arena. It further looks into the justiciability of these rights even within the same family of rights so as to boost their justiciability with ease. This is devised due to the vagueness, generality, and the terseness of constitutionally guaranteed socio-economic rights and the absence of subordinate legislations giving effect to constitutional and treaty-based human rights obligations. Therefore, the Ethiopian Courts should look for drawing inspirations from the jurisprudence of other jurisdictions and utilize the potential of integrated approach that uses the notions of indivisibility and interdependency of human rights in order to advance the justiciability and enjoyment of socio-economic rights via judicial protection for whom these forgotten rights are promised.

Key words: Indirect Justiciability; Integrated approach; Indivisibility; Interdependence; Interrelatedness of human rights.

List of Abbreviations

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
Art.	Article
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of Child
ECH	European Convention on Human Rights
ECHR	European Convention on Human Rights
Ed.	Editor
Edn.	Edition
Eds.	Editors
FDRE	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

No.	Number
NPPO	National Policy Principles and Objectives
OAO	Organization of the African Unity
P.	Page
Para.	Paragraph
Paras.	Paragraphs
Procl.	Proclamation
Rev.	Revised
RTD	Right to Development
SER	Socio-Economic Rights
SERAC	Social and Economic Rights Action Center
U.N.Doc	United Nations Documents
UDHR	Universal Declaration of Human Rights
UN	United Nations
Vol.	Volume

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CHAPTER ONE

1. INTRODUCTION

1.1. Background and Literature Review of the Study

Economic and social rights are an important body of the normative international code of human rights. They have their root in the Universal Declaration of Human Rights (herein after UDHR) which tells us the integrated nature of all human rights and the notion of inseparability of socio-economic rights from civil and political rights though it does not clearly reveal the explicit solidarity of all human rights. It (UDHR) embodies one consolidated text almost the whole range of what today are acknowledged as human rights and fundamental freedoms.¹ The UDHR comprises the two sets of human rights: civil and political rights and social, economic and cultural rights which pre-empted the notion of indivisibility and interdependence of all human rights.² However, the integrated approach to human rights entrenched in the UDHR was criticized by the ideologies of the time (cold war) between the east and the west and their importance (Socio-economic rights) was forgotten for many decades.³ This accounted for the less jurisprudential development of economic and social rights both at global and national fora compared to civil and political rights. The western countries (Capitalist) favored civil and political rights and emphasized their primacy over socio-economic rights; whereas, the eastern block favored socio-economic rights. This contention eventually resulted in drawing a clear line between the two grand categories of

¹ Asbjorn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge', in *Economic, Social and Cultural Rights: A text book*, second Rev. edn., Asbjorn Eide et al(ed.s), Martinus Nijhoff publishers(2001), p. 3.

² Manfred Nowak, *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, (2003), p. 78.

³ Chidi Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', in *The African Charter on Human and Peoples' Rights; the system in practice, 1986-2000: A Text book*, Malcolm D. Evans and Rachel Murry. (ed.s), Cambridge University Press (2002) p. 181.

human of rights.⁴ Due to these ideologies of the past economic and social rights enunciated in the International Covenant on Economic, Social and Cultural Rights (herein after ICESCR) were devoid of justiciability and lacked an individual complaint mechanism that truly guarantee their justiciability with ease, but before no notion of justiciability articulated in the ICESCR.⁵ It is only very recently that a complaint procedure has been developed to ensure their justiciability at the international arena.⁶ Later, the United Nations(UN) saw the importance of socio-economic rights and returned back to the doctrine of indivisibility and interdependence of human rights in the UDHR and reaffirmed in many resolutions since then and that the two covenants and sets of rights are universal, indivisible, interdependent and interrelated in the second world conference on human rights in Vienna.⁷ It further, elucidates that the international community must treat human rights internationally in a fair and equal manner, on the same footing and with equal emphasis.⁸

The conference attempted to bolster the concept of inseparability of the two sets of human rights and supported the doctrine of indivisibility and interdependence of human rights so as to boost the justiciability of economic and social rights which were forgotten and neglected for many years.⁹ However, it does not carry a binding effect and lacks an obligatory force to hold states accountable for violating the rights enunciated in the Vienna Declaration like the UDHR. Not only the UDHR and Vienna declaration, but other international and regional human rights instruments have also rejuvenated the principles of indivisibility and interdependency of human rights. The instruments; inter alia, are embracing Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Elimination of all Forms of Racial

⁴ Nowak at note 2, p. 79.

⁵ Michael J. Dennis and David P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaint Mechanism to Adjudicate the Rights to food, water, housing and health?', *American Journal of International Law* (2004), p. 462.

⁶ Id. P. 463-464 .

⁷ Vienna Declaration, world Conference on Human Rights, Vienna, 14-25 June 1993, UN.Doc. A/CONF. 157/24 (Part I) at 20 (1993).

⁸ Ibid. This was mentioned in the Para. 5 of Vienna Declaration and program of Action, second world conference on Human Rights.

⁹ Henry J. Steiner et al(ed.s), *International Human Rights in Context, Law, Politics, Morals* (3rd ed.), Oxford University Press (2007), p. 264.

Discrimination (CERD), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC), Declaration on the Right to Development, and regionally, specifically in Africa, African Charter on the Rights and Welfare of the Child (ACRWC) and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Grand Bay (Mauritius) Declaration and Kigali Declaration and the African Charter on Human and Peoples' Rights have re-integrated civil and political rights and economic and social rights in one main text. This paves the way for the enhanced justiciability of socio-economic rights and operationalizes the doctrine of indivisibility and interdependency of human rights.¹⁰ The European Court of Human Rights has been using the integrated approach to the enhancement of justiciability of socio-economic rights and has advanced the enjoyment of socio-economic rights in the region through civil and political rights which are clear, not controversial and disputable on their justiciability both at international, regional and domestic fora. The court; further, has mainly emphasized and manifested the close ties (kin) between civil and political, and economic and social rights there by elucidating that:¹¹

While the convention provided that what are essentially civil and political rights, many of them have implication of a socio-economic nature ... the mere fact that an interpretation of the convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the convention.

This indicates that, the justiciability of socio-economic rights or at least some parts of them can be boosted principally through the complaint procedures under treaties on civil and political rights. More over, a number of cases decided by the UN Human Rights Committee or the supervisory organs of the European Convention on Human Rights (herein after ECHR) used to reveal the so called integrated approach which possibly enabled the treaty bodies to afford protection to socio-economic rights through explicitly and plainly guaranteed rights

¹⁰ Eide and Rossas at note 1, P. 4.

¹¹ Martin Scheinin, 'Economic and Social Rights as Legal Rights', in *Economic, Social and Cultural Rights: A text book*, second Rev. edn., Asbjorn Eide et al(ed.s), Martinus Nijhoff publishers(2001), p.34-35.

covered by the treaties in question.¹² The integrated approach to boost justiciability of socio-economic rights utilizes substantive and procedural rights enunciated in the International Covenant on Civil and Political Rights (herein after ICCPR), such as non-discrimination and equality guarantee, procedural safe guards which embraces free legal assistance, access to courts, fair trial or due process of law. These are typical instances of civil and political rights instrumental in rejuvenating the judicial protection of socio-economic rights via an integrated approach.¹³ This was devised due to the status of social and economic rights as non-justiciable human rights because of their vagueness, resource demanding rights and attached to the language of progressive realization unlike civil and political rights which are precise and immediate.¹⁴ The non-justiciability of socio-economic rights principally attributed to the rigid classification of human rights which put socio-economic rights beyond the reach of courts and far from judicial scrutiny. Hence, the justifications were found unconvincing and arbitrary and fail to concord with the notion of indivisibility and interdependence of human rights.¹⁵

Under the African Charter on Human and Peoples' Rights (herein after the ACHPR), the doctrine of indivisibility and interdependence of human rights was avowedly affirmed in the preamble of the ACHPR, that reiterates:¹⁶

It is hence forth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

This articulation has gone beyond what was implied in the notions of indivisibility, universality, interdependency and interrelatedness of human rights that were acknowledged in the UN General Assembly's of the 1977 endorsement on the interdependency and

¹² Id, P. 32.

¹³ Id, p. 40.

¹⁴ Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law*, (2003) p. 5.

¹⁵ Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in comparative constitutional context', in *Justiciability of Economic and Social Rights: Experiences from Domestic System: A textbook*, Fons Coomans (ed.), Intersentia (2006) p. 2.

¹⁶ African [Banjul] Charter on Human and Peoples' Rights adopted on June 27, 1981 and entered into force in 1986 (herein After the African charter), Para. 8 of the preamble of the African Charter and see also James W. Nickel, *Making Sense of Human Rights*, a text book, 2nd edn., Black well Publishing (2007), P.104.

indivisibility of all human rights to cement the unity of the two sets of rights. The ACHPR further affirmed and reinstated the doctrine of inseparability of human rights in its preamble and seem to emphasize the primacy of socio-economic rights over civil and political rights and accorded a heightened protection to socio-economic rights.¹⁷

The African Charter (ACHPR); hence, entirely departed from the notion of separability and further bolstered truly indivisible and interdependent human rights in a single binding instrument as a normative framework coherently emphasizing their equal importance.¹⁸

The African Commission on Human and Peoples' Rights has surprisingly revealed the doctrine of indivisibility and interdependency of human rights entrenched in the ACHPR that is by deriving implicitly guaranteed rights from the explicitly enunciated rights in the African Charter and awarded the remedy to the victim. For instance, the rights to food, to social security, to adequate standard of living and to housing or prohibition of forced labour are not explicitly enshrined in the ACHPR. However, these rights could possibly be derived from other rights expressly guaranteed in the same Charter. This fact clearly reveals the workable notion of the integrated approach via indivisibility and interdependence of all human rights and even with in the same family of rights.¹⁹

In India, the Indian Supreme Court effectively utilized the integrated approach and enhanced the justiciability of socio-economic rights which are made non-justiciable under art 37 of the Indian constitution.²⁰ This was done through creative interpretation of the civil right to life and security of person thereby operationalizing the doctrine of indivisibility and

¹⁷ Odinkalu, at note 3, P. 188.

¹⁸ Id, p. 192.

¹⁹ Heyns and Killander. (ed.s) *Compendium of key Human Rights Documents of the African Union* (3rd ed.s), Pretoria University Press (2007). This aspect of indivisibility and interdependency of human rights was mentioned and well elaborated by the African Commission in SERAC and Purohit cases p. 251 and p. 243 respectively (here you will find the full text of the cases).

²⁰ See art 37 of the Indian Constitution that stipulates: 'Directive Principles of State Policies shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country', See also Bertus De Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience,' *South African Journal on Human Rights*, Vol. 43(1992), p.40.

interdependency of human rights.²¹ That is, by interpreting the interdependency of right to life with food, health, livelihood and education that enable human beings to lead dignified life.²²

The South African jurisprudence has had a major impact on the discussion of socio-economic rights globally with many commentators arguing that the cases developed in particular reveal an effective and manageable approach in making these rights justiciable.²³ The 'reasonableness test or approach'²⁴ taken by the South African Constitutional Court to measure the compliance of the state obligation with the Bill of Rights in the constitution. In doing so, the same Court drew inspiration from the ICESCR using its constitutional mandate and afforded protection to these fundamental rights.²⁵ This was due to the feature of the constitutionalization of socio-economic rights as claimable individual rights, which aptly enhanced the justiciability of these rights with ease before courts.

The Ethiopian constitution has entrenched a very scant number of socio-economic rights as directly justiciable human rights i.e. our Courts are not ousted to adjudicate cases involving socio-economic rights. However, these fundamental rights are not well elucidated so as to ensure their justiciability without difficulty.²⁶ Whenever the rights are not precise, the court faces problem to give a remedy, unless they do have expansive and progressive constitutional power of interpretation over the issue before them. In the latter case, if they are truly mandated to do so they will clarify the normative content of the right guaranteed and afford the remedy to the victim. Interestingly, our constitution enunciated both sets of rights i.e. civil and political rights and socio-economic rights under the same chapter as fundamental rights and put them under the purview of courts. And obliged state organs encompassing

²¹ Sandra Liebenberg, 'The Protection of Economic, Social and Cultural Right in Domestic Legal System', in *Economic Social and Cultural Rights: A text book*. Second Rev.edn. A. Eide etal (ed.s), Martinus Nijhoff Publishers(2001), p.73.

²² Steiner at note 9, p.324.

²³ Id, p.328, see also section 39(a),(b),(c) of the South African Constitution.

²⁴ Bruce Porter, 'The Domestic Implementation of the ICESCR: The Right to Effective Remedies, the Role of Courts and the place of the claimants of ESC Rights', *Remarks for the workshop for Judges and Lawyers in North East Asia on the Justiciability of Economic, Social and Cultural Rights*, Ulaan Baatar, Mangolia Jan.26(2004), p.3.

²⁵ Steiner at note 9, p.334, sees also section 7(2) of the South African Constitution.

²⁶ Rakeb Messele, *The Enforcement of Human Rights in Ethiopia: Research subcontracted by Action Professionals' Association for the People (APAP)*, (un published 2002) p. 3.

legislative, executive and the judiciary to respect and enforce the rights guaranteed in chapter three of the constitution.²⁷ This will ensure the doctrine of indivisibility and interdependence of human rights. Not only chapter three of the constitution, but chapter ten of the constitution also pointed out some implied substantive socio-economic rights under the National Policy Principles and Objectives (NPPO) of the state as the directive principles of the state policy of Ethiopia which any organs of the government are obligated to enforce.²⁸ Note that, it did not take away the rights guaranteed under chapter three of the FDRE constitution. However, they were elucidated as state obligation without a corresponding individual right and similarly they are not directly justiciable by the court of law. Thus, they can be adjudicated indirectly through interpreting the rights enlisted under chapter three of the constitution. These implied socio-economic rights embody education, health, clean water, housing, food and social security necessitated the indirect approach to the justiciability of socio-economic rights.²⁹

1.2. Statement of the Problem and Research Questions

Economic and social rights suffer from a degree of vagueness and there is also lack of normative clarity under the Federal Democratic Republic of Ethiopian Constitution (herein after the FDRE constitution) which plainly hampered the jurisprudential development of socio-economic rights on the domestic fora. Thus, their justiciability under our local courts is not developed, which reveal that the role of courts in enhancing the justiciability of socio-economic rights are insignificant.

Socio-economic rights in Ethiopia have been marginalized in the way the constitution recognized the rights that is, towards at the end. Not only this but these rights are also general and not well elaborated during the constitutionalization of the rights which will raise controversy and remain a subject of debate when brought before the judicial body to award a remedy. And also they are terse and selectively recognized which undermine the direct claimability and enjoyment of socio-economic rights. The other issue is that there is lack of subordinate legislation elaborating or clarifying the norms and contents of some socio-

²⁷The Federal Democratic Republic of Ethiopian Constitution 1st year No. 1, 1995, see Art.13 (1).

²⁸ Id. See Art. 85-90 of the Federal Democratic Republic of Ethiopian Constitution.

²⁹ Id. This was mentioned in the Constitution of Federal Democratic Republic of Ethiopia, Art. 89 and 90 (1).

economic rights as claimable individual rights before the judiciary, that specifically address the problem attached to general and vaguely worded socio-economic rights entrenched under the supreme law of the land.

The under developed judicial scrutiny of social and economic rights enshrined under the FDRE constitution is also partly associated to the national Policy Principles and Objectives which impliedly guaranteed some socio-economic rights that are not directly made justiciable before the court of law.

Therefore, it is with the above problems in mind that the researcher has developed an interest on the topic. Hence, the research questions to be addressed in this work will be primarily:

- ✓ Is the notion of integrated approach to the enhancement of justiciability of economic and social rights is acknowledged and workable under the FDRE constitution?
- ✓ Does the FDRE constitution create conducive approach to the operationalization of the doctrine of indivisibility, interdependency and interrelatedness of human rights?
- ✓ Does the FDRE constitution give a balanced protection to the two grand categories of human rights?
- ✓ Are the Ethiopian Courts mandated to clarify the latent or impliedly guaranteed socio-economic rights or their normative content and concretize it to remedy of the victim there by using the integrated approach to enhance their justiciability or wait for the HOF to do so?
- ✓ What are the challenges to justiciability of socio-economic rights recognized under the FDRE constitution?
- ✓ Can the Ethiopian Courts draw inspiration and adequate lessons from the UN Committee on Economic, Social and Cultural Rights authoritative interpretation of the ICESCR and norm clarification and from the jurisprudence of African Commission on Human and peoples' rights?

1.3. Objective of the Study

With the understanding of the above mentioned background, the main objective of this thesis is to identify the means of ensuring justiciability of social and economic rights via the integrated approach so as to rejuvenate and boost the judicial protection of economic and social rights guaranteed under the Ethiopian constitution. This will enable the researcher to explore the devised mechanism developed at international and regional fora and other jurisdictions emerging trends to overcome the challenges and controversies surrounding economic and social rights on the domestic fora and introduce it to our domestic arena so as to advance the jurisprudence of our courts over socio-economic rights which is under developed and did not call the attention of national appreciation compared to the level of judicial scrutiny of civil and political rights.

Therefore, the following are some of the specific objectives of this research work:

- ❖ To examine the workability or otherwise of the integrated approach to the enhancement of economic and social rights under the Ethiopian constitution.
- ❖ To evaluate the effectiveness of the approach at the global, regional (African and Europe), and domestic arena.
- ❖ To assess and thoroughly examine the normative content and legal basis of socio-economic rights enshrined in the Ethiopian constitution and to critically examine the constitutionalization of socio-economic rights under same.
- ❖ To assess the role of courts in implementing the notion of indirect approach to justiciability of socio-economic rights and their commitment to operationalize the doctrine of indivisibility and interdependency of human rights.
- ❖ To examine the permissibility or otherwise of the derivation of latent rights from the explicitly guaranteed economic and social, civil and political rights under the Ethiopian constitution. [Here, I want to see whether our courts are constitutionally mandated to define and concretize these rights (i.e. clarification of norms).

1.4. Significance of the Study

It is submitted that economic and social rights are emerging areas of human rights. They are relatively developed at the international plane and are far from judicial scrutiny on the domestic fora. These rights are survival rights that enable a human person to lead a decent and dignified life. They are about the wellbeing of an individual and are intricately interwoven to civil and political rights and even are instrumental in the realization of the later. Despite their importance, they are neglected and forgotten for many years. After four decades and half, recognizing and emphasizing the paramount importance of economic and social rights, the international community learning from (their) mistakes of the past in drawing the line between these two sets of rights and more over, denying socio-economic rights their justiciability as individual rights; come together in the second World Human Rights Conference in Vienna in 1993 and declared the indivisibility and interdependence of all human rights. Not only this, but many international and regional human rights instruments have also reiterated and accorded a due protection to economic and social rights by reintegrating the two sets of rights. These all efforts have been done to boost the justiciability of socio-economic rights both at international and regional fora and primarily in the domestic arena.

Ethiopia has acknowledged the justiciability of socio-economic rights. These Socio-economic rights are scattered throughout the constitution that is, some socio-economic rights are implicitly guaranteed (Chapter ten of the FDRE constitution) as Directive Principles of State Policy which are indirectly justiciable. Whereas, under Chapter three of the FDRE constitution, very scant provisions are enunciated as selectively justiciable human rights. But still the current state of our courts shows that these fundamental rights are far from judicial scrutiny. This aptly reveals the underdeveloped jurisprudence on the justiciability of socio-economic rights. Hence, this piece of research will serve as an inspiration and stepping stone for future researchers to make a detailed and comprehensive study on our local jurisprudence and further contribute to its development. Above all, this research work will enable and inspire advocates of human rights, judges, legislatures, executives, NGO's and Human rights

activists to enhance the justiciability of socio-economic rights. It further gives impetus to the advancement of our local jurisprudence in the adjudication of socio-economic rights and will boost the justiciability and enjoyment of same entrenched under the FDRE constitution.

1.5. Research Methodology

This research work is mainly based on assessment of the existing literatures legal and non-legal instruments relating to socio-economic rights in general and specifically pertaining to the integrated approach to the enhancement of justiciability of socio-economic rights and the acknowledgement of the doctrine of indivisibility and interdependence of human rights. Therefore, different source materials such as books, journals, legal instruments, declarations, UN General Comments on socio-economic rights, and other non-legal instruments like resolutions etc at international, regional and national level are used. Internet sources are also utilized so as to see the current trend at both regional and international arena and the prevailing jurisprudence of other countries. Principal emphasis is accorded to the evaluation of the workability of the integrated approach to enhance the justiciability of socio-economic rights in Ethiopia and overcome challenges to the adjudication of these rights.

The researcher also uses case-oriented analyses, which are pertinent and to substantiate the workable nature of indirect justiciability of socio-economic rights, decided at both global and regional level and other jurisdictions and possibly to draw adequate lessons from and to advance the justiciability of socio-economic rights in our local courts. Moreover, the researcher uses interviews with judges, to point out the major legal and practical impediments attributed to the under development or other wise of justiciability of socio-economic rights in our national courts and the role of courts in acknowledging the principle of interdependency and indivisibility of human rights and their equal importance.

Generally, the methodologies employed in this work are review and assessment of the existing literatures, legal and non-legal documents from historical, descriptive, comparative and evaluative points of view. The comparative perspective is employed to make a brief comparison between other countries jurisprudence (India and South Africa) used in the

enhancement of socio-economic rights and the role of courts in Ethiopia in using the approach (indirect justiciability of socio-economic rights) and other sub-regional bodies jurisprudence which may possibly help Ethiopian courts to draw inspiration from. The evaluative aspect principally focuses on the serious assessment of the main nature of socio-economic rights or feature of their constitutionalization and whether the FDRE constitution has the vision of integrating both sets of human rights by pointing out its various provisions.

1.6. Limitations of the Study

Like other humanly works, this research work suffers from certain short comings. Firstly, it pertains to absence of practice-oriented analysis as regards to socio-economic rights in the domestic fora. This is mainly attributed to the underdeveloped jurisprudence of our Courts relating to these rights. As a result, the researcher resorted to foreign jurisprudence so as to reveal the workability of integrated approach used to boost justiciability of socio-economic rights. These enable readers to better understand how other jurisdictions afford protection to these rights and for the benefit of the public at large. Secondly, it is related to the unwillingness of my informants (interviewee) in the Federal Supreme Court Cassation Division except one. As my research is not mainly depends on the primary data, I tried to find other informants from the Oromiya Regional State Supreme Court. The other thing is related to research fund that is not released in time so as to enable the researcher to over come some financial constraints. Therefore, in the interest of precision, brevity, less volume, the usual time and resource constraints, the researcher has cut down certain sections and avoided in depth analysis in certain aspects of the content and which reduce the comprehensive and detailed nature of the research.

1.7. Organization of the Study

This research work comprises four chapters which are divided into sections and sub sections. Chapter one is about the introductory parts of the thesis. It embraces background of the problem, statement of the problem, research questions, objectives of the study, research methodologies, and significance of the study and limitations of the study.

Chapter two addresses the historical notion of the integration of human rights, the doctrine of indivisibility, interdependency and interrelatedness of human rights used under global and regional human rights instruments that are used to operationalize the integrated approach to justiciability of socio-economic rights. Chapter three principally discusses deeply the nature of socio-economic rights, justiciability of economic and social rights and challenges and controversies surrounding these rights and it also looks at direct and indirect justiciability of socio-economic rights. It further elucidates the integrated approach and how it is used to enhance justiciability of socio-economic rights via civil and political rights and even within the same family of rights. It also discusses cross-cutting rights like non-discrimination and equality guarantee, procedural safeguards including fair hearing and speedy trial, judicial protection and remedy which may comprise procedural and substantive access to remedy.

Chapter four is devoted to explore the constitutionalization of economic and social rights under the Ethiopian constitution, features of socio-economics rights under the FDRE constitution, their normative content and legal basis, the workability of the indirect approach to justiciability of socio-economic rights, challenges to justiciability of socio-economic rights, Directive Principles of State Policy (NPPO in our case) impliedly guaranteed some socio-economic rights, derivation of new rights so as to afford protection to the impliedly guaranteed socio-economic rights in the constitution and it assess as judicial role in implementing the integrated approach and specifically to enhance the adjudication of socio-economic rights via indirect justiciability.

Eventually it also forwards conclusions and recommendations arising from the findings of the research. Here, major observations and outcomes of the thesis are summarized. The recommendations are directed to address the vagueness, generality of socio-economic rights, the absence of subordinate legislation and lack of normative clarity, and challenges identified in the justiciability of socio-economic rights in Ethiopia.

CHAPTER TWO

1. HISTORICAL NOTION OF THE INTEGRATION OF HUMAN RIGHTS

2.1. The Notion of Indivisibility, Interdependency and Interrelatedness of Human Rights

This section will point out the principles of the integrated approach to human rights that will come into picture when the notions of indivisibility, interdependency and interrelatedness of all human rights are properly utilized.

Freedom from ‘fear’ and ‘want’ can be realized only through the enjoyment of both civil and political and socio-economic rights. Thus, it is hardly possible to draw a clear line between the two sets of rights. However, failure to accord a due protection to social and economic rights will evidently snatch an individual right to a decent and dignified life. This induces us to look at the utilization of the doctrine of interdependency, interrelatedness and indivisibility of human rights properly and efficiently that can possibly and easily be realized via the proper use of the integrated approach.³⁰ These three notions are well considered herein below one by one under different sub-sections.

2.1.1. The Indivisibility of Human Rights

Literarily the meaning ‘indivisible’ is incapable of being divided, in reality or thought reveals power force: the indivisibility of the Holy trinity - God the Father, the Son and the Holy Spirit comes to mind. If something is indivisible, dividing that thing renders impotent. To claim that human rights like civil, political, economic, social and cultural rights are indivisible reveals restoration to correct a wrong or repair unnatural breach.³¹ Indivisibility is the idea that no

³⁰ Asbjorn Eide; ‘Economic, Social and Cultural Rights as Human Rights’, in *Economic, Social and Cultural Rights: A text book*, second Rev. edn., A. Eide etal (ed.s), Martinus Nijhoff publishers (2001), p.15.

³¹Daniel J. Whelan, ‘Untangling the Indivisibility, Interdependency and Interrelatedness of Human Rights’, *Economic Rights working paper series, University of Connecticut, working paper 7* (2008), p. 6.

human right can be fully realized without fully realizing all other human rights. When indivisibility occurs it has the pragmatic consequence that countries cannot pick and choose among rights that is a notion which truly maintains the supporting relationships between the two sets of human rights. Indivisibility can also be expressed as a very strong form of interdependence or bidirectional support.³²

Though the global community has consistently reiterated the assertion that all human rights are intertwined within a coherent system of law, responses to violations of economic and social rights both procedural and substantive have paled in comparison to the seriousness accorded to infringements of civil and political rights.³³ This was the result of the bifurcation of the two grand categories of human rights. This needs the application of the idea of indivisibility to be mended and that rejuvenates the enhanced justiciability of social and economic rights. Besides, cementing the unity between the two sets of rights; it is also essential in identifying the violation of socio-economic rights using this notion (Leckie: 1998, p. 83).

The concept first emanated during the late 1940s and early 1950s, when the United Nations was engaged in a deep debated about how to codify the rights entrenched in the UDHR in international law. At the outset, it was the intention of the UN Commission on Human Rights which was mandated to draw up a legally binding instrument to embrace only civil rights in the Covenant.³⁴ The G.A. then requested that the treaty should include economic, social and cultural rights. During the debate over one or two covenants, the term indivisible used mainly in reference to the 'Unity' of the UDHR since the Declaration did not define categories, nor create any actual division within the instrument, but rather enumerated a wide ranging category of rights, all should be included in a single legally binding document. In this sense,

³²James W. Nickel, 'Rethinking Indivisibility: Towards A Theory of supporting Relations between Human Rights,' *Human Rights Quarterly* Vol. 30, (2008), p. 984-987.

³³Scott Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights,' *Human Rights Quarterly*, Vol. 20, (1998),p. 81-82.

³⁴Whelan at note 31, p. 6-8, see also Nickel at note 32, p. 985.

the term indivisible returns back to the unity of the UDHR and the artificial nature of the bifurcation of human rights into two sets of conventions.³⁵

An Early statement found in the 1968 Proclamation of Teheran says: “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.” This reveals the idea that socio-economic rights are essential in the actualization of civil and political rights.³⁶ The UN General Assembly endorsed the indivisibility thesis in a 1977 Unity Resolution, ousting the important qualification about full realization.³⁷ The notion of indivisibility was reaffirmed in the 1993 Vienna Declaration, again without the qualification. The first two resolutions political aim was to defend economic and social rights through according equal commitment to the two grand categories of human rights. Therefore, indivisibility was originally devised to rejuvenate the interrelation between the two sets of human rights and to give a due protection to socio-economic rights. It also does not acknowledge a real division between human rights. In a sense, that if there is a violation regarding civil and political rights, it holds true for the doctrine of indivisibility that social and economic rights are also susceptible to violation.³⁸

This notion has also a paramount importance in the enhanced justiciability of social and economic rights that, if civil and political rights are justiciable, the same is inevitable for the socio-economic rights to be held justiciable. Even it emphasizes the idea that the full realization of civil and political rights is hardly possible without guaranteeing social and

³⁵ Ibid, Whelan at note 31, see also Nowak at note 2, p. 25-27.

³⁶ Roland Burke, ‘From Individual Rights to National Development: The First UN International Conference on Human Rights’, Tehran, Jan. 1968, *Journal of World History*, vol. 19, No.3 (2008), p.275-296. In April 1968, almost twenty years after the passage of the UDHR, the first United Nations International Conference on Human Rights opened in Tehran. This proclamation was the culmination of a shift from the western–inflicted concept of individual human rights exemplified in the 1948 Universal Declaration of Human Rights to a model that emphasized economic development and collective rights of the nation. The conditions of man’s political and material life have been changing throughout these two decades, and the very notion of human rights should consequently be regarded in a new light. In our day, political rights without social rights and political democracy without economic democracy no longer have any true meaning. Hence, it emphasized the doctrine of indivisibility and interdependency of human rights for the first time internationally and has a historic significance.

³⁷ Ibid, see also Whelan at note 31, p. 7-8.

³⁸ Daniel J. Whelan, *Indivisible Human Rights: A History*, University of Penn Sylvania Press, (2010), p. 3-5.

economic rights as justiciable rights equally with the former rights by dissolving the boundary between the two sets of rights.³⁹

2.1.2. The Interdependency of Human Rights

Social and economic rights are actually rights and use the language of interdependency to reveal the equality of importance or legitimacy through the advocacy of the principle of interdependency of human rights so as to bolster the realization of economic and social rights.⁴⁰

Civil and political rights work hand in hand with social and economic rights via the doctrine of interdependency of human rights. To say that rights are interdependent despite their distinctiveness as particular rights means that the enjoyment of one right (or group of rights) requires the utilization of others which may or may not be the same family of rights. For instance, freedom of movement (a civil right) is an essential precondition for the exercise of other rights within the same family like freedom of assembly, political rights, (e.g. right to vote) and other category of rights (the right to work) and also it is hardly possible to think of the enjoyment of the right to adequate standard of living without the realization of the right to food, adequate clothing and adequate housing.⁴¹ It is evident that the doctrine of interdependency acknowledges division and categorization and does not seek to overcome it. It embraces the rights as categorized. This kind of supporting relation exists between the two sets of rights when one of the rights contributes to the functioning or stability of another as the case exactly illustrated with above examples.⁴²

³⁹Ida Elisabeth Koch, *Human Rights as Indivisible Rights. The protection of Socio-Economic Demands under the European Convention on Human Rights*, International Studies in Human Rights, Martinus Nijhoff publishers, LEIDEN, BOSTON, Vol.101(2009), p. 9-11, see also Linda M. Keller, *Indivisibility of Economic and Political Rights: Human Rights and Human welfare*, Center on Rights Development, Vol. 1 (2001), p. 9-14.

⁴⁰Whelan at note 38, p. 1-5.

⁴¹Whelan at note 31, p. 2-3, see also Nickel at note 32, p. 991-992 see also Mathew C.R Craven, *The International Covenant on Economic, Social and Cultural rights: A perspectives on its Development*, Clarendon Press, Oxford (1995) p. 288-290.

⁴²Nickel at note 32, p. 990-991, see also Whelan at note 31, p. 1-3.

However, as James Nickel has noted plainly:

*Looking at relations between particular rights is illuminating and cannot be avoided, but fully realizing these perspectives require much tedious work. If there are 40 particular human rights then combining them in pairs will yield 1560 places where supporting relations may exist. Maximal penetration comes at the cost of great complication.*⁴³

The interdependency of human rights is relatively unproblematic, that if a right to something or to be free from something is, as a right justiciable; it becomes difficult when one or more of the rights that are thought to be interdependent are not necessarily justiciable. This notion hence, enables us to bolster the justiciability of socio-economic rights via an integrated approach. It is a means used to claim a certain right as justiciable, if it has a relation with the other justiciable rights that is not contested before a court of law.⁴⁴

Taking economic rights for instance, which have a dual function that most evidently revealed in relation to the right to property. On the one hand, this right serves as a ground for entitlements which can ensure an adequate standard of living, while on the other hand it is a basis for independence and therefore of freedom. This right has also a crucial element in the early quest for freedom and equality, and it is supplemented at least by other two rights: the right to work which can provide an income ensuring an adequate standard of living, and the right to social security which can support, and where necessarily fully substitute, insufficient income derived from property or from work, that is, in regard to enjoyment of an adequate standard of living. Arguably, it is hardly possible to classify the right to property as an exclusively civil and political right or as economic or social right.⁴⁵

This notion takes us to the aspect that a due protection accorded to a certain right, without giving impetus to another is, clearly deprives the protection of the later, hence, it averts selectivity like the case of adequate housing without the right to food, clothing and housing

⁴³Ibid, both Nickel and Whelan, see also Eide at note 30, p. 18-19.

⁴⁴Id, Whelan, p. 3, see also Eide at note 30, p. 18.

⁴⁵Catarina Krause, 'The Right to Property', in *Economic, Social and Cultural Rights: A textbook second Rev. edn.*, Eide et al (Eds.), Martinus Nijhoff publishers (2001), p. 191-192, see also Scott Leckie, 'the Human right to Adequate Housing', in *Economic, Social and Cultural Rights: A Text book second revised edition*, A. Eide et al (ed.s), Martinus Nijhoff Publishers (2001), p.149-152.

which are an integral part of the former. Therefore, the doctrine of interdependency reveals that socio-economic rights are violated when a state makes a certain right justiciable and another right non-justiciable through selectivity which does not concur with the notion of interdependence. Hence, state can bolster the protection and actualization of socio-economic rights by adhering to the principle of interdependence to human rights via integrated approach.

2.1.3. The Interrelatedness of Human Rights

Human rights are interrelated means that they are brought into a situation of mutual relationship or connectedness. Actually, early UN Resolutions used the term ‘interconnected’ instead of ‘interrelated’. Whereas, interdependency is best suited for looking a relationships between particular categories of rights or cluster of rights, interrelatedness has more purchase between broader categories of families of rights, as per their conventional expression in treaties with a variety of functional institutions attached to them.⁴⁶

To be clearer, interdependency is permeability between categories of rights, whereas, relatedness suggests familiarity. Hence, the two grand categories of human rights may be thought as interrelated as long as their legal foundations (like the covenants) are similar. As the compromise in the early 1950s over the covenants for the two sets of rights have as many similar provision as possible. Thus, one can easily notice the identical preambles of the two grand categories of rights and the entrenchment of a right to self-determination into both covenants. Therefore, human rights can be said to be interrelated in so far as they share common characteristics, their emanation from UN bodies, their nature as treaties, that state obligations and limitations are expressed or implied.⁴⁷ It is possible to argue upon this point of view that socio-economic rights are really rights, thus the language of interrelatedness demonstrates equality of importance or legitimacy of socio-economic rights in relation to civil and political rights.⁴⁸

⁴⁶ Whelan at note 38, p. 3-5.

⁴⁷ Whelan at note 31, p, 7, see also Nickel at note 32, p. 990.

⁴⁸ Whelan at note 38, p. 4.

The notion of interrelatedness shows how human rights have been expressed institutionally. This is quite clear in evolution of institutions to promote, economic, social and cultural rights that are similar to civil and political rights, despite the differences between the two distinct regimes.⁴⁹ After nearly two decades of advocacy and negotiation the UN General Assembly adopted an Optional Protocol to the ICESCR that will allow the Committee on the ICESCR to adjudicate state to state complaints, receive individual and collective complaints and initiate inquiries into alleged violation of the covenant.

This move toward greater institutional interrelatedness has pivotal role in bringing socio-economic rights one step closer to indivisibility of the two sets of human rights. It is thus, suggests the bringing together of two or more things into a mutual harmony, but it still acknowledges separateness of the human rights in the two covenants including ICESCR and ICCPR.⁵⁰ Therefore, for strong reason this doctrine has something to give impetus to the justiciability of socio-economic rights at global, regional and primarily on the national fora.

2.2. The Integration of Human Rights under International and Regional Human Rights Instruments

2.2.1. The Inseparability of Human Rights under the UDHR (1948)

The UDHR built in response to World War II atrocities and created a fully formed character, setting out the complete range of human rights applicable to all peoples in the world. Rather like the creation of a Bill of Rights at the national level, the UDHR was the first time that rights had been articulated in a comprehensive manner on the international arena.⁵¹ As has been stated, the UDHR forms part of the International Bill of Rights, together with the two sets of human rights including International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵²

⁴⁹ Whelan at note 31, p. 8, see also Whelan at note 38, p. 6.

⁵⁰ Dennis and Stewart at note 5, p. 475.

⁵¹ Hilary Poole et al (ed.s), *Human Rights: The Essential Reference*, ORYX Press (1999), p. 64.65.

⁵² Id, p. 66.

This plainly reveals the notion of inseparability of human rights there by integrating both sets of human rights in one instrument. As the founding document of international human rights law the UDHR was unanimously ratified by the UN General Assembly in 1948. The UDHR flourished the fundamental vision and principle of the new human rights regime there by recognizing the interdependency, interrelatedness and indivisibility of all human rights which ensures the notion of integration of human rights.⁵³ Under the same Declaration, people were guaranteed civil and political freedom via the human right to life, physical integrity, free speech and belief, and due process of law as well as economic and social well being through the human rights to adequate standard of living, housing, work, education, food and health.⁵⁴ The preamble of the UDHR (1948) clearly points out that the highest aspiration of 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. The intention to integrate the different sets of rights was plain.⁵⁵

When the UDHR was adopted in 1948, there was not much doubt as to the inclusion of social and economic rights. Its untold and great contribution is that it extended the human rights platform to embody the whole field embracing civil, political, economic, social and cultural, and made the different rights mutually reinforcing.⁵⁶ One of the main sources of the broad approach to human rights was the ‘Four Freedoms Address’ by Franklin D. Roosevelt, one of the four freedoms on which President Roosevelt envisaged the post-war world order to be built was the freedom from want. The initial planning of the United Nations was principally carried out within the United States administration, influenced to a large extent by the aims contained in the Four Freedom Address. In his 1944 state of the Union Address, Roosevelt advocated the adoption of an ‘Economic Bill of Rights’, saying that:

⁵³ Poole at note 51, p. 65.

⁵⁴ Ann Jannette Rosga and Margaret L. Satterthwaite, ‘The Trust Indicators: Measuring Human Rights’, *Barkley Journal of International Law*, Vol. 27 (2009), p. 260.

⁵⁵ Universal Declaration of Human Rights, G.A. Res. 217 A of 10 December 1948, UNDOC. A/810(1948), Second Preambular Para. States that: whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of the world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

⁵⁶ Eide at note 30, p.14.

*We have come to the clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not freemen.' People who are hungry and out of job are the stuff of which dictatorship are made.*⁵⁷

Many of these economic and social rights have subsequently come to be embodied in the UDHR and later in ICESCR. This plainly shows the tremendous impact of the four freedoms and the close interdependency of all human rights and importance of economic and social rights in the realization of civil and political rights which are currently divided and recognized in different covenants and with different implementing mechanisms, but historically these two sets of rights have unity under the declaration which reveal their integration.

The human rights clause appears to be based on the assumption that the UDHR, while not embracing an instrument which is legally binding as such, reflects existing general international law, whether seen as customary law or as general principles of law recognized by civilized nations. The Declaration, of course, is based on the principle of indivisibility or inseparability of human rights; civil, political, economic, social as well as cultural rights are recognized.⁵⁸ This implies the integrated nature of all human rights and the notion of inseparability of the two sets of human rights in one comprehensive document. Nevertheless, the integrated notion to human rights flourished in the UDHR was despised by the ideologies of the then (cold war) between the west, the capitalist and the east, the socialist countries and the importance of socio-economic rights in the realization of civil and political rights were neglected and lacked a pragmatic value.⁵⁹

⁵⁷ _____, 'Towards An Economic Bill of Rights', available at <http://www.dsausa.org/pdf/Toward%20an%20Economic%20Bill%20of%20Rights.pdf>. The Four Freedoms were goals articulated by US president Franklin D. Roosevelt on Jan. 6, 1941. In address known as the Four Freedoms speech he proposed that people 'every where in the world' ought to enjoy: freedom of Speech and Expression, freedom of Worship, freedom from Want and Fear. He further advocated that Economic Bill of Rights need to be passed by the Congress that would ensure that all Americans have a right to remunerative employment, the right health, the right to education and the right to a decent housing. He argued that the political rights in the Bill of Rights were not enough to ensure the promise of the Declaration of Independence for the pursuit of happiness for all American citizens. As a result He wanted the Congress an Economic Bill of Rights.

⁵⁸ Allan Rosas, 'Economic, Social and Cultural Rights in the External Relations of the European Union', in *Economic, Social and Cultural Rights: A textbook*, second Rev. Edn., A.s Eide etal (ed.s), Martinus Nijhoff publishers (2001), p. 485-486.

⁵⁹ Chidi Odinkalu at note 3, p. 181-182.

Soon after the UDHR was completed, the Human Rights Commission set out to prepare an internationally binding human rights convention, as well as the apposite mechanisms for monitoring its observance. In 1951, however, the western states succeeded in demanding the division of the UDHR into two separate treaties. This momentous decision was taken against the resistance of socialist states, which had insisted on the interdependence, interrelatedness and indivisibility of all human rights. The west essentially justified their request for separation by arguing that economic, social and cultural rights were only ‘programmatic rights’, which could not give rise to any directly enforceable international obligations and as a result could not be made justiciable.⁶⁰ This currently does not hold true for at least a certain socio-economic rights can be made justiciable and claimable on the basis of core-minimum rights before courts of law at the national level. On the other hand the socialist states emphasized the indivisibility of human rights, as matter of principle. Given these differences of opinion it was, of course, exceptionally hard to draw up a universal human rights convention embodying an effective implementation procedure during the cold war.⁶¹ The adoption of an optional protocol would be an important step to fulfill the comprehensive vision of human rights entrenched in the UDHR both symbolically and practically.⁶²

Even though the cold war politics succeeded in dividing the indivisible human rights that resulted in the denial of the ICESCR the implementing mechanisms which remain intact as a paper value, because economic, social and cultural rights were not really rights. No matter what the version, the resulting message is usually the same; the purity and organic unity of the UDHR was compromised. This enables us to get back to history and balance between the two grand categories of human rights.⁶³

A closer look at review of this remarkable period in the history of United Nations between the adoption of the Universal Declaration of Human Rights in 1948 and the transmission of the drafts of the two covenants to the third Committee of the General Assembly in 1954 reveals a

⁶⁰Nowak at note2, p.78-79.

⁶¹Id, p. 79.

⁶²Daniel J. Whelan, ‘unpacking a “violation Approach” to protecting Economic, Social and Cultural Rights’: *A paper delivered at the 2007 Annual meeting of the American Political Science Association August 30 September 2(2007)*, Chicago, IL, p. 9.

⁶³Id,10.

much more intricate account of the politics and complications of writing the lofty ideals of the UDHR into international law. It is history we should take seriously and taking a serious look at this history clearly tells us something very important and interesting about the relationship between the two categories of human rights. It also reveals the compromises that were achieved on the two grand categories of human rights were arrived at practically and with an enormous amount of deliberation and consideration.⁶⁴ The General Assembly adopted Resolution 421 (V), on December 4th, 1950, which, among other things instructed the Commission, in accordance with the spirit of UDHR, to include in the draft covenant a clear expression of economic, social and cultural rights in a manner which relates to the civil and political freedoms proclaimed by the draft covenant.⁶⁵ This emphasized the interdependency of all categories of human rights and called up on the Commission to adopt a single convention. Nevertheless, the next year, the western states were able to reverse the decision asking the Commission to divide the rights contained in the UDHR into two separate covenants.⁶⁶ As a result, it has become evident to see that the international bill of rights to consist of two distinct sets of human rights. It is possible to argue that the UDHR integrated the two grand categories of human rights embracing civil, political, and economic, social and cultural rights in one consolidated text. Historically one can deduce that the UDHR maintained the interconnection between civil and political rights on one hand and economic and social rights on the other.⁶⁷ Thus, it is avowed that the UDHR reveals the integrated notion of human rights; however, it lacked a binding nature unlike the covenants on human rights.

As evidenced in the separation resolution that bifurcated the two sets of human rights enumerated in the UDHR that both sets of human rights, civil and political, economic, social and cultural rights had unity. This ensures the kin relationship of the two sets of human rights.⁶⁸ Hence, it is unquestionable and inevitable that this essence of linkage between human rights will enable us to afford a due protection to socio-economic rights both at international

⁶⁴Id, p. 11.

⁶⁵ Ibid.

⁶⁶ Eide and Rosas at note1, p.3.

⁶⁷ Id, p. 4.

⁶⁸ Koch at note14, p .5-6 and see also Coomans at note15, p.2.

and regional arena. Not only at these two levels of protection, but it will have also untold importance in the enhancement of the justiciability of socio-economic rights on the domestic level.

2.2.2. The Integrated Approach Enunciated in the Vienna Declaration and Program of Action (1993)

Before I directly go to the Vienna Declaration and Program of Action (1993) (herein after the Vienna Declaration). It is worth mentioning that, the notion of indivisibility and interdependency of all human rights were mentioned and plainly stated in the United Nations Office prior to the Vienna Declaration. Two decades before this Declaration the interdependency and indivisibility of human rights were an official doctrine of the United Nations, backed by the General Assembly and by the Office of the High Commissioner for Human Rights.⁶⁹ The UN General Assembly's 1977 endorsement of interdependence and indivisibility of human rights to cement the unity of the same provide a representative formulation:

*All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, and economic, social and cultural rights.*⁷⁰

This resolution of the General Assembly exactly emphasizes that the supporting relations between rights extend, but not only restricted to the supporting relations between civil and political rights and socio-economic rights, rather it extends to all human rights family that is mutual support exists, in varying degrees of strength, between all of the families of rights.⁷¹

States had high hopes that the vast problems caused by rapid globalization and the new political scenario after the cold war would be solved through major conferences under the auspices of the United Nations. The second world conference on Human Rights in Vienna (1993) was expected to come up with a new world order based on human rights. Though

⁶⁹ Nickel at note 16, P.104.

⁷⁰ Ibid.

⁷¹ Ibid.

many of the objectives set out in the respective programs of action, and many of the final documents solemnly adopted by the world leaders might seem almost revolutionary, their implementation was less so and instead has had a rather sobering effect on people's minds.⁷²

From the 1950s on ward, international progress in human rights was impeded for many years due to the East-west block conflict and its tendency to politicize human rights. The second world conference on human rights in Vienna from 14 to 25 June 1993 and around 171 head of state and government managed to pass the extensive Vienna Declaration. And this lay the ground work for a new and future oriented UN Human Rights program approved by consensus.⁷³

The Vienna Declaration embodies a number of very specific objectives and recommendations, some of which have been implemented since. These embrace, inter alia; improving the human rights of women, as stated in the optional Protocol to CEDAW, rejuvenating the human rights of child via universal ratification of CRC and strengthening the international enforcement of economic, social and cultural rights by drafting an optional protocol to the ICESCR so as to permit an individual complaints procedure under the same.⁷⁴

The conceptions of integrated approach to human rights that maintains unity of human rights and which reveals the interdependence, indivisibility and interrelatedness of human rights are well entertained in the Vienna Declaration. The preamble clearly states that:

*Considering that the promotion and protection of human rights is a matter of priority for the international community, and that the conference affords a unique opportunity to carry out ... in order to enhance and thus promote a fuller observance of those rights, in a just and balanced manner.*⁷⁵

One can easily deduce from the above preamble that, the World Conference on Human Rights wants to boost the promotion and protection of all human rights on equal emphasis via a balanced treatment and fuller observance there by averting the promotion and protection of

⁷² Nowak at Note 2, p. 147.

⁷³ Id, p. 148.

⁷⁴ Id, p. 149.

⁷⁵ See the Preamble of the Vienna Declaration at note 7, Para. 1.

human rights partially that is, it clearly states that promoting a certain right, by neglecting the other is prohibited as stated herein above. This has the notion of integrated approach to all human rights by giving an equal emphasis to the same.

Secondly, the third preamble of the same Declaration tells us that states should live up to their commitment contained in the Charter of United Nations and the UDHR.⁷⁶ It is evident that the principle in the UDHR was integrating the two sets of human rights. It further plainly shows the integrated notion of human rights in the Eighth paragraph of the preamble of the Declaration that reiterates: ‘the importance of UDHR as the source of inspiration and standard setting in the United Nations International Human Rights instruments thereby mentioning the two sets of human rights.’⁷⁷ Hence, one can possibly argue that the Vienna Declaration in its preamble has implicitly and expressly favored the balanced recognition of human rights thereby adhering to the principles enunciated in the UDHR and the Charter of United Nations.

The other concept of integrated approach to human rights is explicitly guaranteed under the Vienna Declaration that states:

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be born in mind, it is the duty of the states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*⁷⁸

Every one working with human rights is well acquainted and familiar with the passage stated herein above and it is often considered as (original) source for the understanding of human rights as indivisible, interdependent and interrelated. However, the perception that socio-economic, civil and political rights are interdependent, interrelated and indivisible goes as far back as human rights themselves. Hence, the passage is quite similar to the one quoted above

⁷⁶ Id, the third Para. that reiterates: The world Conference on Human Rights; reaffirming their commitment to the purposes and principles contained in the charter of the United Nations and the Universal Declarations of Human Rights.

⁷⁷ Id, see the Preamble of Vienna declaration Para. 8.

⁷⁸ *Ibid*, section I, Para. 5.

was entrenched in resolution 421(v) from 1950 by which the United Nations GA originally decided to adopt one single covenant embracing all rights enunciated in the UDHR.⁷⁹ Nevertheless, it was repeated one year later, that when the GA in the so called separation resolution decided to reverse the decision and demand to separate the rights into two different covenants, the ICESCR and the ICCPR. It is obvious that the Vienna Declaration wanted to reintegrate both sets of human rights. However, the Vienna Declaration lacked a binding force despite its tremendous impact on the subsequent international regional human rights instruments.

Despite the prime consideration given to civil and political rights the perception of human rights as indivisible, interdependent and interrelated rights has come more into focus very recently. However, the positive and pleasant connotations, but repeating it does not give more substance to it which did not go beyond a mere slogan for it lacked a practical value. Therefore, it must be born in mind and that must be considered a fact that human rights are not pragmatically treated as ‘indivisible, interrelated and interdependent and they are certainly not treated either “on the same footing” or “with the same emphasis.”’ The two sets of rights are divided at the global level and the legal protection is quite far from being equal due to the weakness of complaint mechanism for the protection of socio-economic rights.⁸⁰ However, one might also argue that the three different notions in human rights that is indivisibility, interdependency and interrelatedness of human rights will enable us in maintaining the balanced and uniform relation in according protection to both types of rights, most importantly via the realization of integrated approach to human right that will boost the justiciability and protection of socio-economic rights guaranteed under the ICESCR.

The UN Committee on Economic, Social and Cultural Rights was well aware of the imbalance between the two sets of rights when it stated in the General Comment No. 9 (1998) on the domestic application of the socio-economic rights. ‘The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond

⁷⁹ Koch at note 39, P.1, See as well, Resolution 421 (V), Draft International Covenant on Human Rights and Measures of Commission on Human Rights.

⁸⁰ Id, p. 2-3.

the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights as 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 the society.⁸¹ This notion of interdependency, interrelatedness and indivisibility of human right were repeatedly and widely reflected in the scholarly literature, writings of human rights advocates and practitioners, and in the authoritative interpretations surrounding the content and obligations of socio-economic rights (ICESCR).⁸²

2.2.3. The Acknowledged notion of Integration of Human Rights under the Declaration on the Right to Development (1986)

The Declaration on the Right to Development (herein after RTD) which stated unequivocally that the RTD is a human right, was adopted by United Nations in 1986 by an overwhelming majority with the USA casting the single dissenting vote. This Declaration comes almost three decades and eight years after the adoption of the UDHR, which constituted both civil and political rights (Articles 1 to 21) and socio-economic and cultural rights (Articles 22 to 28).⁸³ It is obvious that the UDHR revealed the immediate post-war consensus about human rights based on what President Roosevelt described as four freedoms embracing the freedom from want which he wanted to be incorporated in an International Bill of Rights.⁸⁴ There was no doubt at that time about political and economic rights being interrelated and interdependent components of human rights, and it is clear that “true individual freedom cannot exist without economic security and independence”. Not only this, the untold contribution of Mrs. Eleanor Roosevelt, during the drafting of the UDHR, identified and advocated the RTD when she stated that:⁸⁵

⁸¹See General Comment No. 9, Para. 10 (Nineteenth session 1998), Report of the Committee on Economic, Social and Cultural Rights, UN doc. E/1999/22, p. 117-121.

⁸² Whelan at note 38, p. 1.

⁸³Arjun Sengupta, *The Right to Development as Human Rights* (2000), this paper was written at the Francois-Xavier Bagnoud center for health and Human Rights and Harvard School of public health in December in 1999, unpublished., see also Arjun Sengupta, *Towards realizing the right to development: Development and Change*, June (2000),p. 1-2.

⁸⁴M.Glen Johnson, ‘The contribution of Eleanor and Franklin Roosevelt to the Development of International protection for Human Rights,’ *Human Rights Quarterly*, NO. 9.1 (1987), p. 19-24.

⁸⁵Id, p. 35.

We are writing a Bill of Rights for the world, and ... one of the most important rights is the opportunity for development.

Many years were lapsed for the world community to get back to the original conception of integrated and indivisible human rights.⁸⁶ The Declaration on the RTD was the result.

Finally a new consensus emerged in Vienna at the second UN world conference on Human Rights in 1993, there by reaffirming the RTD as a universal and inalienable right and an integral part of fundamental human right which integrated economic, social and cultural rights with civil and political rights in the way revealed in the UDHR.

In the part I, section eight of the Vienna Declaration (1993) the holistic nature of human rights was revealed in connection with democracy, and development as interdependent and mutually reinforcing and further under the same part, section 10, the World Conference on Human Rights in Vienna (1993) stipulated the RTD as a universal, and inalienable right and an integral part of fundamental human rights, thereby making the RTD as part and parcel of human rights. And further affirmed the difficulty to think of human rights without development for they are interlinked by their very essence.⁸⁷

Coming directly to the Declaration on the RTD begin with the preambular statement of the Declaration on the RTD in Para. 3 and 4 clearly enunciated the doctrine of integrated notion of human rights there by recalling the international bill of rights that embraces the UDHR, ICESCR and CCPR as they are interdependent, interrelated and mutually reinforcing one another.⁸⁸ Further, in the same preamble Para.10, interestingly the declaration reinstates plainly the concern of the international community in the integration of all human rights and the full realization of the same. The full text of the same paragraph is well elucidated herein below:⁸⁹

⁸⁶Sengupta at note 83, p. 1.

⁸⁷Vienna Declaration at note 7, See Para. I, section Eighth and ten.

⁸⁸Declaration on the Right to Development, 4 December (1986), A/RES/41/128, 4 December 1986, plenary.

⁸⁹Id, Preambular Statement Para.10, see also Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality,' *Harvard Human Rights Journal*, Vol. 17(2004), p. 145-146.

Concerned at the existence serious obstacle to development as well as to the complete fulfillment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, social, economic ... and considering that all human rights and fundamental freedoms are indivisible and interdependent ... equal attention and urgent consideration should be given to the protection and promotion of civil ..., accordingly the promotion of, the respect for and enjoyment of certain human rights cannot justify the denial of other human rights.

Thus, one can possibly argue that the promotion of the RTD is quite linked to the equal attention and balanced protection given to all human rights in general and specifically to the two sets of human rights that is ICCPR and ICESCR.

Article 1 of the Declaration on RTD reiterates the inalienability of the RTD and its role in guaranteeing the full realization of all human rights and fundamental freedoms. And the plain wordings of Art 6, (2) and (3) clearly reinstated the notion of interdependency and interrelatedness of all human rights and give prominence to the equal importance and treatment of the two sets of human rights so as to avoid obstacle to development and to fully realize all human rights for the well being of the entire community.⁹⁰ Arguably, one can see that the integrated approach to human rights enunciated in the Declaration on the RTD. This will also enable states to take note of this declaration and give the way to the enhanced protection of socio-economic rights in their domestic fora. However, what is regrettable is that the Declaration on the RTD lacked a binding force on states.⁹¹

In sum, it is observable that this Declaration has clearly entrenched the doctrine of integrated approach to human rights that operationalizes the notion of indivisibility and interdependency of all human rights. Hence, this will be considered as path giving to an equal and balanced recognition of both sets of human rights and specifically will pave the way for enhanced protection of socio-economic rights that is neglected at the international fora and the

⁹⁰See Art 1, 6 (2) and (3) and (8) (1) of the Declaration on the RTD at note 88.

⁹¹Marks at note 68, p. 147-148 and see also Sengupta at note 83, p. 2 – 8 and see also Art 9(1) of the Declaration on the RTD at note 88.

Declaration thus can be said to realize the idea of the indivisible and interdependent notion of human rights.⁹²

2.2.4. Strengthened Conceptions of Integration of Human Rights under the CEDAW (1981)

The utmost significance of socio-economic rights to women was illustrated in the fourth world conference on women in Beijing in 1995 in which the United Nations Development Program published a special report on gender specific indicators. This in fact revealed that women face the severest human rights problems in the areas of socio-economic rights.⁹³

The increasing global focus on economic, social, and cultural rights during the recent years has given impetus to the enhanced awareness in regard to specific human rights problems encountered by women. Arguably, international law accords priority to civil and political rights that may have very meager to offer women generally. The notion of indivisibility and interdependence of human rights, which emphasizes the importance of all sets of human rights, has in fact been endorsed simultaneously, with the recognition that the human rights of women form an inalienable, integral and indivisible part of human rights.⁹⁴

Thus, one can easily infer from the above wording that the idea of unity among all human rights was strengthened four years after United Nations resolutions on the interdependence and indivisibility of all human rights passed, the Convention on the Elimination of Discrimination against Women (1981) (herein after CEDAW) is consisted of both sets of human rights including ICCPR and ICESCR which was the result of the position of women considered on the global fora.⁹⁵ This clearly tells us that the principle of integrated approach to human rights is well considered in CEDAW and that the convention has given equal importance to both sets of human rights and it rather enhanced the equal enjoyment of all

⁹²Allan Rosas, 'The Right to Development', in *Economic, Social and Cultural Rights: A textbook*, second Rev. edn., A. Eide et al (ed.s), Martinus Nijhoff publishers (2001), p. 126 and also see Art. 22 of the ACHPR.

⁹³Katarina Frostell and Martin Scheinin, 'Women,' in *Economic, Social and Cultural rights. A textbook*, second Rev. edn, A. Eide etal (eds.), Martinus Nijhoff publishers (2001), p. 331.

⁹⁴Vienna Declaration at note 7, Para. 5 and 8.

⁹⁵Nickel at note 16, p. 104-105.

human rights irrespective of sex. This approach focused on the application of the principle of equality and non-discrimination; on human rights of particular importance to woman such as socio-economic rights of women and specifically on human rights of women like protective rights related to pregnancy or on gender specific interpretation and application of human rights.⁹⁶ It is clear that this aspect of integration inevitably give an impetus to the enhanced justiciability of socio-economic rights under the same convention (CEDAW) thereby emphasizing the equal importance of the two sets of human rights. This will enable us to overcome the controversies related to socio-economic rights both at global and national level.

These two sets of human rights were under the same implementing mechanism or complaint procedure which accords the equal protection to the same rights in CEDAW under its optional protocol (1999).⁹⁷ The CEDAW includes property rights, social security and work related rights of women in the covenant and at the regional level (in the African regional human rights system) women were given a heightened protection in the protocol to the African charter on human and people's right on the rights of women in Africa (2005) which is supplementary to the African charter on human and peoples' rights (ACHPR), hence, it embraces the doctrine of indivisibility and interdependency of human rights enunciated in the preambular charter.⁹⁸

The preamble in the Para.4, of the protocol on the rights of women in Africa has clearly cemented the notion of integrated approach to all human rights thereby according emphasis to the essence of indivisibility, interdependence and interrelatedness of all human rights: that is:

Women's rights have been recognized and guaranteed in all international human rights instruments, notably the universal declarations of human rights, the international covenant on civil and political rights, the international covenant on economic, social and cultural rights, the convention on the elimination of all forms of discrimination against women and its optional

⁹⁶Frostell and Scheinin at note 93, p. 332-333, see also Convention on the Elimination of all Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR supp. (No. 46) al 193, U.N. Doc. A/34/46, entered into force sep. 3, 1981.

⁹⁷See Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women adopted by the General Assembly on October 1999. UN doc. A/RES/54/4.

⁹⁸See also Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa, adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005.

protocol, the African charter on the rights and welfare of the child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights.

The protocol has entrenched plainly the rights of women in Africa to the right to education and training, economic and social welfare rights, health and reproductive rights, food security and adequate housing. These substantive socio-economic rights of women is accorded a due protection under this protocol and hence, one can easily infer that these rights are well entrenched and given primacy at the regional fora than on global level.⁹⁹

In sum, the human rights of women are given a holistic approach which will realize the notion of indivisibility and interdependence of all human rights by integrating the two grand categories of human rights both under CEDAW and protocol to the African charter on the right of women in Africa. One can see that this integrated approach to women human rights in a holistic manner will have a pivotal importance to contribute in the judicial protection of socio-economic rights of women specifically and socio-economic rights in general. This can be done by putting into effect the notion of inseparability of all human rights. This notion hence will have untold contribution in the enhancement of enforcement of socio-economic rights embedded in the CEDAW which is the most effective and important legal protection for it has the binding nature on state party to it.¹⁰⁰

2.2.5. Rejuvenated Concept of Integration of Human Rights under the CRC (1989)

The Convention on the Rights of the Child (herein after CRC) is the first treaty covering civil, political and socio-economic human rights on an equal level in a single comprehensive document; it attempts to address the various needs of children and juveniles not only by establishing special guarantees for the protection of children for instance from violence, abuse, exploitation, neglect or unacceptably poor conditions, but also by affording protection to children in the development of their identity, autonomy and active participation in social

⁹⁹Id, see Articles 12, 13, 14, 15, 16 of the African Charter on the Rights of Women in Africa.

¹⁰⁰Nowak at note 2, p. 86.

life like, the right to privacy, freedom of expression and etc.¹⁰¹ It also provides for positive obligation of states to ensure adequate standards of living, access to education, health institutions, social security, etc. which correspond to the universal human rights in many areas and in addition, also embodies a number of human rights that specifically addresses the problem encountered by children due to their very nature.¹⁰²

The CRC can be cited as the best example in the integration of both sets of human rights including ICCPR and ICESCR in one document. The CRC has now been ratified by 190 and above states, which comprises the vast majority of the global community.¹⁰³ An essential aspect is that the CRC defines some general principles which together form an approach to the rights of the child which guide national programs of implementation. The CRC is flourished on some important values about the treatment of children, their protection and participation in society. These notions are well elucidated under Articles 2, 3, 6 and 12 of the CRC.¹⁰⁴ These Articles were emphasized and referred as the general principles by the Committee on the Rights of the Child. These principles embrace non-discrimination, best interest of the child, right to survival and development and views of the child which are the part and parcel of both sets of human rights including civil, political and socio-economic rights of the child.¹⁰⁵

In the spirit of respecting the notion that all human rights are interlinked, there was an ambition during the drafting of the CRC to avert distinguishing between all human rights as defined by the two covenants. In the text of the CRC there is only one direct reference to the term socio-economic rights (Art. 4). It is evident from the *travaux preparatoires* that this wording was a reflection of a concern that some provisions of the convention are resource demanding which should be sufficient available resources.¹⁰⁶ Poor countries should at least meet the minimum core rights to be made justiciable at the domestic level so as to realize their minimum core obligations which are always on the shoulder of ratifying states or state party

¹⁰¹Id, p. 93-94.

¹⁰²Convention on the Rights of the Child, G.A. res. 44/25, annex 44, UN. GA OR SUPP. (No. 49) at 167, UN.DOC. A/44/49 (1989), see Articles 24, 26, 27, and 28 of the CRC.

¹⁰³Eide at note 3o, P.11.

¹⁰⁴Thomas Hammarberg, 'Children,' in *Economic, Social and Cultural Rights*; a text book, second Rev. edn., Eide et al (ed.s), Martinus Nijhoff publishers (2001), p. 355.

¹⁰⁵ Id, p. 356-57, sees also Articles, 2, 3, 6 and 12 of the CRC at note 102.

¹⁰⁶ Hammarberg at note 104, p. 364.

to the CRC. They should make every effort in using their scarce resources to fulfill these minimum core rights as a matter of priority. However, the majority of the norms in the convention have no such limitation except (Article 4), thus, one can argue that, the CRC to a great extent attempted to dissolve the disparities envisaged between the two sets of rights at the international level and come down to the point that all human rights are equally important.¹⁰⁷ This will enable state parties to the CRC and major actors in the field to realize the full protection of the child rights on the domestic plane through the integrated approach to human rights entrenched in the CRC. It is obvious that this will specifically give an important impetus in the enhanced justiciability of socio-economic rights on the national fora.

The global work for the CRC has not been much disturbed by the political polarization which once drove a wedge in the UN between the two sets of rights. The CRC embodies all human rights for children in a single instrument thereby imposing the obligation to respect, protect and fulfill, on the ratifying states.¹⁰⁸

Coming to the regional human rights system in Africa, the African Charter on the Rights and Welfare of Child came into force 10 years after the CRC. This African Children's Charter is very similar to the CRC. However, the Charter offers a heightened protection to the person under the age of 18 years by providing an individual complaint procedure which is lacking under the CRC. The African Children's Charter is also came up by reintegrating the two sets of human rights there by averting the differences noticed at the international level through the bifurcation of the two inseparable human rights. Hence, the Charter gives a heightened protection to the child at the regional arena and specifically it will boost the justiciability of socio-economic rights of the children of Africa to a great extent. And further, this will bring untold and great protection at higher level to the rights of child on the domestic fora if ratified by states for it has a binding force.¹⁰⁹

¹⁰⁷ Id, p. 366-368.

¹⁰⁸ Id, p. 370-372.

¹⁰⁹ Heyns and Killander at note 19, p.62 and see also the African Charter on the Rights and Welfare of the Child, adopted in Addis Ababa, Ethiopia on July 1990 and entered into force on 29 November (1999), see Articles, 11, 13, 14, 15 of the same.

In sum, one can boldly speak that the notion of indivisibility and interdependency of all human rights are envisaged under the CRC and African Charter on the Rights and Welfare of Child. Thus, the holistic approaches to human rights through equal importance that acknowledge the kin relationship between the two sets of human rights are well elucidated under both instruments (i.e. CRC and ACRWC).¹¹⁰

2.2.6. The Integrated Notion of Human Rights Enunciated under the ACHPR (1981)

The African human rights system is the youngest of regional mechanisms and follows its counter parts with the provision of similar procedures such as the inter-state, individual communication mechanisms and the state reporting procedure. The ACHPR was adopted, under the auspices of the Organization of African Unity (OAU), in 1981 and came into force in 1986.¹¹¹

The ACHPR was the result of the political polarization of the cold war and shows a compromise between the ideological and belief systems represented at its negotiation. Before the adoption of the Charter, these ideological disputes had undermined the realization of the integrated vision of human rights articulated in the UDHR, resulting in the division of the international human rights treaty regimes when the global human rights covenants were clearly separated.¹¹² It (ACHPR) embodies a unique document representing the African concept of rights. The intention of drafters was to create an instrument that was based on African philosophy and responsive to African needs. The uniqueness is elucidated by, for instance, the inclusion of civil and political rights, economic, social and cultural rights and peoples' rights in one comprehensive document treating them as indivisible, interrelated and interdependent.¹¹³

¹¹⁰Hammarberg at note 104, p. 372.

¹¹¹Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law*, Hart Publishing, Oxford-Portland Oregon (2000), p. 9-10.

¹¹²Chidi Aselm Odinkalu, 'Analysis of paralysis or paralysis by Analysis?', Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 23 (2001), p. 330.

¹¹³Murray at note 111, p. 10-11.

The ACHPR embodies unique characteristics that departed significantly from the Orthodoxies of the era. The preamble to the charter clearly asserted the notion of indivisibility, interdependence and interrelatedness of all human rights, that reiterates:

*It is hence forth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.*¹¹⁴

The wording of the ACHPR in its preamble and its formulation has gone much further than what was implied in the principle of universality, indivisibility, and interdependency of human rights that were acknowledged in varying degrees in the charters preamble and what was explicit in the UN General Assembly's 1977 endorsement of the interdependence and indivisibility of all human rights on global fora to cement the solidarity of the two sets of human rights.¹¹⁵ Four years after this endorsement the ACHPR came into picture with the legal implications of indivisibility, interdependence and interrelatedness of human rights in its main text (as a binding legal force). Arguably, one can see from the clause that affirms "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights" seems to recognize and accords the primacy of socio-economic rights over civil and political rights.¹¹⁶ Thus, the charter gives a due protection to socio-economic rights by totally deviating from the doctrine of separability of human rights and further integrated the two grand categories of human rights in a single binding instrument and also the ACHPR accords a heightened protection to socio-economic rights over civil and political rights which will pave the way for the enhanced justiciability of socio-economic rights on the regional fora. This has a positive consequence for the protection of social and economic rights at the national level for it has a legal implication for the ratifying states.

¹¹⁴ See the preamble of the African Charter at note 16, Para. 8.

¹¹⁵ Odinkalu at note 112, P.337.

¹¹⁶ Ibid and see also Takele Soboka, '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), p.16.

Not only this, but the ACHPR also paid a particular attention to the right to development which has another express aspect of indivisible, interdependent and interrelated notions of human rights that ensure and guarantee the protection of socio-economic rights. As the declaration on the RTD, development is both an individual and a collective right which give an impetus to the social, economic and cultural development and made an integral part of human rights that truly revealed the essence of indivisible and interdependent human rights at a global level; furthermore, the ACHPR substantiated in its charter as a legally binding instrument.¹¹⁷

The ACHPR has shown the means that can be used to bolster the justiciability of socio-economic rights at the regional level and this could be a good lesson for the states party to the charter. One can hold a position that the ACHPR has alleviated to some extent the problem of differential treatment accorded to the two grand categories of human rights at the international arena there by integrating all human rights as truly indivisible and interdependent in one comprehensive document. This aspect of integration of human rights will have untold contribution in the rejuvenation of the enhanced justiciability of socio-economic rights. This will also increases the protection of the rights of people facing a problem of socio-economic rights in the continent.¹¹⁸

Cementing on the very principle of indivisibility and interdependence of all human rights, the ACHPR in its main text addresses socio-economic rights. First, the ACHPR guaranteed cross-cutting rights which facilitate the exercise of both civil and political rights and socio-economic rights. These embrace the principle of non-discrimination and equality before the law as well as the right to life and human dignity; which are instrumental in enhancing the justiciability of socio-economic rights particularly, second, it included the right to property (Art 14) of the African charter as new rights which were not entrenched in the other international human rights regime to which Africa is not a party, this new rights have socio-economic implication and the right to participate in the government of one's country, of

¹¹⁷ Nowak at note 2, p. 44, see also Article 22 of the African Charter, that included the right to development in the Charter as a binding instrument and integral part of human rights and its particular importance in the full enjoyment of all human rights, see also preamble of the same Charter Para.8 at note 16 as well.

¹¹⁸ Takele at note 116, p. 12.

access to public property and services of one's country and thirdly, it enunciated a classic or traditional social and economic rights, one can see the distinguishing feature of the African Charter in this regard is that it declined to divide human rights at a time when this was the staple of international law, rather it articulates as indivisible and integrated all human rights in one document.¹¹⁹ One can boldly speak that the ACHPR has reinstated the unity of all human rights as a binding normative framework coherently in its main instrument. This will pave the way for boosting the justiciability of socio-economic rights and affords a greater protection in the areas of the same for those who are without means to sustain their life across the continent.

The ACHPR embodies no derogation clause in which the African commission on human and peoples' right held this to mean, that "limitations on the rights and freedoms enshrined in the charter cannot be excused by the emergencies or special conditions" and the incremental language of progressive realization is also averted by the charter except in Article 16(1), which protects the best attainable state of physical and mental health, the rest, the obligations that state parties should take with respect to these rights are avowedly stated as an outright application.¹²⁰

Economic and social rights are put on the same footing as all other rights in the charter and even the charter accords primacy of the socio-economic rights as clearly provided in the preamble of the charter.¹²¹ It is evident from the wording of the preamble that the bifurcation of human rights guaranteed under the ACHPR is prohibited for they cannot be dissociated from one another. Therefore, this has a far reaching consequence in realizing the justiciability of socio-economic rights enunciated in the ACHPR as truly indivisible and interdependent human rights via the doctrine of integrated approach to human rights.¹²² It also has a paramount importance in boosting the justiciability of social and economic rights at the domestic plane for states parties to the ACHPR are bound to enforce this notion of

¹¹⁹Odinkalu at note 112, p.338-340.

¹²⁰Id, 62, p. 349.

¹²¹Nowak at note 2, p.205.

¹²²Odinkalu at note 112, p.349-350.

interdependence and interrelatedness of human rights by according an equal emphasis and supporting the relationship between the two sets of human rights.

When we see the Grand Bay (Mauritius) Declaration and Plan of Action (1999) rejuvenates the notion of integration of all human rights in its preamble Para .12, reiterates:

The need to constructively examine human rights issues in a spirit of justice, impartiality and non-selectivity, avoiding their use for political purposes.

Thus, in this instance, no one will be allowed to be selective in the areas of human rights so as to accord the equal importance to the same. And it also plainly maintained the inseparability of all human rights in the same Declaration under section 1 and 2.¹²³

By the same token the Kigali Declaration (2003), has reaffirmed the notion that ‘all human rights are universal, indivisible, interdependent and interrelated and it further urges member states and regional institutions to accord the same importance to economic, social and cultural and civil and political rights, and aptly, at all levels, a rights-based approach to policy, program planning, implementation and evaluations.’¹²⁴

At the regional level, besides the ACHPR, the above respectively entertained declarations reiterate that all human rights are interdependent and indivisible. The holistic approach to human rights would cement the unity among all categories of human rights and will give impetus to the full enjoyment of the same in the region if they were given practical value and not used for political purposes.¹²⁵

¹²³Grand Bay (Mauritius) Declaration and Plan of Action, this document was adopted by the first OAU Ministerial Conference on Human Rights, held in April 1999 in Grand Bay, Mauritius; section 1 and 2 of the declaration clearly asserts that human rights are universal, indivisible, interdependent and interrelated and urges governments, in their policies, to give priority to economic, social and cultural rights as well as civil and political rights, and the conference also affirms that the right to development is universal and in alienable right which form an integral part of fundamental human rights.

¹²⁴Kigali Declaration, Adopted by the AU ministerial conference on Human Rights in Africa, May 2003 in Kigali, Rwanda, see section 1 and 4 of the declaration.

¹²⁵ Grand Bay Declaration at note 102, See the preamble of the declaration Para. 12.

CHAPTER THREE

3. The Nature of Socio-Economic Rights

3.1. Progressive Realization

“Each state party to the present covenant undertakes steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of 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.”¹²⁶

This Article could be described as the most important part of the covenant (ICESCR). It shows the duties incumbent upon states parties in the realization of the rights contained in the covenant, an understanding of which has a pivotal importance both as to the substance and implementation of the ICESCR as a whole. The most surprising feature of the covenant as a human rights guarantee is the nature of the obligations undertaken by states as regards the implementation of the rights.¹²⁷

Unlike other human rights documents, states are not required to outrightly guarantee the rights, but rather they may implement them over time depending upon the availability of necessary resources. Article 2(1) has often characterized socio-economic rights as being ‘progressive in nature’. Certainly, the full realization of some of the rights presumes the availability of sufficient economic resources.¹²⁸ By the same token, the failure of many states fully to implement social and economic rights can often be more plainly attributed to a lack of political will than any matter of resource scarcity.

The notion of progressive achievement is in many ways the linchpin of the whole covenant. Upon its meaning, it reveals the nature of state obligations. Most of the rights granted rely in

¹²⁶ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/ 6316 (1966), 993 UN.T.S. 3, entered into force Jan. 3, 1976.

¹²⁷ Craven at note 41, p. 106.

¹²⁸ Ibid.

varying degrees on the availability of resources and this fact is recognized and revealed in the concept of progressive achievement. The idea; hence, mirrors inevitably contingent nature of state obligations.¹²⁹

It was argued that using this notion of “progressive realization” as a pretext, states may postpone their obligation to an indefinite time in the distant future? This notion relates to the feature of the obligation imposed up on states parties to the ICCPR. Commentators invariably contrast the concept of progressive achievement with that of immediate implementation which is said to be required by Art 2 of the ICCPR.¹³⁰ At the time of drafting that Article it was reached on consensus that the notion of implementation at the earliest moment was implicit in article 2 as a whole. However, the reality is that the full realization of the civil and political rights heavily relies both on the availability of resources. The suggestion that realization of civil and political rights requires only abstentions on the part of the state and can be achieved without significant expenditure is patently at odds with reality.¹³¹

The dominant feature of obligations pertaining to socio-economic rights must be their ‘progressive’ nature. Though, recently such rights have been included in the ACHPR on the same footing as civil and political rights, they are hardly possible to be outrightly implemented due to the considerable expenses involved in their realization.¹³² The progressive realization yardsticks take into account that valid expectations and concomitant obligations of states parties to the ICESCR are not uniform and universal. This induces us to look at the development levels relatively and resource availability of specific countries.¹³³

The Committee on Economic, Social and Cultural rights has interpreted the notion of “progressive realization” that is:

¹²⁹ Philip Alston and Gerard Quinn, ‘The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 9 (1987), p. 175, see also Rosga and Satterthwaite at note 54, p. 260-265.

¹³⁰ Craven at note 41, p. 130, see also Alston and Quinn at note 129, p. 175.

¹³¹ Alston and Quinn at note 129, p. 175, see also Craven at note 41, p. 131.

¹³² Id, Craven, p. 129 and Alston and Quinn at note 129.

¹³³ Andrey R. Chapman, ‘A “Violation Approach” for monitoring the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 18 (1996), p. 31-32.

*The concept of progressive realization constitutes a recognition of the fact that full realization of economic, social and cultural rights cannot be achieved in a short period of time ...it is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison de'tere*, of the covenant which is to establish clear obligations for states parties in respect of the full realization of the rights in question.¹³⁴*

It is plain from the above statement that the Committee has not defined what moving expeditiously and effectively entails, it lacks concrete standards for assessing the performance of government and their compliance with the covenant.¹³⁵ However, states parties far from viewing the phrase progressive realization as a let-out clause, the Committee has sought to give it a meaning that backs the meaning of other phrases within article 2 (1), thus states may not delay in their efforts to realize their rights, and actually they must take measures which would achieve that objective in the shortest possible time.¹³⁶ The obligation stated herein above seems to require a continuous improvement of conditions overtime without backward movement of any kind, that is “any deliberately retrogressive” measures ... are prohibited unless justified by reference to the totality of rights provided for in the covenant and in the context of the full use of the maximum of available resources.¹³⁷

For instance, the Committee has also revealed that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by states parties to the ICESCR, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations entrenched in the covenant.¹³⁸ This shows the avowed unwillingness of a state to respect a norm when it is obviously capable of doing so. Hence, the language of progressive realization embedded in the covenant will not serve as a defense for states with

¹³⁴ General Comment No. 3: *The Nature of States Parties Obligation* (Art. 2(1)), Committee on Economic, Social and Cultural Rights, 5th Session, 1990 and its Report, UN doc, E/1991/23.

¹³⁵ Chapman at note 133, p. 32.

¹³⁶ Craven at note 41, p. 131.

¹³⁷ Leckie at note 45, p. 99, see also Alston and Quinn at note 129, p. 192-205.

¹³⁸ *Ibid*, Leckie at note 45.

available resources and to sit back there by postponing their obligation to indefinite distant future, if not complied with states could be found in violating the ICESCR.¹³⁹

It is evident that the notion of “progressive realization” is not totally averted the concept of immediate realization in revealing the obligation of states parties to the covenant. For instance, steps to be taken, guaranteeing the rights, equality protection etc are of immediate in their very nature which are even resource demanding and hence, progressive realization will not serve states as escape clause.¹⁴⁰ The other thing is that states parties to the covenant should at least guarantee the individual right to the core-minimum entitlement of their individuals subjected to their jurisdictions.

3.2. Core-Minimum Obligation

The minimum core entitlement concept has gained rampant acceptance and support as a means of ensuring and reinvigorating socio-economic rights claims. For instance, “states are obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all”.¹⁴¹ States to consider identifying specific national benchmarks designed to give effect to the minimum core obligation to ensure the satisfaction of minimum essential levels of each of socio-economic rights.¹⁴²

The Committee on Economic, Social and Cultural Rights in its General Comment No. 3 backs the existence of “minimum core obligations” emanating from the ICESCR. It asserts that:

The committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential food stuffs, and primary health care, of basic shelter and housing, or of

¹³⁹ Id, p. 100-101, sees also Alston and Quinn at note 143, p. 185.

¹⁴⁰ Craven at note 41, p. 132

¹⁴¹ Report of the Special Rapporteur on the Realization of Economic, Social and Cultural rights, UN.ESCOR, Commission on Human Rights, 43rd, sess. Agenda Item 8, at 18, 52 (d), U.N.Doc, I/CN.41 sub. 2/1991/17(1991). This was an assertion made by Danilo Turk, U.N. Special Rapporteur on ICESCR, as cited in Leckie at note 134, P. 100.

¹⁴² U.N.ESCOR, Commission on Human Rights. Res. 1993/14. This was a resolution made by U.N. Commission on Human Rights as cited in Leckie at note 45, P. 100.

the most basic forms of education is, prime facie, failing to discharge its obligations under the covenant. If the Covenant were to be read in such away as not to establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.¹⁴³ Ensuring the minimum core entitlement standards in this way raises the question as to whether such threshold applies primarily to the 'individual enjoyment of a right or to society wide levels of enjoyment.' Supporters of the minimum core obligation approach have favored the latter position, saying that "the scope of violation of economic and social rights would then refer to the percentage of the population not assured of this minimal threshold."¹⁴⁴

Others, nevertheless, have sought to address this question more from the perspectives of the people possessing the rights at large, rather than from the state's perspectives, which is exclusively obliged to ensure rights. For instance, it was asserted that "Each right must therefore give rise to an absolute minimum entitlement, in the absence of which a state is to be in violation of its obligations".¹⁴⁵ Thereby noting that:

*There would be no justification for elevating a "claim" to the status of a right with all the connotations that concept is generally assumed to have. If its normative content could be so indeterminate as to allow for the possibility the right holders possess no particular entitlement to anything.*¹⁴⁶

Identifying minimum core entitlements, as well as the minimum core obligations of states parties to the ICESCR to secure and protect such rights, must be taken as the first step, but not as the end of the process.¹⁴⁷ The "minimum threshold approach" applies irrespective of resources and hence, lack of resources could not be a defense, but exceptionally, unless the demonstration is made to the extent that every efforts has been made to use all the resources that are available in a commitment to satisfy, as a matter of priority, those minimum core-obligations so as to secure the minimum entitlements.¹⁴⁸

¹⁴³ See General Comment No. 3, at note 134.

¹⁴⁴ Alston and Quinn at note 129, p. 184, see also, Leckie at note 45, p. 101.

¹⁴⁵ Leckie at note 45, p. 101-102.

¹⁴⁶ Alston and Quinn at note 129, p. 184.

¹⁴⁷ Leckie at note 134, p.102.

¹⁴⁸ Craven at note 41, p. 142-143.

This statement must be taken into account by establishing a “presumption of guilt” independent of resource considerations. If not, it becomes no value to speak of either minimum core threshold or the prime facie of violation of socio-economic rights that established by the Committee.¹⁴⁹ It is possible to argue that, thus, states were immediately responsible to satisfy and meet a minimum core obligation for each right in the covenant and in the mean time the notion of minimum core entitlement and obligations of states was to act as the burden shifting instrument in reporting before the Committee.¹⁵⁰ It is also clear that this concept will not allow us to draw a line between rights as a matter of priority over one another, but rather each rights should be actualized to the extent that provides for the basic needs of every member of society. These minimum standards should be achieved by all states, regardless of their economic condition, at the earliest possible moment. All the available means should be utilized embracing, if necessary, international assistance.¹⁵¹ Thus, this concept reveals that it can easily be possible to maintain the indivisibility of rights through minimum threshold approach as clearly revealed above.

The aspect of minimum core as a normative essence embraces two main concepts, these are a needs based core, including life, survival and basic needs and a value based approach which presuppose the concept of dignity, equality and freedom which has gone far beyond the “basic needs” approach to core minimum obligation.¹⁵² These notions resulted in giving content to socio-economic rights and paved the way for the utilization of integrated approach to human rights.

Therefore, it was maintained by the Committee that it is only in the situation of full realization that states would come up with a defense of resource constraint, but in the case of minimum threshold approach to sustain minimum core entitlement it was held that the resource

¹⁴⁹ Ibid.

¹⁵⁰ Rosga and Satterth at note 54, p. 272.

¹⁵¹ Craven at note 41, p. 141.

¹⁵² Katharine G. Young, ‘The Minimum Core of Economic, and Social Rights: A Concept in search of Content’, *Yale Journal of International Law*, vol. 33: 113 (2008), p. 126-139.

availability defense will no longer hold as a truth for states evading from liability in the situations of socio-economic rights in actual sense.¹⁵³

3.3. The Justiciability of Socio-Economic Rights

Before I delve into direct or indirect approach to justiciability, it would be better to see first the issue pertaining to the concept of justiciability in brief as a very definitional notion.

The question about justiciability of social and economic rights have persisted in the global human rights movement since, the bifurcation of the integrated human rights in the UDHR into two sets of human rights embracing the ICESCR and ICCPR.¹⁵⁴ The notion of justiciability may be given a broad definition: it means the extent to which an alleged violation of an economic or social subjective right invoked in a particular case is suitable for judicial or quasi-judicial review on the domestic fora.¹⁵⁵ Another concept of justiciability is that, it can also be defined, on the very basis of three normative preconditions cumulatively required: the claim element of justiciability which reveals as to what right is guaranteed and claimable as of legal rights (i.e. legal basis), the setting element of justiciability which is the right of accessing the court of law (i.e. whether the judiciary is empowered to entertain the rights in question) and the consequence component of justiciability which aptly talks about the right to get remedy for the violation (i.e. the right to remedy). Hence, these three elements of justiciability clearly tell us the notion of a certain rights suited for judicial scrutiny and enforceability, which is aptly the concept of justiciability. If, one element is missing, it is hardly possible to see a certain right as justiciable with ease before the judicial body; in short it is not-justiciable.¹⁵⁶

In sum, the working definition of justiciability (of socio-economic) rights is that whether it would be or a certain socio-economic rights is suited to determination of judicial proceedings

¹⁵³ Ibid, see also Craven at note 41, p. 142.

¹⁵⁴ Bruce Porter, *Justiciability of ESC Rights and the Right to Effective Remedies: Historic Challenges and New opportunities*, Beijing (2008), p. 1, see also Koch at note 14, p. 3-4.

¹⁵⁵ Coomans at note 15, p. 3-4, see also Koch at note 14, p. 257.

¹⁵⁶ Takele at note 116, p. 29-31, see also Ashap James, 'The Forgotten Rights: The case for the Legal Enforcement of Socio-Economic Rights in the UK National Law'(2007), p. 4-2 Available at,http://www.ucl.ac.uk/opticon18226/archives/issues2/vfPLAW_SE_rights.pdf.

or whether it vests an enforceable right in the individual and whether it lends itself sufficiently specific obligations on the part of the state. Thus, for economic and social rights to be justiciable; they should embrace the afore stated three cumulative elements: claimable rights, access to court and remedy which may be judicial or quasi-judicial that avowedly answer the question of justiciability.¹⁵⁷

3.3.1. Direct (Approach to) Justiciability

This section will emphasize on the direct protection of socio-economic rights as justiciable rights on the domestic arena.

Economic and social rights that are entrenched in the national constitutions allow individuals or groups whose rights are violated to seek redress from the judicial body.¹⁵⁸ This can only be realized when there is a willing machinery to adjudicate the entrenched socio-economic rights,¹⁵⁹ this reveals a justiciable right when there is a mechanism capable of adjudicating them, and non-justiciable, when one is lacking. Mathew Craven puts this idea plainly:

*The justiciability of a particular issue depends, not on the quality of decision, but rather on the authority of the body to make the decision. Prima facie then, in so far as the Committee is given the authority to assume a quasi-judicial role over the rights in the covenant, those rights will be justiciable.*¹⁶⁰

The constitutional entrenchment of justiciable human rights usually represents the highest ranking norms within the domestic legal order.¹⁶¹ To the contrary, constitutionally guaranteed socio-economic rights are in many countries more directive statements of principle than justiciable legal claims.¹⁶² However, providing a legal grounding of socio-economic rights by creating institutional frameworks for adjudicating them as justiciable rights is instrumental in establishing the relationship between social and economic rights, democratic citizenship and

¹⁵⁷ Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall Law Journal*, vol. 27, No. 4 (1989), p. 832-833, see also Dennis and Stewart at note 5, p. 474.

¹⁵⁸ Liebenberg at note 21, p. 57.

¹⁵⁹ Dennis and Stewart at note 55, p. 474.

¹⁶⁰ Craven at note 41, p. 102.

¹⁶¹ Liebenberg at note 21, p. 57.

¹⁶² Daniel J. Whelan and Jack Donnelly, 'The west, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight', *Human Rights Quarterly*, Vol. 29, (2007), p. 933.

respect for personal dignity. In doing so, we are able to create an ability at the domestic, regional and global level to alleviate the growing socio-economic inequality, tragic deprivation, wide spread hunger and homelessness.¹⁶³ Thus, merely guaranteeing the right without the judicial body empowered to give effective redress to the victims of socio-economic rights violation is an empty promise and hence, for socio-economic rights to be seen as justiciable rights pragmatically, there should be a claim, the judicial body and remedy cumulatively.

If the above cumulative elements are lacking, or one of them it is evident that socio-economic rights are devoid of direct justiciability on the domestic fora. This aspect of problem induces us to look for other means used as indirect justiciability which is applicable by interpreting other rights in the constitutions that will give an impetus in according due protection to social and economic rights indirectly.¹⁶⁴

3.3.2. Indirect (Approach to) Justiciability

The relationship between direct and indirect approach to justiciability of socio-economic rights is such that the former, which is the end, can be boosted through the utilization of the later as a viable instrument.¹⁶⁵ Economic and social rights more commonly receive indirect protection in a constitutional context through the application of civil and political rights. Furthermore, the indirect approach to justiciability is mainly based up on the expansive and progressive interpretation of the more flourished and expressly protected often via civil and political or cross-cutting rights. This approach has been successfully utilized in the Inter-American and European Human Rights systems and even in some national jurisdictions as a means to litigate and reveal the violations of socio-economic rights.¹⁶⁶ Consequently, there is a need to look for novel ways of boosting the justiciability of social and economic rights in the absence of direct justiciable rights at the regional and domestic fora. This aspect of justiciability has proven to be instrumental in rendering an impetus for the enhanced

¹⁶³ Porter at note 154, p. 4.

¹⁶⁴ Liebenberg at note 21, p. 56-57.

¹⁶⁵ Takele at note 116, p. 19-20, see also Liebenberg at note 21, p. 59.

¹⁶⁶ Liebenberg at note 21, p. 71-72, see also Takele at note 116, p. 22.

justiciability as well as giving an outlet to the gradual development of a jurisprudence for the complaints to depend on to establish specific socio-economic rights violations.¹⁶⁷

This approach to indirect justiciability utilizes, equality guarantee, the right to judicial protection and judicial remedy and the right to due process not only this ,but also it accords protection to economic and social rights via expansive interpretation of certain civil and political rights such as right to life or security of the person in some national jurisdictions.¹⁶⁸

Such aspect of justiciability will be much explored under chapter three in this thesis and how these notions are integrated and work hand in hand with socio-economic rights to enhance justiciability of the same and ensure the principles of indivisibility, interdependence and interrelatedness of human rights.

3.4. Challenges to Justiciability of Socio-Economic Rights

The notion of socio-economic rights has long generated controversy among philosophers and scholars, as actually has the very notion of human rights itself.¹⁶⁹ Despite, the UN universal acceptance of the doctrine of indivisible and interdependent nature of the two sets of rights, the reality in practice is that socio-economic rights remain largely ignored.¹⁷⁰

Economic and social rights are almost totally absent from common discourse of human rights in many states. Even in those states where socio-economic rights are constitutionally acted or where the ICESCR forms part of the domestic law, national courts have depended up on the over simplified characterization of economic and social rights as non-justiciable rights, due to this fact they have rarely given them full effect. Not only this but the absence of national case law directly related to socio-economic rights also itself has perpetuated the idea that those

¹⁶⁷ Takele at note 116, p.21.

¹⁶⁸ Liebenberg at note 21, p.73-74, see also Takele at note 116, p. 22, see Koch at note 14, p. 3, see also Philip Alston, 'No Right to Complain About Being Poor: The need for an Optional Protocol to the Economic Covenant in Asbjorn Eide and Jain Helgesen (ed.s), *The Future of Human right protections in a Changing World: Fifty years since the four freedoms Address-Essays* in Honour of Torkel Opsah (1991), p. 79-93.

¹⁶⁹ Alston and Quinn at note 129, p.157-159.

¹⁷⁰ Craven at note 41, p. 10.

rights are not capable of judicial enforcement.¹⁷¹ This may differ according to, for instance, the nature of the case, the wording of the provision that is invoked, the attitude of the judge and the features of the domestic system in particular.¹⁷² There are a lot of objections posed to socio-economic rights to challenge their justiciability: some of the major arguments are depicted herein below.

3.4.1. Socio-Economic Rights are demanding Rights

In this essence, many scholars argue that economic and social rights require state actions and considered as positive rights. Hence, the realization of the ICESCR requires a financial effort and resource committal of state as compared to civil and political rights which is considered as negative rights that requires state non-interference.¹⁷³ However, this assertion currently does not holds true, because, there are civil and political rights that demands a committal of state resources for instance, the right to fair trial, legal aid, setting up of the adequate judiciary and free and secret election. Ethiopia for instance, in the 2010 national election has devoted /invested/ 189.5 million birr to carry out the election.¹⁷⁴ Therefore, denying hearings and adjudication of socio-economic rights claimants on the basis of false differences between ICCPR and ICESCR such as positive versus negative, undefined and vague versus clear and defined, programmatic versus immediate and resource demanding versus resource independent can no longer successfully challenge the justiciability of socio-economic rights.¹⁷⁵ Arguably, civil and political rights are fulfilled by means of social initiatives, and that civil and political rights in fact become social rights at the fulfillment level. Thus, the notion of obligation to respect, protect and to fulfill all human rights give rise only to few controversies as regards justiciability. Not only social rights, but civil and political rights are also resource demanding.¹⁷⁶ Hence, the black and white distinction between the two grand

¹⁷¹ Ibid, see also Eide and Rosas at note 1, p. 5.

¹⁷² Coomans at note 15, p. 4.

¹⁷³ G.J.H.Van Hoof, 'The Legal Nature of Economic, Social and Cultural rights: A Rebuttal of some Traditional views', *in* the Right to Food, Alston and Tomaseviked , Martinus Nijhoff publishers (1984), p. 102-103, see also Scott at note 157, p. 833-836.

¹⁷⁴ This was disseminated on TVs & Radios during the National Election Campaign of Ethiopia at 7:00 PM, May 2010.

¹⁷⁵ Porter at note 154, p. 6, See also Alston and Quinn at note 129, p. 157-160.

¹⁷⁶ Koch at note 14, p. 3-5.

categories of human rights is mistaken and that instead a more integrated approach encompassing both sets of rights is preferable.¹⁷⁷

3.4.2. Political Controversy

In the UNs, pertaining to the feasibility of the implementation of social rights to the socio-economic system in which they must function has led to sometimes bitter controversy, in particular on the issue whether there should be one or two covenants. This controversy was apparently resolved in favor of the principle of indivisibility and interdependency of the two grand categories of human rights to strike down the notion that socio-economic rights are non-justiciable and far from judicial scrutiny.¹⁷⁸ Therefore, arguably, the ideology of the time though it contributed to the bifurcation of the UDHR into two covenants, it did not totally deprive the ICESCR the essence of justiciability to day. Many states have accepted socio-economic rights as justiciable rights in their constitution and recently the development of optional protocol to the ICESCR that tell us avowedly the ideological controversy of that time is now losing its currency.¹⁷⁹

3.4.3. Democratic Legitimacy of the Courts

Controversy about the justiciability of economic and social rights typically emphasizes in the very outset on their legitimacy which is meant whether their nature and content is suitable for constitutionalization. The constitutionalization of socio-economic rights primarily related to broader ideological concern on the redistribution of wealth and state intervention in the market economy. It has, for example, been claimed that socio-economic rights are choice sensitive issues that are better suited for political, rather than legal deliberation.¹⁸⁰

The institutional legitimacy of judiciary pertain both to the boundaries imposed by the principles of separation of powers and to the ideological contention concerning democracy,

¹⁷⁷Van Hoof at note 173, p 102-106.

¹⁷⁸Nicholas Hoysom, 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights', *South African Journal on Human Rights* (1992), p. 451.

¹⁷⁹Liebenberg at note 21, p. 57, see also Dennis and Stewart at note 5, p. 473-475.

¹⁸⁰Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights', *South African Journal on Human Rights* (2004), p. 389-392.

majoritarianism and judicial accountability.¹⁸¹ Thus, these are said to be distinct counter-majoritarian tensions inherent in judicial review. This impedes unelected judges to strike down legislation or policy conceived by the democratic branches.¹⁸² The decision of the courts may affect the possibility of the legislature and executive to freely take decision as regarding financial resources. This assumption has negative connotations that usually attached with undesirable politicization of the court and hence, impairment of the democratically elected legislature.¹⁸³ The perception emanated from a majoritarian's supposition is that, legitimate law making lies in the will of the parliaments, the elected representative of the sovereign people.¹⁸⁴ Thus, arguably, judges would unavoidably over step their legitimate boundaries.¹⁸⁵ Consequently, several states adopted the model of the Indian constitution, by entrenching socio-economic rights as the directive principles of state policy (DPSP) to guide state policy, but not made directly justiciable.¹⁸⁶

The justiciability of socio-economic rights boils down to the incapacity of courts to make decisions about the implementation of these rights, due to the nature of the rights that require making political choices, setting priorities, allocating resources and rearranging budgets such decisions should fall within the ambit of policy issues and the implementation of political program.¹⁸⁷ As per this interpretation of the doctrine, social policy and budgetary allocations is the exclusive domain of the legislature which is directly accountable to the electorate. This represents rigid, formalistic notion of the principle of separation of powers for many civil and political rights like right to vote, equality, freedom of speech, legal aid and a fair trial embodies a question of social policy and have budgetary implications.¹⁸⁸

¹⁸¹ Ibid.

¹⁸² Koch at note 39, p. 155-157.

¹⁸³ Id. 156.

¹⁸⁴ Koch at note 14, p. 4.

¹⁸⁵ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Social Rights*, Oxford University Press (2007). 135.

¹⁸⁶ Ibid.

¹⁸⁷ Liebenberg at note 21, p. 58.

¹⁸⁸ Coomans at note 15, p. 5-6.

The Committee on Economic, Social and Cultural rights has also commented in the way it shows the counter argument and answer to the problem relating to judicial legitimacy in dealing with issues involving socio-economic rights. That is:

*The adoption of a rigid classification of socio-economic ... 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.*¹⁸⁹

The separation of power at the outset is devised to avert the concentration of power in one branch of the government and is the means of ensuring the check and balances between the three branches of the government.¹⁹⁰ Not only this but also the experiences of different countries like South Africa and India reveal the possibility of socio-economic rights justiciability, suited for judicial enforcement as individual rights.¹⁹¹

3.4.4. Judicial Competency: Problems of Institutional Competence

This objection is raised usually against the inclusion of socio-economic rights as justiciable in a constitution that is the judicial bodies lack institutional competence to enforce rights of this nature.¹⁹² Economic and social rights frequently involve complex policy choices with far reaching socio-economic ramifications. It mostly relates to the concept that judges lack skill or are not economists or public policy experts; they are neither equipped to evaluate the most effective policy measures, for realization of the rights nor the impact of their decisions on other rights and needs within a democratic society. For instance, in the area of housing and health judges do not have specific expertise to make such complex decisions; this task is made more difficult by the fact that the provisions protecting human rights are frequently formulated in a broad, open ended way, leaving a large margin of appreciation to judges.¹⁹³

¹⁸⁹ Ibid, see also Dennis and Stewart at note 5, p. 474-475.

¹⁹⁰ General Comment No. 9, Para. 10.

¹⁹¹ Pieterse at note 180, p.386. See also, Liebenberg at note 21, p. 58-59.

¹⁹² Coomans at note 15, p. 5.

¹⁹³ Liebenberg at note 21, p. 60-62.

However, all human rights have social policy and budgetary implications and particularly the normative content of socio-economic rights is less well-developed than civil and political rights is more a reflection of their historical exclusion from adjudication procedures than their inherent nature. It is also possible at a minimum to negatively protect socio-economic rights, for instance, unlawful eviction and unjustified termination of social security benefits and employment have something to reveal and justify the intervention of courts competently in the area of social and economic rights.

3.5. The Integrated Approach: A Quest for Enhancing Justiciability of Socio-Economic Rights

The integrated human rights approach undertaken by the European Court of Human Rights, the UN Human Rights Committee and the emerging jurisprudence of the African Commission on Human and Peoples' Rights disproves; however, the traditional understanding of socio-economic rights as non-justiciable at least when they appear as fulfillment elements in civil rights. This is one good reason to exploit the potential of the integrated approach though it does not offer general conclusion on the justiciability issue.¹⁹⁴ This is an innovative way devised for enhancing the justiciability of socio-economic rights.

3.5.1. Cross-Cutting Rights

3.5.1.1. Non-discrimination and Equality Guarantee

The prohibition of discrimination is part of the human rights of equality, yet at the same time it is a notion applicable to all human rights alike.¹⁹⁵ As a result domestic and global legislative and judicial (or quasi-judicial) bodies have long been engaged in the formulation and elaboration of the right to equality and its flip side (non-discrimination) and principles that inform and underlie the protection of the right to equality. This right to equality is essential for guaranteeing the enforcement of the underlying human rights guarantees, embracing the

¹⁹⁴ Koch at note 14, p. 3.

¹⁹⁵ Nowak at note 2, p. 61.

protection and promotion of socio-economic rights in equal and equitable manner.¹⁹⁶ Distinctions which are not objectively defined in the enjoyment of the right to vote, work, education, social security, and housing, to day are generally considered discriminatory. Hence, the UN Human Rights Committee, in the Dutch social security cases, decided that traditional gender specific distinctions in the pension and social insurance laws (based on the 'breadwinner' concept) constituted violations of article 26 of the ICCPR.¹⁹⁷ Arguably, the prohibition of discrimination is essential in the areas of economic and social rights, because disadvantaged groups, such as women, ethnic or religious minorities and persons with disabilities are discriminated against especially when trying to access the labour or housing market, educational and health care institution, as well as social services.¹⁹⁸ Thus, the prohibition of discrimination is used as a means to overcome the still widespread assumption that socio-economic rights are not justiciable. This is a cross-cutting right that facilitates the exercise of both sets of human rights.¹⁹⁹ The equality guarantee is therefore a thread that draws together all categories of human rights and its is also a principle that tells the distribution of public resources for protection and promotion of, for instance, the right to health, labour rights, the right to education and other prized social goods and services to every one at equal measure.²⁰⁰

3.5.1.2. Procedural Safeguards

I. Fair Hearing: If the non-discrimination clause is suitable for extending the protection of the ICCPR to some assets of socio-economic rights, the same holds true for the right to fair hearing via the fair trial process which is part and parcel of the rights to due process which completes the judicial protection of human rights.²⁰¹ Art 6(1) of the European Convention on Human Rights (ECHR) and Art 7(1) of the ACHPR provide for the right to fair trial and every one's right to have his cause heard. These procedural safeguards are the avowed instances,

¹⁹⁶Takele at note 116, p.22.

¹⁹⁷Nowak at note 2, p.61.

¹⁹⁸Id, p.62.

¹⁹⁹Id, p.63, See Scheinin at note11, p32, 1 See also Odinkalu at note 38, p.189.

²⁰⁰Takele at note 116, p.22, see also Kate O'Regan, 'Addressing the Legacy of the past: Equality in the South African Constitution', in *Non-Discrimination law: Comparative perspectives*, a text book edited by Titia Loenen and Peter R.Rodrigues, Martinus Nijhoff Publishers (1999), p. 14-37.

giving additional protection to rights that are basically covered by other human rights treaties. Therefore, the fair trial clause has at least so far, been the starting point for the most important interpretations that give protection to some socio-economic rights.²⁰²

A meaningful hearing of human rights complaint by a judicial body must realize the due process guarantees. Although the due process guarantee is often attached to criminal proceeding, there is no reason why the same procedural safeguards cannot be applied to hearings partly, solely involving social and economic rights. Thus, the right is pertinent to violations of all fundamental rights and freedoms recognized in the international and regional human rights documents.²⁰³ As the inter-American Court decided, the minimum safeguards in the determination of disputes about violation of human rights equally apply to cases that are of ‘civil, labour, fiscal, or any other nature,’ therefore, it embodies the extension of due process guarantee to economic and social rights.²⁰⁴

The UN Committee on Economic, Social and Cultural Rights affirmed that forced evictions should not be undertaken without judicial orders, without procedural safeguards allowing the evictees the opportunity to be heard.²⁰⁵ This aspect also reveals the notion that fair hearing is instrumental in according a due protection to economic and social rights that are devoid of much attention, but essential in guaranteeing other rights. The right to fair hearing also encompasses the right to be heard within a reasonable period of time which is another name of speedy trial pivotal in ensuring fair trial and securing the right of an individual. This notion was held by the African Commission, that the denial of the right to fair hearing, embracing failure in giving decision in a reasonable time ‘reveals a denial of justice and the violation of the equality of all citizens before the law.’²⁰⁶

²⁰¹ Scheinin at note 11, p.34, see also Nickel at note 16, p.110-112.

²⁰² Ibid.

²⁰³ Takele at note 116, p.33.

²⁰⁴ Id, p.35.

²⁰⁵ See General Comment No.7, *The Right to Adequate Housing* (art 11(1)) of the ICESCR: *Forced evictions* (1997), para.15.

²⁰⁶ Takele at note 116, p.35.

II. Free Legal Aid: The right to free legal assistance as a social dimension of the right to fair trial was emphasized by the European court of human rights already in the Airey case. In this situation, the court, in avowed terms, discussed the interlink between the two sets of rights. Saying that: ‘While the convention sets forth what are essentially civil, and political rights, many of them have implications of a social or economic nature.’²⁰⁷

One can possibly argue that the line drawn between both sets of rights are artificial than real for there is no watertight bifurcation separating these human rights, hence a more integrated approach is preferable.²⁰⁸

3.5.1.3. Judicial Protection and Remedy

Human rights instruments generally refer to the obligation of states to provide effective remedies for human rights violations through judicial means. Remedies refer to the range of measures that may be taken in response to actual or threatened violations of human rights.²⁰⁹

The word remedy contains two separate notions, the first being procedural and the second substantive. Hence, it is better to look at each remedy separately.

I. Procedural Access to Remedy: At the procedural level states commit themselves to establishing suitable institutions to take decisions on alleged human rights violations during a procedure determined by the rule of law. It is primarily judicial bodies (ordinary courts, constitutional or human rights courts), which render decisions on the complaints of victims of alleged human rights violation. Not only ordinary courts, but also ombudsman institution and national human rights commission will give decisions to the same.²¹⁰ In this sense, remedies are the process by which arguable claims of human rights, including socio-economic rights violations are heard and decided, whether by courts, administrative agencies or other competent bodies.²¹¹ Hence, it is possible to argue that the right to accessing a court of

²⁰⁷Scheinin at note 11, p.34-35.

²⁰⁸Ibid, see also Vincent Berger, *Case Law of the European Court of Human Rights*, vol. I, 1960-1987, the Round Hall press Ltd (1991), p.120-123(here you will find the full text of the case).

²⁰⁹Dianah Selton, *Remedies in International Human Rights Law*, a text book, second edn., Oxford University Press (2000), p.7-8.

²¹⁰Nowak at note 2, p.63-64.

²¹¹Shelton at note 209, p.8.

appropriate jurisdiction is central aspiration of all human rights documents and is essential to the rule of law.²¹²

II. Substantive Access to Remedy: At the substantive level, the right to a remedy shall provide reparation to victims of human rights violations.²¹³ This notion of remedy refers to the outcome of the proceedings and the relief afforded to the successful claimant. The obligation to afford remedies for violations of human rights requires in the first place the existence of remedial institution and procedures to which victims may have access.²¹⁴

The primary function of remedial justice is to rectify the wrong done to a victim that is to correct injustice.²¹⁵ State is obliged therefore to provide effective remedies for any violation of the rights guaranteed by the ICESCR.²¹⁶ Both acts and omissions may constitute a violation of these rights.²¹⁷ Any person or group who is victim of violations of economic and social rights should have access to effective judicial or other appropriate remedies at national, regional and international fora.²¹⁸

Accessible and effective national remedies are the primary means of protecting economic, social and cultural rights.²¹⁹ Constitutional incorporation or recognition of economic and social rights does not in it self ensure compliance; states require ensuring appropriate mechanisms for redressing violations of these rights.²²⁰ Where there is a right there is a remedy²²¹, a right without a remedy is no avail and is an empty promise. Perhaps, it may not necessary that the remedy is specifically defined,²²²to legislatively provide a right is generally

²¹²Tekele at note 116, p.29.

²¹³Nowak at note 2, p.64.

²¹⁴Shelton at note 209, p.7.

²¹⁵Id, p.10.

²¹⁶Dianne Otto and David Wiseman, 'in search of Effective Remedies', *Australian Journal of Human Rights* (2004), p.26.

²¹⁷Pieter N. Drost, *Human Rights as Legal Rights*, 2nd printing, A. W. Sijthoff's Uitgeversmij, Leiden,(1965), p.56.

²¹⁸See General comment No 12, Para. 32.

²¹⁹Liebenberg at note 21, p. 55.

²²⁰Otto and Wiseman at note 216, p.27.

²²¹Kent Roach, 'The Challenges of Crafting Remedies for violations of Socio-Economic Rights', in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press (2008), p.48.

²²²Drost at note 217, p.57.

to enable a remedy in the sense that the very existence of a right entitles a person to demand that right and a remedy, if that right is violated.²²³ The right to effective remedy should not be interpreted as often requiring a judicial remedy. Administrative remedy will also, in many instances be adequate. By the same token, there is obligation in relation to which the provision of judicial remedy would seem indispensable in order to satisfy the requirement of the covenant.²²⁴

Now days, states constitutions explicitly secure remedial rights, if not provided, there exist implied remedial right.²²⁵ This means the very existence of the right entitles a person to demand that right and also to claim a redress if that right is violated.²²⁶ Hence, domestic laws must be interpreted and applied so as to provide, wherever possible, effective, available and sufficient redress to socio-economic rights.²²⁷

3.6. The Jurisprudence of other Jurisdictions

This section will delve into exploring the jurisprudence of other jurisdictions that effectively utilized the integrated approach to afford protection to economic and social rights. This was done by interpreting the justiciable civil and political rights and socio-economic rights in the same family.

3.6.1. The Indian Jurisprudence: Innovative means Devised to overcome Non-Justiciable SER

Socio-economic rights received constitutional protection through an extensive interpretation of civil and political rights such as the right to life or security of person.²²⁸ Because, the judicial body is ousted to entertain cases involving socio-economic rights for they are directive principles of state policy (DPSP). Pursuant to Article 37 of the Indian constitution; DPSP, 'shall not be enforceable by any court, but the principles therein laid down are

²²³ Shelton at note 209, p.27, See also Leckie at note 33, p.82-85.

²²⁴ General Comment No. 9, *the Domestic Application of the Covenant* (ICESCR), 1998, Para. 9.

²²⁵ Shelton at note 209, p.27.

²²⁶ Id, p.28.

²²⁷ Porter at note 24, p.27.

²²⁸ Liebenberg at note 21, p.73.

nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.’²²⁹ The DPSP consist of a set of social and economic objectives aimed at securing social justice within society and the meeting of social needs such as the means of livelihood, education, public health care, and decent working conditions.²³⁰

As a result, due to the ‘ouster clause’ that is DPSP; the Indian Court devised the mechanism to establish the nexus between fundamental rights which are justiciable and enforceable by ease in court of law and the non-justiciable DPSP.²³¹ That is the court developed a harmonious construction in case of conflict between the two and even upheld the DPSP in the time of public interest is needed to be actualized. This is seemed to promote the larger interest of the society.²³²

Though, an alleged breach of a DPSP does not invalidate any law, nor does it confer a direct right on an individual or group to seek relief against the state for non-compliance with the relevant directive; However, the Indian Supreme Court has held that the DPSP are of paramount important in interpreting the content of fundamental rights.²³³ Hence, the court took the view that what was fundamental in the governance of the country could not be less significant than that which was fundamental in the life of an individual and therefore, fundamental rights and DPSP were complementary.²³⁴ This instance, of creative interpretation of the doctrine of substantive due process as being integral to the chapter on fundamental right, inspired the court to see the right to life which is negative right. In the decision of *Maneka Gandhi V Union of India*, in which the court proceeded to expand the content of the right to life to embrace ‘the right to live with human dignity and all that goes with it, such as, the bare necessities of life including adequate nutrition, clothing and shelter, facilities²³⁵ for

²²⁹ See Article 37 of the Indian constitution.

²³⁰ Liebenberg at note 21, p.73.

²³¹ De Villiers at note20, p.40.

²³² Ibid.

²³³ Liebenberg at note 21, p. 73.

²³⁴ S. Muralidhar, ‘Judicial enforcement of Economic and Social Rights: The Indian Scenario’, in *Justiciability of Economic and Social Rights: Experiences from Domestic System*, Fons Coomans(ed.), Intersentia (2006), p, 239.

²³⁵ Franciscoralie, *Mullin V. The Administrator, Union Territory of Delhi*, (1981) 2 SCR516 at 529, as cited in Liebenberg at note 21, p.73.

reading, writing and expressing one self in diverse forms, health²³⁶ and education,²³⁷ and also right to livelihood.²³⁸

This expanded notion of the right life enabled the court, in its public interest litigation (herein after PIL) jurisdiction, to overcome objections on the grounds of justiciability to adjudicating the enforceability of some of the rights enlisted in the DPSP.²³⁹ Thus, such innovative mechanisms helped the court to address issues pertaining to socio-economic rights which are non-justiciable, by utilizing its expansive and progressive constitutional power of interpretation.²⁴⁰

The principle of proportionality is also an essential element in determining the degree to which it is permissible to limit civil and political rights to achieve social justice objectives. The Indian courts also affirmed that they have a duty to harmonize the DPSP and the fundamental rights.²⁴¹

It is noticeable from the above instances that, over the years the Indian courts as well as the legislative body have redefined the relationship between fundamental rights and DPSP. The court has approached the two categories in an integral manner, one result of which is to give

²³⁶Paschim Banga Khet Mazdoor Samity V. State of West Bengal, (1996) AIR SC 2426 (the right to emergency medical treatment), as cited in Liebenberg at note 21, p.74.

²³⁷Jain V. State of Karnataka, (1992) 2 SCC 666, Krishnan V. State of Andhra Pradesh and other, (1993) 4 LRC 234 as cited in Liebenberg at note 21, p.74.

²³⁸Tellis and others V. Bombay Municipal Corporation and Others, (1987) LRC (const). 351 (The so called 'pavement-dwellers' case). Art. 39(a) and 41 of the Indian constitution oblige the state to direct its policy towards securing the right to an adequate means of livelihood and the right to work, as cited in Liebenberg at note 21 p.73, see also Steiner at note 9, p.323. Says 'If there is an obligation up on the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life' (Para. 33).

²³⁹Muralidhar at note 234, p.240. Public Interest Litigation (PIL) describes legal tools which allow individuals, groups and communities to challenge government decisions and activities in a court of law for the enforcement of public interest. PIL represents a departure from traditional judicial proceedings, as litigation is not necessarily filed by the aggrieved person. PIL cases deal with major environmental and social grievances. They are often used strategically as part of a wider campaign on behalf of disadvantaged and vulnerable groups in society. Where individuals, groups and communities do not have the necessary resources to commence litigation, PIL provides an opportunity for using the law to promote social and economic justice. It also encourages governments to make their human rights obligation meaningful to all parts of society and thus contribute to social, economic and environmental justice.

²⁴⁰Id, p.244, see also Scheinin at note 11, p.38.

²⁴¹Liebenberg at note 21, p. 75, see also De Villiers at note 20, P.40-41.

some DPSP the status of fundamental rights.²⁴² Note only this, but the Indian jurisprudence also reveals one of the best examples in the world in terms of the justiciability of socio-economic rights, with the right to life interpreted expansively by the Supreme Court to embrace the right to food.²⁴³ In the same case, the Supreme Court held that the government has a direct responsibility to prevent starvation:

The anxiety of the court is to see that the poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of same is one of the prime responsibilities of the government whether central or the state. Mere schemes without any implementation are of no use. What is important is that the food must reach the hungry (peoples' union for civil liberties V. Union of India and others (as cited in Steiner etal (ed.s) at note 9, p.324-325).

The peoples' Union for civil liberties (PUCL) case represents a great advance in the justiciability of the right to food as human rights, as the orders of the Supreme Court in this case have transformed the policy choices of the government, into enforceable, justiciable right of the people.²⁴⁴ Though, this case relates primarily to the obligation to 'fulfill' the right to food, the Court has also made judgments that are related to the obligation to 'respect' and 'protect' the right to food.²⁴⁵ For instance, the Court protected the right to water of Dalits against discrimination by the upper castes (state of Karnataka v Appa Balu Ingale, 1993) the right to livelihood of traditional fisher people against the shrimp industry (the Aqua culture case: S. Jagannath v Union of India, 1996), and the right to livelihood of scheduled tribes against the acquisition of land by a private company (Samatha v State of Andhra Pradesh, 1997). The Supreme Court said 'any person who is deprived of his right to livelihood except according to just and fair procedure established by the law, can challenge the deprivation as offending the right to life provided for in Article 21 of the Indian constitution.'²⁴⁶ This paves the way for the justiciability of DPSP indirectly through civil right to life.

²⁴² Steiner at note 9, p.322.

²⁴³ Id, p.324.

²⁴⁴ Report of the Special Rapporteur on the Right to Food, Jeanziegler, mission to India, UNDOCE/CN 4/2006/44/Add. 2 (2006) as cited in Steiner at note 9, p.324.

²⁴⁵ Id, p.325.

²⁴⁶ Id, p. 325, Para. 26.

In the case of *Olga Tellis V Bombay Municipal Corporation*, the Court further elucidated boldly saying that:

*...for the purpose of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Up on that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Art.21 is wide and far reaching... That, which alone makes it possible that to live, leave aside what makes life livable must be deemed to be an integral component of the right to life. Deprived a person of his right to livelihood and you shall deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities.*²⁴⁷

One can boldly argue that, the mechanism devised by the Indian Court seem too interesting, that it made the right to livelihood part and parcel of right to life. And therefore it made the right to livelihood justiciable and enforceable before the Court of law.

The same concept is also rejuvenated in establishing the interrelationship of the two sets of human rights that: ‘...if there is an obligation upon the state to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life...’²⁴⁸

The same Court used its expansive and progressive power of constitutional interpretation through judicial activism and the court’s approach to human rights there by giving primacy to socio-economic demands in the DPSP.²⁴⁹ Such struggle of the court was despised due to, its incursion, into the spheres of the legislative and executive bodies on the very basis of the aspect of judicial activism is undemocratic, and it is contrary to the rule of separation of powers and courts’ lack of effectiveness in the area. Never the less, the Court using its power of constitutional interpretation gave content to some socio-economic objectives enlisted in

²⁴⁷ *Olga Tellis V. Bombay Municipal Corporation*, Supreme Court of India, 1985, AIR 1986, Supreme Court 18, as cited in Steiner at note 9, p.323, Para. 32.

²⁴⁸ *Ibid*, Para.33.

²⁴⁹ Balakrishnan Raja Gopal, ‘Socio-Economic Rights and the Indian Supreme Court: Reflections from a social movement perspective’, Draft August 2004, as cited in Steiner at note 9, p.326, see Muralidhar at note 234, p.265 and see also De Villiers at note 20, p.43-44.

DPSP and made them justiciable.²⁵⁰ Thus, in such impressive instances, in which the court's intervention reveal, the paramount importance of judicial protection of socio-economic demands in the DPSP, the executives and legislative bodies should tolerate for the intervention is justified due to check and balances and judicial accountability in the areas of human rights protection. Hence, the role of the Court is quite essential in making the non-justiciable rights a justiciable and enforceable right at ease before Court of law. This mechanism of adjudication has brought an impetus to law and policy making and the primary role of the courts in India in interpreting the constitutional provisions and in delineating the scope and content of the individual rights performed a significant role in determining and enforcing state obligations in the areas of socio-economic rights.²⁵¹ It is confirmed that, the Indian constitution divested the judiciary from adjudicating social and economic objectives in the DPSP (Art.37). As a result, an integrated reading of the fundamental rights in part III and DPSP in part IV along with the preamble of the constitution by the court, is led to the notion that the rights have been treated not merely as legal entitlements or claims of the people on the state, but they are intended to bring about structural changes in the society of India.²⁵²

3.6.2. The South African Jurisprudence

The South African jurisprudence has had a major impact on the discussion of economic and social rights globally with many commentators arguing that the cases developed in particular made these rights justiciable.²⁵³

The South African constitution of 1996 has guaranteed its citizens right to life (sec.11), right to access to adequate housing (sec.26 (1)), right to health, food and water, social security, and right to emergency medical treatment (sec.27) and more interestingly, it gave the court power to interpret the Bill of Rights. In using its mandate, the Court must promote the values that

²⁵⁰Muralidhar at note 234, p.264.

²⁵¹Ibid.

²⁵²Ajay Kumar Singh, 'Role of Judiciary in the Protection and Promotion of Human Rights: The Indian Experience', in *Perspectives on Human Rights*, Abdulrahim P. Vijapur and Kumar Suresh (ed.s), A text book, first edn. Manak Publications PVT. LTD (1999), p.71.

²⁵³Steiner at note 9, p.328.

underlie an open and democratic society based on human dignity, equality and freedom.²⁵⁴ Note only this, but the court must also consider international law; and foreign law.²⁵⁵ Under section 7(2) of the same constitution, one can see the plain obligation of state to respect, protect, promote and fulfill the rights in the Bill of Rights.²⁵⁶ This aspect of constitutionalization of SER is important in ensuring the justiciability of the same with ease before Court.

The Constitutional Court of South Africa in adjudicating, socio-economic rights, used “a reasonable approach” that is what is the measures taken by the government of South Africa, in the case of government of South African V Grootboom²⁵⁷ in which the Court addressed the needs of the victims saying “the poor are particularly vulnerable and their needs require special attention.”²⁵⁸

In solving such problems of the victims, the Court drew inspirations from international human rights law that is ICESCR and work of the UN Committee on ICESCR. It emphasized Art 11(the right to every one to an adequate standard of living...embracing adequate food, clothing and housing).²⁵⁹ Which enabled the court to cement the interrelationship between section 26 and 27 and other socio-economic rights.²⁶⁰ These are the right to access to adequate housing and the right to health care services, food, water respectively. The victims in the above case around 390 adults and 510 children live in the lamentable living condition, with very low income, no electricity, in squatter settlement, water and no roof over their heads.²⁶¹ Seeing their situation of life and measures of the government of South Africa, the court declared that:

²⁵⁴ See section 39(a) of the 1996 South African Constitution.

²⁵⁵ Id, section 39(b) and (c).

²⁵⁶ Section 7(2) of the 1996 South African constitution says: the state must respect, protect, promote and fulfill the rights in the Bill of rights that reveal a clear obligation of the state in securing its citizens SER.

²⁵⁷ Grootboom V. Government of South Africa, constitutional Court of South Africa, case CCT11/00,4 October 2000 as cited in Steiner at note 9, p.333-338.

²⁵⁸ Id, p.335, para.36.

²⁵⁹ Id, p.334, Para. 26.

²⁶⁰ Id, p.335-336, Para. 36.

²⁶¹ Ibid.

*The state housing programme in the area of the cape metropolitan council fell short of reasonable measure as stated under section 26 (2) of the constitution that state failed to make reasonable provision. Within its available resources for people in Cape metropolitan area with no access to land, no roof over their heads and who were living in intolerable conditions or crises situations.*²⁶²

The same Court in the above case recognized that there are insufficient resources and legacies of oppression and inequality which make it impossible to fully realize the right to housing in South Africa at present. But this does not mean that the right does not entail present obligations, or that the actions of the government cannot be reviewed for their consistency with the right. Hence, each state is under the same obligation to take reasonable steps within available resources, including international assistance and that this obligation is a universally applied requirement under the covenant on ESCR.²⁶³

In the case of *Van Biljon v Minister of Correctional Services*,²⁶⁴ the applicants were HIV infected prisoners who sought, inter alia, a declaratory order that their right to adequate medical treatment entitled them to the provision of expensive anti-retroviral medication. It was contended on behalf of the applicants that because the right to adequate medical treatment was guaranteed in the Bill of Rights, prison authorities could not on the basis of lack of funds, refuse to provide treatment which was medically indicated. This argument was accepted by the court. In the view of the Court, the lack of funds could not be an answer to a prisoner's constitutional claim to adequate treatment. A prisoner had a constitutional right to that form of medical treatment which was adequate. The applicants order was granted and the respondents were ordered to supply them with the combination of anti-retroviral medication which had been prescribed for them for as long as such medication continued to be prescribed.²⁶⁵ Although, the *Van Biljon* case was decided in the context of prisoner's and their constitutional right to adequate medical treatment (under section 35(2), (e)) it has a pivotal ramifications for every one's right to health care services (under section 27(1)).

²⁶²Id, p.338-339, Para. 99.

²⁶³Porter at note 24, p.3.

²⁶⁴John Contius Mubangizi, 'Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience', in *the 7th World Congress the International Association of Constitutional Law, Constitutionalization and Justiciability of Social Rights*, Athens, 11-15 June 2007, p.6.

²⁶⁵ Ibid.

These ramifications were revealed in the constitutional court's decision in *Minister of Health and others v Treatment Action Campaign and others*.²⁶⁶ In that case, the Treatment Action Campaign, a non-governmental organization, in a bid to force government to provide anti-retroviral drugs that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with the virus. The Court held that the government's policy and measures to prevent mother to child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the constitution and ordered the state to provide the required medication and remedy its programme.²⁶⁷

It is hence possible to argue that the South African constitution innovated a robust and extensive system for the realization of socio-economic rights. This empowers the courts to hear challenges to constitutionality of any rule of statutory, common or customary law on the basis of constitutional socio-economic rights. Courts can decide challenges that, state or private conduct as inconsistent with a socio-economic right and develop a common law rule so as to give effect to the spirit, purpose and objects of the Bill of Rights.²⁶⁸

As evidenced in the foregoing cases, the South African judiciary is unconditionally obliged to give content to socio-economic rights and the duties they impose through the process of constitutional interpretation. The constitution awards Courts significant scope for innovative and creativity that may be used to further its transformative aims, and judges are in principle free to use this power, without fear of overstepping the boundaries of separation of powers.²⁶⁹

Therefore, one can easily deduce that, how the judges in South Africa are committed to the protection of socio-economic rights enunciated in the Bill of Rights and measured the state's compliance in implementing the same. This was largely due to the feature of constitutionalization

²⁶⁶ *Treatment of Action campaign V Minister of health*, Constitutional Court of South Africa, case CCT 8/02, 5 July 2002 as cited in Steiner at note 9, p.339, see also Porter at note 73, p.6.

²⁶⁷ Porter at note 24, p.6-7, See also Steiner at note 9, p.339, Para. 135, see also John Contius Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in selected African countries: A comparative Evaluation', *African Journal of Legal Studies* (2006), P. 6.

²⁶⁸ Dannie Brand, *Socio-Economic Rights and Courts in South Africa: Justiciability on a sliding Scale*, in *Justiciability of Economic and Social Rights: Experiences from Domestic System*, Fons Coomans (ed.), Intersentia (2006), p.208-209.

²⁶⁹ Pieterse at note 18, p.406.

of socio-economic rights as claimable individual rights in the 1996 Constitution of the Republic of South Africa.

3.6.3. The Jurisprudence European Court of Human Rights

The European convention on Human Rights (ECHR) was from the very outset perceived as the binding democratic foundation on which the endeavor of closer integration of European states was built. By virtue of the convention, the Court is empowered to sit in final and binding judgment on the democratic process of sovereign states.²⁷⁰ The protection of social and economic rights within the Council of Europe has for a long time been confined to the European Social Charter.²⁷¹

The European court of human rights has encroached into the boundary of socio-economic rights. A case in point is, the Airey case, the Court therefore considers, that the mere fact that an interpretation of the convention may extend into the sphere of social and economic rights should not be a decisive factor against an interpretation; there is no watertight division separating that sphere from the field covered by the Convention.²⁷²

It is plain that the Court evidenced the so called classical rights, the civil and political rights, may also entail positive obligations on the part of the state, apart from negative obligations there by obfuscating the bifurcation between the two sets of rights.²⁷³ The road is therefore paved to make economic and social rights justiciable by the same Court on the basis of the European convention on human rights.²⁷⁴ Airey the claimant lacked access to the courts due to personal circumstances, and hence, hindrance in fact could contravene the Convention just

²⁷⁰Paul Mahoney and Soren Presbensen, 'The European Court of Human Rights' ,in *the European System for the Protection of Human Rights*, a text book, R. St J. Macdonald etal (ed.s), Martinus Nijhoff Publishers (1993), p.637,and see also Nowak at note 2, p.160-169.

²⁷¹Cees Flinterman, 'The protection of Economic, Social and Cultural Rights and the European Convention on Human Rights, in *the Dynamic of the protection of Human Rights in Europe*, A text book, Rick Lawson and Matthijs de Blois (ed.s) essays in the Honour of Henry G. Schermers, Vol. III, Martinus Nijhoff Publishers (1994), p.165-173.

²⁷²European Court of Human Rights, Airey Judgment of October 1979, series A, No. 32, p.15, Para.26, see Scheinin at note 11, p.35 and see also Berger at note 208, p.122.

²⁷³Flinterman at note 275, p.173-174.

²⁷⁴Id, p.174.

like a legal impediment and fulfillment of a duty under the convention on occasion necessitated some positive actions on the part of the state.²⁷⁵

The Convention though contained no provision on civil legal aid; Article 6(1) might some times compel the state to provide for the assistance of a lawyer when it is proved pivotal. By interpretation the Court trumped into the spheres of socio-economic demands of human rights.²⁷⁶ Hence, the Court integrated both sets of rights and made socio-economic rights of the victim to be enforceable and justiciable. It also holds the same position and bolstered the extended protection of Art 6(1) of the ECHR to social security benefits, thereby maintaining the link between private law and public law feature and the right to the benefits in question as a civil right.²⁷⁷ This was made in the cases of *Feldbrugge v the Netherlands* and *Deumeland v Germany*.²⁷⁸

In the above two cases the Court decided the right to health insurance allowances and widow's supplementary pension on the basis of compulsory insurance against industrial accidents respectively. In these instances, the Court analyzed the private and public law features of the right in question and found the former to be predominant and that the dispute, therefore, related to a civil right and was covered by Article 6(1).²⁷⁹

One can boldly argue that the black white distinction set between the two sets of rights, lose its feature for they are indivisible and highly interwoven in their very nature.

Such kind of holistic approach to human rights also holds true in the right to education and housing as cross-cutting issue for they are interlinked to other human rights and fundamental freedoms as they are emanated from the UDHR.²⁸⁰

²⁷⁵Berger at note 208, p.122.

²⁷⁶Ibid, Article 6 of the ECHR says the right to a fair and public trial with in a reasonable time that the court revealed the social nature of the right to fair trial in the *Airey* case.

²⁷⁷*Feldbrugge* case, Judgment of 29 may 1986, Publication of the European Court of Human Rights, Series A, No. 99 as cited in Scheinin at note 11, p.35.

²⁷⁸*Deumeland* case, Judgment of may 1986, publications of the European Court of Human Rights, series A, No. 100 as cited in Scheinin at note 11, p.35-36.

²⁷⁹Scheinin at note 11, p.35-37, see also Berger at note 208, p.3 08-314.

²⁸⁰Koch at note 39, p.113-151.

In *Akdivar and other v Turkey* the Court said that:

*there can be no doubt that the deliberate burning of the applicants' homes and their contents constitute at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions... the court concluded that there has been a violation of Art 8 of the Convention and Art 1 of protocol No 1.*²⁸¹

The court further bolstered the integrated nature of civil, political and socio-economic rights in the above case and ordered the government of Turkey to remedy the situation.

The other issue is related to the right to education as an important instrument to play as a linkage and as a key to the unlocking of other human rights, embodying; economic and social rights, civil and political ones. The court hence integrated the right to education as its holistic nature and its interrelationship with other articles 8, 9 and 10 of the ECHR that provides the right of every one including parents and children to 'respect for his private and family life; to freedom of thought, conscience and religion', 'freedom... to receive and impart information and ideas.'²⁸² And arguably, the right to education is essential in realizing the rights stated herein above as civil and political rights under the convention and hence drawing a line between the two sets of rights is hardly possible for they are mutually reinforcing one another.

3.6.4. The Jurisprudence of African Commission on Human and Peoples' Rights

This section is devoted to exploring the jurisprudence of the African Commission on Human and Peoples' Rights in its endeavor in the operationalization of the notion of interdependency and indivisibility of human rights via the integrated approach. The African Commission has a protective and promotional mandate.²⁸³ The equal importance of both sets of human rights was entrenched in the ACHPR and these rights are obviously within the ambit of the African

²⁸¹Ibid, *Akdivar and others v Turkey*, Judgment of 16 September 1996, Para. 88, p.116. In this case, the Court clearly realized the interlink between the right to respect for private and family life, home and correspondence Art 8 of the ECHR, which is the civil right in nature and the right to peaceful enjoyment of possessions enunciated in the Art 1 of Protocol No. 1 of the ECHR.

²⁸²ef. *Kjelden , Busk Madsen and Pedersen v Denmark*, Para. 52 and *Campbell and Cosans V the United Kingdom*, Judgment of 25 February 1982, Para. 40 as cited in Koch at note 58, p.151-152.

²⁸³Steiner at note 9, P.106, See also Nowak at note 2, P. 27-209.

Commission.²⁸⁴ This led some to claim the ACHPR as the most interesting of the regional instrument.²⁸⁵ Approaching economic and social rights from their civil and politic rights dimensions will help clarify the scope of protection and vividness of the socio-economic rights in question.²⁸⁶ The developed degree of justiciability of socio-economic rights is mainly attributed to the recognition of the principle of indivisibility and interdependency of all human rights. This can only be realized by according a balanced recognition to the same.

3.6.4.1. Derivation of Latent Rights from Explicitly Guaranteed Rights: Exploring the Jurisprudence of African Commission

This section is devoted to revealing the workability of the notion of interdependency of human rights in boosting the justiciability of economic and social rights.

The African Commission has revealed that social and economic rights that are not explicitly entrenched in the ACHPR could be regarded as implicitly embraced.²⁸⁷ A comprehensive account of socio-economic guarantees of the ACHPR are hence the mixture of explicit norms and implicit guarantees that have yet to be explored by the African Commission within the context of gradual development of the regional human rights system.²⁸⁸ The African Commission realized the more implicit rights guaranteed under the ACHPR in relation to the right to food and shelter.²⁸⁹ And other complaints relating to social and economic rights were interlinked with the violation of civil and political rights enunciated in the African charter.²⁹⁰

In the SERAC (Social and Economic Rights action Center) case the African Commission has derived the right to food from the right to life (Art.4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22) of the ACHPR. Saying that;

²⁸⁴Murry at note 111, p.11.

²⁸⁵OdinKalu at note 3, p.188.

²⁸⁶Takele at note 116, p.17.

²⁸⁷Takele at note 116, p.19.

²⁸⁸Ibid.

²⁸⁹Heyns and Killander at note 19, p. 251.

²⁹⁰Id, p.259-260.

'by its violation of these rights, the Nigerian government disregarded not only the explicitly protected rights, but also up on the right to food implicitly guaranteed.'²⁹¹

The African Commission further revealed the interrelationship of the right to food to other human rights by reiterating 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 ... the minimum core right to food requires the Nigerian government should not destroy or contaminate food sources. It should not also allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed them selves.*²⁹²

This aspect of reasoning plainly tells us the linkage between sets of rights, and the jurisprudence of the African Commission show that the Nigerian government violated the duty to respect, protect, promote and fulfill in destroying food sources of the Ogoni people.

The other hidden right derived from other rights in the same case is the right to housing which is interrelated to the right to property (article 14), the right to health (Article 16) and the right to protected family (Article 18) of the ACHPR.²⁹³ The African commission stated that:

*The government of Nigeria has failed to fulfill these two minimum obligations. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases shot and killed innocent citizens who have attempted to return to rebuild their ruined homes...*²⁹⁴

This aptly shows a particular and blatant violation by the Nigerian government of the right to adequate housing as implicitly protected in the African Charter which also embodies the right to protection against forced evictions.²⁹⁵ Thus, one can boldly argue that the African Commission explored much in that case in rejuvenating the justiciability of socio-economic

²⁹¹Social and Economic Rights Action Center (SERAC) and Another V Nigeria (2001) AHRLR 60 (ACHPR 2001), as cited in Heyns and Killander at note 19, p.260, Para. 64.

²⁹²Id, p.260, Para. 65.

²⁹³Id, P.259, Para. 62.

²⁹⁴Ibid.

²⁹⁵Ibid, Para. 63.

rights at the regional arena. In its decision the same Commission dealt with the obligation of the state to ensure the realization of rights that addressed the issue of socio-economic rights enshrined in the ACHPR and find some ‘implied socio-economic rights’ in the same not only from the same family of rights, but also from other civil and political rights as evidenced in the foregoing case.²⁹⁶

The other case in which the African Commission also cemented the indivisibility and interdependency of human rights is the Purohit and another v the Gambia.²⁹⁷ The case was brought to the same Commission in regard to the legal and material conditions of detention in a Gambia mental health institution. In this instance, the African Commission explored the prohibition of discrimination on the basis of disability and the meaning of the right to health, as entrenched in the African Charter.²⁹⁸ The African Commission held that the mental disable persons would like to share the ‘same hopes, dreams and goals, and have the same rights to pursue those hopes, dreams and goals just like any other human being,²⁹⁹ hence; they should enjoy the right to decent life which lies at the heart of the right to human dignity.’³⁰⁰

It is therefore, possible to argue that, after all, one can boldly claim before the African Commission the impliedly enshrined right to food and housing in the African Charter. This aspect of justiciability even has untold contribution in boosting the justiciability of socio-economic rights at the domestic level, if emulated by states parties to the African Charter.

3.6.4.2. Drawing Inspirations via Cross-Reference in Boosting the Justiciability of Socio-Economic Rights

Socio-economic rights provided for in the ACHPR are somewhat modest as there are yet quite a few very important social and economic rights that eluded the direct protection of its provisions.³⁰¹ However, the limitation in the ambit of the African charter’s socio-economic

²⁹⁶Id, p.251.

²⁹⁷Purohit and Another V Gambia (2003) AHRLR 96 (ACHPR 2003), as cited in Heyns and Killander at note 19, p.243.

²⁹⁸Ibid.

²⁹⁹Id, p.247, Para. 61.

³⁰⁰Ibid.

³⁰¹Takele at note 116, p.12.

rights has been reduced by the broadly defined mandates of the African Commission and the cross-referring provisions of the same Charter.³⁰² Within the ambit of its promotional mandate the African Commission:

*Shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the present charter are members.*³⁰³

The ACHPR has therefore provided a vast reference to sources on which the African Commission may depend in interpreting the rights guaranteed under the same. Such interpretive latitude conferred by Article 60 of the ACHPR is of paramount relevance to the implicitly protected socio-economic rights, which are within the scope of the same charter but lack express protection.³⁰⁴ The ACHPR enabled the African Commission to give a due consideration to the wisdom, experience and emerging jurisprudence of the older regional human rights system and UN bodies to enrich its promotional and protective roles.³⁰⁵

The African Commission also resorted to non-African practices and jurisprudence on a number of substantive issues. In doing so, it referred to the General Comments of the UN Human Rights Committee and the jurisprudence of European Human Rights Commission in relation to the right to fair trial and other regional human rights system like decision of the European court of human rights and Inter-American Human Rights Commission.³⁰⁶ In the decision of SERAC case³⁰⁷ the African Commission similarly relied on the jurisprudence established by the Inter-American and European court of human rights in the analysis of states' obligations in implementing socio-economic rights domestically. The same Commission repeatedly adopted the General Comments of the ICESCR in the interpretation

³⁰²Ibid.

³⁰³See African Charter at note 16, Art 60.

³⁰⁴Takele at note 116, p.13, see also Murray at note 111, p.25-27.

³⁰⁵Id, Takele 116, p.14.

³⁰⁶Id, p. 15.

³⁰⁷SERAC Case at note 291, Paras. 49, 57 and 66 and see also Takele at note 116, p.15-16.

of some of the most controversial provision of ACHPR. In the same case, the African Commission plainly stated that it sought to draw inspiration from General Comment No. 7 of the ICESCR on the definition of forced evictions which was devoid of meaning under the African Charter. In the same way the same Commission relied on the General Comment No. 4 of the ICESCR for the analysis of the right to adequate housing.³⁰⁸ The African Commission did the same thing in Puhorit case³⁰⁹ and it drew inspirations from the international human rights instruments and Vienna Declaration and Programme of Action of 1993.³¹⁰

In addition to the jurisprudence and practices of the global and other regional human rights bodies and instruments, the African Commission has also been mandated by the ACHPR to resort to international customary law, general principles of law and other legal doctrines as provided for in the same.³¹¹ The African commission emulated the emerging jurisprudences of UN Human Rights bodies and other regional human rights systems in protecting and rejuvenating the enhanced justiciability of socio-economic rights implicitly entrenched in the African Charter. The decision of the same Commission is also binding on the state parties to the African Charter.³¹² Thus, the emerging jurisprudence and approach of the African Commission has been described as imaginative and integrative.³¹³ This has untold contribution, if utilized on the domestic fora by states parties to the Charter.

³⁰⁸Takele at note 116, p.15.

³⁰⁹Puhorit case at note 297, Paras. 48, 54 and 60.

³¹⁰Id, Para. 48.

³¹¹Takele at note 116, p.15. and see also Art 61 of the African Charter that reiterates: The Commission that, also take into considerations, subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the organization of African Unity, African practices consistent with international norms on Human and peoples' Rights, customs generally accepted as a law, general principles of law recognized by African states as well as legal precedents and doctrine.

³¹²Murray at note 111, p.25.

³¹³Takele at note 116, p.18.

CHAPTER FOUR

4. ECONOMIC AND SOCIAL RIGHTS UNDER THE ETHIOPIA CONSTITUTION

4.1. The Constitutionalization of Socio-Economic Rights under the FDRE Constitution

A country's constitution has the potential to be powerful vehicle for giving domestic legal effect to international standards on economic and social rights. The entrenchment of a Chapter of Bill of fundamental rights in a constitution is particularly relevant for human rights protection. Civil and political and socio-economic rights have received extensive protection through their inclusion as justiciable rights in the constitutions of various countries. For instance, the 1996 South African Constitution will be used as a model because it entrenches a comprehensive range of the two grand categories of human rights as directly justiciable rights in its Bill of Rights. This symbolizes a far reaching commitment on the national fora to the interdependent and indivisibility of all human rights.³¹⁴

The constitution of Ethiopia lists an exhaustive array of human rights. Almost one third of the Articles of the FDRE Constitution are devoted to elaborating all categories of human rights.³¹⁵ The FDRE Constitution has entrenched Bill of Rights as fundamental rights and freedoms in the Chapter three. This Chapter stands in volume having thirty two articles³¹⁶ embracing, civil and political rights extensively and very scant socio-economic rights. Ethiopia has also adopted and ratified a number of international and regional human rights instruments. To mention some of them, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on

³¹⁴Liebenberg at note21, p.56-76.

³¹⁵Minase Haile, 'The New Ethiopian Constitution: Its Impact up on Unity, Human Rights and Development', *Suffolk Transnational Law Review*, Vol.20, No.1 (1996), p.53.

³¹⁶Fasil Nahum, *Constitution for A Nation of Nations, the Ethiopian prospect*, the Red sea Press (1997),p.10

the Right of Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR) and etc. Hence, these human rights are part and parcel of the law of the land.³¹⁷

The Bill of rights recognized in the FDRE constitution as fundamental rights and freedoms are bifurcated into "Human Rights" on the one hand and 'Democratic Rights' on the other hand. Socio-economic rights are embedded in the latter category. This classification seems only for technical reasons since equal recognition is granted to human and democratic rights under chapter three of this constitution and hence these two sets of rights are indivisible and interdependent regardless of their division.³¹⁸

Ethiopia has acceded to the ICESCR on 11 Sep.1993 and hence, all the socio-economic rights enunciated under the ICESCR are an integral part of the law of the land.³¹⁹ So, socio-economic rights incorporated under chapter three of the FDRE constitution can be considered as part and parcel of the constitution. On the other hand, in the legal system of Ethiopia the FDRE Constitution is the supreme law of the land.³²⁰ Any law, customary practice or a decision of an organ of a state or a public official that contradicts with the constitution is void immediately. All citizens, therefore embodying all organs of the government, political organizations, etc have the constitutional obligation to respect and obey the provisions of the supreme law of the land including socio-economic rights enunciated in the chapter three of the same constitution.³²¹

The Ethiopian constitution clearly recognizes socio-economic rights. Unlike that of civil and political rights which are provided in a very explicit and clear manner, socio-economic rights are found in a vague manner. However, under Art 41, socio-economic rights are found in a comprehensive manner with no separate provision specifically dealing with different socio-economic rights recognized in the international and regional fora.

³¹⁷FDRE Constitution Art.9(4).

³¹⁸Id, Art 10(1) of the FDRE constitution seem to consider the inalienable (indivisible) nature of human rights and art 9(4) also plainly remedy the situation by making cross- reference to the ACHPR which aptly maintained the notion of indivisibility and interdependency of human rights in its preamble.

³¹⁹Gebreamlak Gebregiorgis, 'The Incorporation and the Status International Human Rights under the FDRE Constitution', *Ethiopian Human Rights Law Series*, Vo 1.2, Faculty of Law, (2008), p.37.

³²⁰FDRE Constitution Art 9(1).

³²¹Id, Art 9(3).

There are also some rights which have the nature and implication of socio-economic rights but that are provided separately from this group of socio-economic rights as if they are different. These rights embrace the right to property (Art 40) and the right to work (Art 43) and also the most fundamental rights for instance, the right to clean water, food etc are impliedly protected under “National Policy Principles and Objectives’ (Art 90), the right to health of women (Art 35), Child right (Art 36(1)(d)). It is therefore possible to boldly argue that there are no separate and specific provisions devoted to the right to health, to housing, to education, to food and to clean water expressly. The later categories of rights were implicitly protected by the constitution.³²² For instance, when we look at the right to health, there is no separate provision in the constitution pertaining to the same right, explicitly in a clear manner; however, references to the right could be found in Articles 35, 36, 41 and 90 of the Ethiopian constitution. Hence, the FDRE constitution enshrines socio-economic rights both in the bill of rights and in what it calls ‘National Policy Principles and Objectives’ which are important guide line for the three organs of government.³²³ The recognition of socio-economic rights implicitly; in the supreme law of the land pave the way to look for the integrated approach to human rights so as to enhance the justiciability of hidden socio-economic rights under the FDRE constitution of chapter ten too.

³²²Dejene Girma, ‘Economic, Social and Cultural Rights and their Enforcement under the FDRE Constitution’, *Jimma University Law Journal* Vol.1, No. 2, (2008), p.74-75.

³²³Sisay Alemahu, ‘The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia’, *Journal of Ethiopian Law*, Vol. 22, No.2, (2008), p.138.

4.1.1. Features of Socio-Economic Rights under the FDRE Constitution

As evidenced in the foregoing discussion socio-economic rights are recognized and protected under the FDRE constitution. These rights include the explicit and implied socio-economic rights. In this section, the researcher will try to reveal the feature of these rights and how they are enunciated in the same constitution that may show also whether the FDRE constitution accorded a balanced recognition of both sets of rights. Socio-economic rights found in the FDRE constitution are:

I. Fewer in Number: The provisions of economic and social rights enunciated in the FDRE constitution are very scant in number when compared to civil and political rights. There are only three articles that directly deal with these rights, but generally the constitution is constituted of 106 articles. On the other hand civil and political rights have a wide coverage of the constitution. This aspect of constitutionalization of socio-economic rights reveals that socio-economic rights are not given the same emphasis like that of civil and political rights. It seems selective in the way it recognized these socio-economic provisions. This aptly tells us the failure of the FDRE constitution in according a balanced protection to the two grand categories of human rights. As T.S. Twibell said ‘Ignoring rights is not really a complex legal problem, it may be justified that Ethiopia lacks many resources due to its under developed industrial and educational infrastructure.’³²⁴ However, socio-economic rights can be negatively protected.

II. Broad and Very Vague: Despite their terseness, those socio-economic rights enunciated in the FDRE constitutions are very broad and vague. If a certain law is broad and vague it always opens the door for controversy and contradiction. When such rights contested before the court of law; it is hardly possible to give content to the contested right and remedy the situation. For instance, in Art 41(3) what does the phrase “publicly funded social services” mean? Almost all the rights under the same articles are crude that it is difficult to identify the

³²⁴T.S. Twibell, ‘Ethiopian Constitutional Law: The Structure of the Ethiopian Government and The New Constitutions Ability to Overcome Ethiopians Problem’, Vol. 21, No. 399, *Loy.L.A. International and Comparative Law Journal* (1999), p.444-445.

rights guaranteed and the extent of protection afforded to them.³²⁵ Specifically Art 41(6) and (7) do not give rise to a right based approach rather, they impose duty on the government to ensure the enjoyment of the rights provided for in article 41(1) and (2) recognized in crude terms.³²⁶ The only possible way of alleviating this problem is “interpretation” through which it is possible to expand the existing rights in order to cover the untouched areas of economic and social rights. The vagueness of socio-economic rights is not the only feature of Ethiopian constitution, but also it is attributed to the ICESCR from its inception, Philip Alston put this situation clearly:

*It is generally agreed that the major short coming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the covenant and the resulting lack in the clarity as to their normative implications.*³²⁷

It is possible to argue that the vagueness of the right clearly hampers the normative development of the rights and enjoyment of the same before the court law.

III. Poorly Drafted: This feature is mainly attributed to the constitutionalization of some fundamental socio-economic rights; among others, encompassing the right to food, to clean water, to health, to social security and etc under Art 90³²⁸ of the constitution as ‘social objectives’ than a directly claimable human rights. This aspect crafting puts those rights beyond the reach of courts and remains without any constitutional remedy. Arguably, the researcher boldly claims that these implied socio-economic rights are rights; hence, they should not have been put under National Policy Principles and Objectives which eluded their direct judicial protection. One can see and draw adequate lessons from the constitutionalization of socio-economic rights in the South African Constitution of 1996; in

³²⁵Sisay at note 327, p.139 and see also Twibell at note 324, p.442-443.

³²⁶Dejene at note 322, p.83-85 and see also Sisay at note 323, p.148.

³²⁷Alston at note 168, p.86.

³²⁸Art 90(1) of the FDRE Constitution provides that: to the extend the country’s resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security. It is totally a government obligation without the corresponding individual rights and tied up by the language of progressive realization.

which the drafting of the relevant provisions in the South African Bill of Rights relating to socio-economic rights were substantially influenced by the provisions of the ICESCR.³²⁹

4.2. Justiciability of Economic and Social Rights under the FDRE Constitution

As has been discussed in the second Chapter, there exists dominant debate regarding the justiciability of socio-economic rights.³³⁰ Many legal academics hold the view that it is inappropriate to include socio-economic rights as justiciable rights.³³¹ Here, it is essential to consider General Comment No. 9 of the Committee on Economic, Social and Cultural Rights, it expresses that states parties are under obligation to use all the means at its disposal to give effect to the rights recognized under the covenant. In this respect, appropriate means of redress or remedies must be available to any aggrieved individual or group.³³² In addition, the expression of the Committee is that some rights of the ICESCR are capable of immediate implementation reveals that the rights in question are justiciable irrespective of resource situation.³³³ Granting remedies for violation of civil and political rights and rendering socio-economic rights (other half of indivisible right) beyond the reach of courts would thus be arbitrary and incompatible with the notion of indivisibility.³³⁴

Economic and social rights as one part of the bill of rights are recognized under the FDRE constitution. All organs of the government including legislative, executive and judiciary at all levels, are under obligation to respect and give effect to those rights provided for in the bill of rights.³³⁵ Not only this, but Ethiopia being state party to the ICESCR also under obligation to realize and enforce these rights more than that of constitutional recognition. Meaning,

³²⁹Liebenberg at note 21, p.76.

³³⁰Steiner at note 9, p.313.

³³¹Liebenberg at note 21, p.58.

³³²General Comment No.9, Para. 9.

³³³Koch at note 14,p.18

³³⁴Steiner at note 9, p.313.

³³⁵FDRE Constitution Art 13(1).

measures taken by Ethiopia should go beyond constitutional entrenchment that is the task of concretizing these rights and converting the same into legally consumable commodities.³³⁶

This aspect of giving effect to the obligation undertaken in the international treaty and constitutionally guaranteed socio-economic rights plainly binds the judicial body to enforce and respect those fundamental rights and freedoms. Therefore, imposing the responsibility of respecting, protecting and fulfilling the same, embracing socio-economic rights, on the judiciary, has given a justiciable dimension to these rights.³³⁷ There is also another provision under the constitution that further rejuvenates the adjudicatory power of the court: ‘Every one 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.’³³⁸

It is evident that a claimant can bring any justiciable matter before the judicial body and get remedy. Here, the major issue is whether socio-economic rights are justiciable or not under the FDRE constitution. In our constitution the availability of socio-economic rights (as legal basis) under the fundamental rights and freedom is a proof for the justiciability of the same. Because the title of the chapter expresses that those rights which are believed to be of such nature are listed therein and socio-economic rights are one of them and subjected to some form of judicial enforcement (the setting element of justiciability). It is therefore possible to boldly argue that the FDRE constitution protects economic and social rights by incorporating them in the bill of rights as directly justiciable as well as by making pertinent international treaties ratified by Ethiopia part and parcel of the law of the land.³³⁹ What is regrettable is that the claimable socio-economic rights as directly justiciable human rights are very meager in number. To mention some them:

Article 41 of the constitution is with the title of “Economic, Social and Cultural rights.” It has 9 sub-articles that deal with different socio-economic rights. The first two sub-articles guarantee, the right to engage freely in economic activity and to pursue a livelihood of his/her

³³⁶Tsegaye Regassa, ‘Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia’, *Mizan Law Review*, Vol.3, No. 2, (2009), p.289.

³³⁷Sisay at note 323, p.142.

³³⁸FDRE Constitution Art 37(1).

³³⁹Sisay at note 323, p.151.

choice and the right to choose his/her means of livelihood, occupation and profession.³⁴⁰ These are a plainly guaranteed socio-economic right to work any where in the country without any qualification of the type of the work so long as it is not contrary to the law. Therefore, this right to work has a directly justiciable dimension before Court of law.³⁴¹ The other directly justiciable right is under sub-article 8 of the same provision which guarantee the right to receive fair prices; that is:

Ethiopian farmers and pastoralists have the right to receive fair prices for their products that would lead to improvement of their condition of life and to enable them to obtain an equitable share of the national wealth commensurate with their contribution. This objective shall guide the state in the formulation of economic, social and development policies.

This right has an aim of protecting the farmer's and pastoralists socio-economic rights so as to enable them to receive fair prices for their products which has the purpose of improving their living conditions. Not only this, but it has also extended the protection of their right to property which has both the nature of civil, political and socio-economic rights. Sub-article 8 further stipulates that the government should use the right receive fair prices as a guide in the course of formulating economic, social and development policies.³⁴² This facilitates the enjoyment of the right and gives a kind of second protection to the farmers and pastoralists.

Sub-art 3 of the same article, however, does not provide for the right to publicly funded social services embracing the right to health, housing, clean water and etc, for such rights are not explicitly guaranteed rights under our constitution and hence, they are not directly justiciable. If so, the right to equal access to publicly funded social services is not socio-economic right. Dejene said that "sub- article 3 is a tricky provision...at first glance; it appears that it grants the right to these services...does not provide for the right to health, housing, water or electricity. In short it does not provide the right to get social services." He further argues that this sub-article does not seem socio-economic rights but civil and political rights for it talks about the notion of equality.³⁴³ Therefore, Art 41 except sub 1, 2 and 8 does not provide for

³⁴⁰See art 41(1) and (2) of the FDRE Constitution.

³⁴¹Dejene at note 322, p. 91-93.

³⁴²Id, p.88-89.

³⁴³Id, p.86-87.

all rights falling within the realm of socio-economic rights in black and white letters as one would hope by reading at its caption.³⁴⁴

The other directly justiciable right is provided under art 42 which protect the right to work. It embraces rights among others, right to form associations like trade unions, and the right to equal pay for equal work for women, the right to strike, the right to reasonable limitation of working hours, to rest and leisure, to leaves and etc. The first two rights have the nature of civil and political rights, where as the latter illustrated rights are socio-economic rights in their very nature for they do not entail positive obligation of the government.³⁴⁵ It also accords protection to only workers who have already a job and earn their livelihood; however, it does not extend protection to those who are not able to earn their livelihood. In short, it does not impose obligation on the state to provide job for the jobless rather it protect work related rights for one cannot forces the government to provide him a job.³⁴⁶

One can see the terseness of socio-economic rights guaranteed under the FDRE constitution. Such rights even do not entail a government obligation to ‘fulfill’; however, to respect and protect and hence, it seems that as if the government evaded its obligation to fulfill by exempting the right to health, to food, to education and etc from the Bill of Rights.

Therefore, the only possible way of addressing such problems is looking for the impliedly guaranteed rights through the integrated approach. Socio-economic rights are blurred under the FDRE constitution, unless they are read into other rights expressly guaranteed, including civil and political rights and even socio-economic rights within the same family so as to enhance the justiciability of the right to food, health, housing, clean water at the minimum threshold established independent of resources.

³⁴⁴Sisay at note 323, p.139.

³⁴⁵Dejene at note 322, p.91-92.

³⁴⁶Id, p.91, see also Sisay at note 323, p.140.

4.3. The Integrated Approach: Exploring the Impliedly guaranteed SER under the FDRE Constitution

Under this section, the researcher will delve into looking at the workability of the integrated approach that helps to explore the impliedly guaranteed socio-economic rights. And also whether the FDRE constitution has acknowledge the notion of indivisibility and interdependence of the all human rights during the constitutionalization of the same will be considered. Not only these two issues, but it also reveals other cross-cutting rights enunciated in the constitution which lay the ground for the better enjoyment of the latent rights pre-empted in the constitution.

From the very outset the FDRE constitution has seemed to maintain the inalienability or indivisibility of human rights and fundamental freedom as the fundamental principles of the constitution.³⁴⁷ That is, one can see the pre-empted notion of indivisibility in Article 10(1) which states: “Human rights and freedoms, emanating from the nature of man kind, are inviolable and inalienable.’ It is this notion that, in a compact way, established the idea of inherence, universality, indivisibility and inviolability of human rights.³⁴⁸

The Ethiopian constitution has entrenched both socio-economic rights and civil and political rights under the same chapter and within the same text. This aspect of constitutionalization, putting the two sets of rights under the same chapter and in the same text there by putting the same within the ambit of the Court will help us to see a sort of integration of human rights. That is (Art 14-43) embodies civil, political, and socio-economic rights. The FDRE constitution also protected some socio-economic matters that guarantee the implied socio-economic rights under chapter ten. The judiciary is also obliged to respect and enforce the

³⁴⁷See Art 10(1) of the FDRE Constitution.

³⁴⁸Tsegaye at note 336, p.301.

provisions of the chapter of human rights and fundamental freedoms³⁴⁹ as well as guided by the principles embedded in chapter ten of the constitution.³⁵⁰

It is possible to argue that the objectives enunciated in chapter ten did not take away the power of the Court, hence, at least some socio-economic rights tacitly guaranteed in the 'National policy principles and objectives' can be made justiciable indirectly. The notion of interdependency, indivisibility and interrelatedness of human rights in the FDRE constitution can also plainly be inferred from Art 9(4) that makes reference to international and regional human rights treaties ratified by Ethiopia as an integral part of the law of the land. For instance, Ethiopia acceded to the ACHPR and accepted the accession in 1998.³⁵¹

Notwithstanding, the scattered provisions of the socio-economic rights through out the constitution that has validly entrenched both sets of rights, However, socio-economic rights did not get a balanced protection as compared to civil and political rights under the constitution. But, such regrettable situations of socio-economic rights recognition can also be remedied via cross-reference to treaties by Art 9(4). Therefore, the FDRE constitution seems to have an integrated vision towards both sets of rights. The double-edged recognition of human rights in Ethiopia under the constitution both as part and parcel of the law of the land and as tools of interpretation of the fundamental rights and freedoms in the Bill of Rights is inevitably an impetus to human rights protection in the country.³⁵²

Arguably, due to FDRE constitution reference to international treaty for interpreting bill of rights as a guiding principle to maintain consistency in giving content to the rights in the FDRE Constitution. For instance, it point to the UDHR which embodies the two grand

³⁴⁹See Art13(1) of the FDRE Constitution plainly states that the judiciary as one organ of the state, is duty bound to respect and enforce civil and political rights, including socio-economic rights, that enable them also to have a jurisdiction over cases involving the latter rights as well.

³⁵⁰See Art 85(1) of the FDRE Constitution with no ouster clause that enunciated some, but very important tacitly guaranteed socio-economic rights which fall within the ambit of judiciary and judges will take the National policy principles and objective as a guideline to give effect to some socio-economic matters enunciated therein while implementing the constitution, other laws and public policies.

³⁵¹Accession to the African Human Rights Charter Proclamation No.114/1998, Federal Negarit Gazeta, 4th year, No.1.

³⁵²Taken from 'Editorial Introduction', in *Ethiopian Human Rights Law series*, Faculty of Law, Vol.2 (2008), P.VI and see also Art 9(4) and 13(2) of the FDRE constitution.

categories of human rights in one document. It is therefore possible to claim that the FDRE constitution has laid down a fertile ground for the operationalization of the integrated approach to human rights despite, its selective nature.³⁵³ The following discussion will look at cross-cutting rights entrenched in the FDRE Constitution, that help, to explore the implicit socio-economic rights protected under the same but not limited to the following.

4.3.1. Right to Equality or Non-discrimination

Before dealing with this notion it is better to see the statement made by the president of South African Constitutional Court. That is; Arthur Chaskalson, rightly put about cross-cutting rights when describing human dignity as:

*A foundational value of the constitutional order and a value implicit in almost all the rights enumerated in the Universal Declaration, arguing that human rights can only be protected in a state in which there is no equality of rights but also equality of dignity. There cannot be dignity in life without food, housing, work and livelihood.*³⁵⁴

As evidenced herein above, Chaskalson, advocated for the protection of socio-economic rights, that realizes the better protection of all human rights.

Ethiopia under Art 25 enunciated the right to equality in the FDRE constitution. This article will have untold contribution in establishing the Violation of Socio-economic rights. Meaning, the violation of a given socio-economic rights may trample not just the specific socio-economic right in question but also the equality clause enunciated in the constitution. In such instances, the use of the right to equality, or, alternatively, proving discrimination has been shown to be an essential instrument as a means of demonstrating the violations of socio-

³⁵³Art 13(2) of the FDRE Constitution states that; the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of Universal Declaration of Human Rights: Here, one may easily deduce that the principles or notions embedded in the UDHR was giving equal importance to both sets of rights and according equal treatment in one main text as indivisible and interdependent human rights. Therefore, it implied the very principles of integrating the two grand categories of human rights including socio-economic rights and civil and political rights, when judges consult international treaties in elucidating their meaning to give effect to the fundamental rights and freedoms enunciated in the chapter three of the FDRE constitution, they should also look into the visions pre-empted in the UDHR. In short, it is integrating the two sets human rights without any disparity.

³⁵⁴Odinkalu at note112, p.328-329.

economic rights.³⁵⁵ This aspect of justiciability is an extension of civil and political right to the protection of socio-economic rights sphere, for the former rights are not contested to be adjudicated before the Court. And they can be used as a means of ensuring the justiciability of socio-economic rights without difficulty.

One can also infer from the ‘phrase equal accesses’ under Art 41(3) of the Ethiopia constitution that ensure every Ethiopia right to equal access to publicly funded social services. The phrase aptly makes a close tie between the socio-economic rights and equality guarantee that also overlap with article 25.³⁵⁶ Thus, these articles rejuvenate one another in according protection to socio-economic rights. Meaning, the government is obliged to amend or repeal laws or policies that have the effect of marginalizing or excluding particular groups from the enjoyment of publicly funded social services from being enacted.³⁵⁷ This aspect of social services may be taken to embrace, but are not limited to health, education, housing and food it must also include an investment in the future, since a healthier and better educated citizen is a crucial asset.³⁵⁸

The equality guarantee in the FDRE constitution in both instances; including Art 25 and 41(3) reveal non-discrimination in public sphere only. What if there exists discrimination in the private sphere? This article seems inadequate in protecting citizen’s right to work in the private sphere which has a direct relation with the right to life and pursue one’s livelihood. However, until legislation is enacted regarding this area, it would be better for our judges to remedy the situation via cross-reference to art 9(4) as discussed before. For instance, art 26 of the ICCPR extends protection horizontally (private sphere) and vertically (public sphere) which is adequate in fighting discrimination and has untold contribution especially in the private sphere.

Lets say that a certain law or policy adopted to realize the right to housing or health happens to be discriminatory, the right to equality right being part of the bill of rights; hence, Courts

³⁵⁵Takele at note 116, p.24.

³⁵⁶Dejene at note 322, p.87.

³⁵⁷Rakeb at note26, p. 38.

³⁵⁸Fasil at note 316, p.165.

may intervene and accord protection to socio-economic rights on the ground of equality guarantee.³⁵⁹ Thus, one can challenge the violation of socio-economic rights, implicitly or expressly guaranteed in the FDRE constitution before court of law and can claim a redress on the legal basis of equality guarantee enshrined in the same constitution as a means establishing the violation in issue.

4.3.2. The Right to Life and Dignity

The right to life enunciated under Art 15³⁶⁰ of the FDRE constitution will have a great assistance in realizing the protection of Socio-economic rights via the notion of indivisibility and interdependency of rights. There is a close interlink between the right life and dignity with that of the right to adequate standard of living that embody food, shelter and housing. Thus, it is possible to argue that the right to an adequate standard of living and health is part of or is justified by the right to life and dignity because the effectiveness of the latter rights depend on them.³⁶¹ Such aspect of integrated approach to human right was aptly revealed in the case of Olga Tellies and others V Bombay Municipal Corporation and others, (AIR (1986) SC 180), Paragraph 32 as cited in Steiner at note 9).

In that case, the Supreme Court of India stated that:

The right to life does not mean merely that life cannot extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by the law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood, food, housing, water, work etc because no person can live without the means of living. If the right to livelihood not treated as part of the constitutional right to life, the easiest way to deprive a person of his right to life would be to deprive him of his livelihood to the point of abrogation.

³⁵⁹Sisay at note 323, p.142.

³⁶⁰Art 15 o the FDRE Constitution and art 5 of the ACHPR which is made an integral part of the law of the land. The former deals with the right to life where as the latter deals with human dignity and also Art 24(1) of the FDRE constitution concords with the latter concept of right, which cannot be realized without adequate right to food, health, water and housing; hence, 'the right life with dignity.'

³⁶¹Scott at note 157, p.874.

Accordingly, the same Court held that, the right to life at the same time encompasses; inter alia, the right to health, housing, clothing, food, water, work, others and any thing that enables people to have a decent life. Therefore, it is possible to extend protection, to the socio-economic rights that are hidden in the constitution through the interpretation of the constitutional right to life. This will help us to reinvigorate some latent socio-economic rights under the FDRE constitution. Thus, the right life is not a bare right rather it is a right to life with dignity as a human person. If unequal treatment between the two sets of rights being undertaken that is according protection to one set of the rights, there by denying the other set of rights will inevitably results in the violation of the other rights.

By the same token, when equal protection is given to both sets of rights, each right will receive the protection of the other. For instance, state cannot realize a right to adequate standard of living without according a due protection to right to food, housing, clothing, clean water and health. The same holds true for the right to life that aptly depends on the right to health, food, housing and etc. Therefore, it is possible to boldly claim by using the notion of integrated approach the court; to get redress for the constitution has enunciated many hidden rights. This holds true that the failure to meet these rights, say, the right to health, food, would inevitably jeopardize the enjoyment of those rights, say, the right to life and dignity which are explicitly recognized.³⁶²

4.3.3. The Right to Fair Hearing

The right to fair hearing applies across the board to civil and political rights as well as socio-economic rights, and group rights.³⁶³ For instance, the right to free legal assistance as a social dimension of the right to a fair trial was given primacy by European Court of Human rights in the Airey case as discussed in the chapter three. The court plainly revealed the relationship between the two sets of rights saying ‘...many of the civil and political rights have implications of economic and social nature... hence, the interpretation of the convention may

³⁶²Dejene at note 322, p.95 and see also Scott at note 157, p.875.

³⁶³Takele at note 116, p.32.

extend to the sphere of socio-economic rights.’³⁶⁴ Another aspect of the protection of social and economic rights is access to courts that guarantee citizens right to a fair and public trial. This notion is also well cemented by the African Commission in which the Commission has thus declared the right to fair trial to be a fundamental right; the non observance of which undermines all other human rights.³⁶⁵

In the case of Ethiopia under Article 20(5) of the FDRE constitution guaranteed the right to legal assistance in case the accused do not have sufficient means to pay ...will have legal assistance at the state expenses. And art 37(1) of the same constitution stipulates the right to access to court of every Ethiopian citizen who has a justiciable matter. In the former article it seems narrow that it only applies to criminal cases, however, the latter provision seem to broader than the former, if a person has a right to claim for the right to food, but have no sufficient means to appear before the court of law and cannot pay for his private attorney, as in the above case art 20(5) shall be interpreted to embrace legal assistance in civil cases so as to ensure the right of the victim’s access to justice or court of law. Therefore, it is possible to rejuvenate the judicial protection of socio-economic rights thereby addressing from the angle of civil and political rights.

4.3.4. Remedies

‘No right without remedies, no remedies without actions.’ ‘No actions without sanctions.’ Thus, the existence of remedies has no importance, if it cannot be demanded or enforced.³⁶⁶ Any person or group who is a victim of an economic and social rights violation should have access to effective judicial or other appropriate remedies at both national and international levels.³⁶⁷ But, in the first place redress for violation of human rights and fundamental freedoms should be available to victims within their own state.³⁶⁸ Art 2(1) of the ICESCR proclaims that appropriate measures to implement the covenant should be taken by

³⁶⁴Scheinin at note11, p.34-35.

³⁶⁵Resolution on the Right to Fair Trial and Legal Assistance in Africa, Adopting the Dakar Declaration on the Right to Fair Trial in Africa, Doc/05/26/ InF. 19, see also Scott at note 52, p.860.

³⁶⁶Drost at 217, p. 58.

³⁶⁷Shelton at note209, p.17.

³⁶⁸Paul Sleggart, *The International Law of Human Rights*, Clarendon Press, Oxford (1992), p.69.

states and this might include judicial remedies. It specifically refers to non-discrimination requirement and cross reference to the right to remedy in the covenant on civil and political rights.³⁶⁹ Constitutional remedy is simply the relief that one obtains whenever these rights expressly or impliedly guaranteed under the constitution are violated. And the right to remedy when rights are violated is itself a right expressly guaranteed by global and regional human rights instrument like for instance, Art 8 of the UDHR and Art 2(3), 9(5), 14(6) of the ICCPR.³⁷⁰

The remedy could be judicial, administrative or legislative remedy. As it was discussed in detail on the General Comment No.9, domestic system is the primary option for the effective protection of socio-economic rights. The role of judicial body in protecting these groups of rights is avowedly provided under the same that: 'All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provision of this chapter.'³⁷¹

The responsibility is also shared among other organs of the government. For instance, the duty of the legislature is to enact laws that ensure the better protection of the rights or to amend laws that violate these rights to be consistent with the constitutionally guaranteed human rights. Similarly, the duty of the executive may be to enforce these rights and address them to the needy person which is the main objective of the law. The judiciary is therefore, bound by this article to safeguard socio-economic rights enunciated under the constitution, in respecting, protecting and enforcing (fulfilling), the fundamental rights and freedoms.³⁷² A closer look at this provision seems to acknowledge the workable notion of the integrated approach by putting both sets of rights equally within the purview of the judicial body.

One can see from the above wording that socio-economic rights could be subjected to judicial scrutiny and also be provided with judicial remedy. In the FDRE constitution though they are terse, the availability of socio-economic rights under the fundamental rights and freedoms are

³⁶⁹Shelton at note 209, p.18.

³⁷⁰Shelton at note 209, p.14.

³⁷¹See Art 13(1) of the FDRE constitution.

³⁷²Sisay at note 323, p.142.

a proof for the justiciability of the same and one can get a redress by invoking the violation of those rights as that of civil and political rights. Here, there is no particular provision that excludes the judicial review of socio-economic rights entrenched in the constitution. Thus, as long as socio-economic rights are justiciable, judges have the adjudicatory power to decide upon cases of socio-economic rights embracing the impliedly guaranteed rights based on the legal basis of Art 37(1) of the FDRE constitution. This is one of the constitutional remedy for the violation of those rights provided for in the chapter of human rights and fundamental freedoms. Therefore, Art 37(1) affords the heightened judicial protection to socio-economic rights in addition to Art 13(1) of the same constitution.

4.4. Relevance of NPPO to Indirect Justiciability in Ethiopia

In the foregoing sections, it has been discussed that socio-economic rights guaranteed expressly under the FDRE constitution are very few. As a result, the need to look for the impliedly protected rights arises. We can find a number of hidden socio-economic rights in the constitution under the Chapter of National Policy Principles and objectives (NPPO).

In addition to incorporating socio-economic rights in the chapter of Bill of Rights, the FDRE constitution entrenched some substantive socio-economic matters (Implied rights), as social and economic objectives and the principles the State has to adhere to it in the formulation of national policies.³⁷³ Public authorities of federal and member state government are obliged to be guided by these principles and objectives in the implementation of the constitution, laws and policies.³⁷⁴ The constitution further strengthens that the government is duty bound to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them.³⁷⁵ It further provides that policies aim at providing all citizens access to health, education, clean water, housing, food and social security.³⁷⁶ These NPPO are not directly justiciable; however, they may affect the interpretation of other rights by being read into those rights or may be relevant in the

³⁷³Rakeb at note 26, p.29.

³⁷⁴See FDRE Constitution Art 85 (1).

³⁷⁵Id, Art 89(2).

³⁷⁶Id, Art. 90(1).

interpretation of legislation.³⁷⁷ Therefore, these socio-economic objectives can be taken as guiding principles in the implementation of the provision of the constitution encompassing socio-economic rights provision for the government organs. It is hence, possible to claim that, these NPPO under chapter ten (art 89 and 90) of the constitution are imposing other additional obligations on the part of organ of the government to implement socio-economic rights.

The fact that the constitution does not provide for many socio-economic rights, it does not mean that the constitution cannot be used to claim the enforcement of other hidden rights indirectly.³⁷⁸ Meaning, Ethiopia citizens are not totally devoid of right to clean water, health, food and etc. Therefore, one can claim the enforcement of the right to food or housing by invoking the constitution itself. One possible way of exercising these rights is by trying to read the same into the explicitly protected rights.³⁷⁹ Even though courts lacks direct adjudicatory power, these rights are still in the protection of the constitution, note that NPPO does not take away the power of courts totally to adjudicate socio-economic rights impliedly rooted therein in a plain wordings of the constitution. However, this induces us to look for the implied right theory in which implicit rights can possibly be derived from explicit rights including civil, political and socio-economic rights thereby using indirect justiciability.

4.4.1. Derivation of Rights: Affording Protection to Latent Socio-Economic Rights under the NPPO

According to the notion of implied Right theory,³⁸⁰ it is possible to derive, implicit socio-economic rights from those expressly recognized rights in the constitution. It is hence possible to claim that, the fact that, the right to socio-economic rights embracing right to food, to education, to clean water, to housing, and etc are not plainly stated in the separate provisions in an explicit manner, which eluded their direct protection. This adversely and inevitably affects the right of the beneficiaries to boldly and effectively claim and enjoy their rights on the domestic plane. Indirect Justiciability; however, will remedy the situation at least to some

³⁷⁷Rakeb at note 26, p.29 and see also Dejene at note 322, p.93-95.

³⁷⁸Dejene at note 322, p.93.

³⁷⁹Ibid.

³⁸⁰Heyns and Killander at note19, p.251.

extent. Hence, the Ethiopian constitution is not only accorded protection to explicit socio-economic rights, but also to the implied socio-economic rights.

Art 41 of the same constitution help us to derive new rights. For instance, the phrases “publicly funded social services” and “other social services.” of sub-art (3) and (4). These phrases are too broad and open for interpretation. So, we can come up with the right to housing, social security, food and clean water from sub-article 3 and 4 of Art 41 of the FDRE constitution.³⁸¹ Referring to regional jurisprudence will also be supportive. The most famous case in this regard is the SERAC case (Social and Economic Right Action Center and Another V Nigeria (2001)):

*In which the complaint concerns the consequences of environmental degradation in Ogoni Land (in the Niger Delta of Niger) caused by Shell corporation in collision with the Nigerian government. In its decision the African Human Right Commission dealt with the obligation of the state to ensure the realization (also by private parties). The decision also considered with socio-economic rights provided for in the African charter, and finds some ‘implied socio-economic rights’ in the charter’.*³⁸²

In this particular case, the African Commission decided that even if the right to housing and food is not explicitly provided for in under the Charter, the violation of these rights adversely affects the right to property, health, family life and right to life with dignity. The same analogy could apply to the Ethiopian situation by harmonizing the NPPO with the fundamental rights and freedoms.

For instance, access to food is only mentioned as part of social objectives in the chapter ten of the FDRE constitution entitled as NPPO rather than the right itself, despite the fact that the right to food is not explicitly mentioned in the FDRE constitution, it is only 20 constitutions in the world which make reference to food.³⁸³ Art 90 of the same, under the banner of social objectives, states that “to the extent the country’s resources permit, policies shall aim to provide all Ethiopians with access to public health and education, clean water, housing, food,

³⁸¹Sisay at note 323, p.140, and see also Dejene at note 322, p.93-95.

³⁸²SERAC at note 291, Para. 63.

³⁸³Alexander Attilio Vadala, ‘The Right to Food in Ethiopia: Challenges and Opportunities’, in *Ethiopian Human Rights Law series*, Vol.1, No.2, Faculty of Law, (2008), p.191.

and social insurance.” Food is thus regarded as a social objective rather than as directly justiciable human right.³⁸⁴ Nevertheless, this is far from saying that Ethiopia does not have international obligation stemming from the right to food. For instance, the country voted in favor of the UDHR in 1948 (Art 25, right to food), as indicated earlier, Ethiopia also became state party to the ICESCR in 1993. Article 11 of the ICESCR (as interpreted by ICESCR General Comment No.12) puts duties on states to respect, protect, and fulfill the right to food.³⁸⁵

Arguably, by harmonizing the NPPO with the fundamental rights and freedoms as complementary to each other, the right to food could possibly be implied in the constitution and made indirectly justiciable as the minimum core right to free citizens from hunger and starvation. Article 43(1) which deals with the right to improved standard of living, art 40(3-5) which covers land possession/use also indirectly implied the right to food. Therefore, to the extent that these provisions allow, the interpretation of the right to food should be construed in light of the obligation of the Ethiopian state under the ICESCR.³⁸⁶

In so doing, our court can extend the heightened judicial protection to the implied socio-economic rights enshrined in the FDRE constitution. Arguably, this has untold contribution in advancing the justiciability of economic and social rights on the national fora. Not only this, but Courts can also refer to civil rights that are directly pertaining to socio-economic rights, for example, the right to health, food and clean water may be interlinked with the right to life because they are basic necessities for a life to continue.³⁸⁷ It is hence possible to argue that a number of economic and social rights are blurred in the constitution which does not give rise to direct justiciability and enjoyment of the same. Thus, the Court should read into the explicitly recognized civil and political rights including right to life, honor, security of a person and some few socio-economic rights within the same family entrenched in our constitution.³⁸⁸ In such instances, the means to resolve the same problem is “interpretation”

³⁸⁴Id, p.192.

³⁸⁵Ibid.

³⁸⁶Id, p.193.

³⁸⁷Liebenberg at note 21, p.69.

³⁸⁸Id, p.71-73.

through which it is possible to expand the existing rights in order to cover the untouched boundaries of socio-economic rights. Arguably, our Courts are mandated to reveal the latent rights and accord protection to the same.

4.5. Challenges to the Adjudication of Socio-Economic Rights in the FDRE Constitution

In this section, the researcher will try to reveal factors contributing to the underdeveloped local jurisprudence on the justiciability enunciated in the constitution. There are, challenges to adjudication of socio-economic rights, but not only limited to the following grounds:

I. Vagueness and Generality of the Constitution Regarding SER: It is plain that whenever there is a vague provision in relation to a certain right in the constitution, courts face difficulty in adjudicating the matter and to give a concrete remedy to the right in question. As an interview made with Nega Dufisa reveals one of the blame that the constitution is the source of controversy regarding the entrenched socio-economic rights, that they are too broad and vague and difficult to give content and determine the scope of their protection.³⁸⁹ Hence, the researcher firmly believes that the only means of alleviating this challenge, until legislation is enacted, is interpretation to give content to some socio-economic rights. For instance, the right to clean water is lacking under chapter three of the constitution, thus it need a generous interpretation of the constitution, the court should accept it with an open mind and ready to do so.³⁹⁰ The other aspect is also can be deduced from Art 41(5) of the constitution which only talks about duty bearer, but not about the right holder which aptly reveal that it is poorly crafted, because it does not give rise to any right and undermines their justiciability.³⁹¹

³⁸⁹Interview with Nega Dufisa Judge of Oromiya Supreme Court, on October 8/10/2010.

³⁹⁰Interview with Tadele Nagisho, President of Supreme Court of Oromiya, on October 11/10/2010.

³⁹¹Said that majority of the articles dealing with socio-economic rights are not framed as claimable individual rights; rather as duty of the government which also receives 'ever increasing resource,' hence, the obligation of the government cannot be their justiciable rights.

II. Absence of Subordinate Legislation: Law has been central to most national and international efforts to define and implement human rights. The notion of formulating human rights claims as legal claims and pursuing human rights objectives through legal mechanisms is pivotal for effective implementation and enforcement of socio-economic rights within domestic jurisdictions.³⁹²

Article 2 (1) of the ICESCR also places; particular emphasis in the adoption of legislative measures to achieve the realization of the rights recognized in the covenant. The Committee on Economic, Social and Cultural Rights recognizes that ‘in many instances legislation is highly desirable and in some cases may even be indispensable in making socio-economic rights justiciable.’³⁹³ To mention some of them’ it serves as providing a more precise, detailed definition of the scope and content of the rights encountered in the international human rights instruments and national constitution. For instance, legislation is needed to elaborate on the concept of ‘adequate housing’ in Art 11 of the CESCR³⁹⁴ and the same is true for Art 43(1) of the FDRE constitution that elaborating the concept of “improved living standards” is possible through legislation. Legislation is also essential in stipulating the financing arrangements for the delivery of the rights, prescribing the exact responsibilities and functions of the different spheres of government at every level to give effect to the rights; creating a coherent and coordinated institutional framework for the delivery of the rights; preventing and prohibiting violations of the right by both public official and private parties and providing concrete remedies to redress violations of the rights.³⁹⁵ Hence, Legislation is crucial in ensuring the justiciability and enforcement of socio-economic rights with ease.

³⁹²Jack Donnelly, ‘The Virtues of legalization’, in *the Legalization of Human Rights, Multi Disciplinary Perspectives on Human Rights and Human Rights Law*, Saladin Meckled and Basak Garcia (eds.), Landon and New York, Routledge Tylor and Francis Group (2006), p.68, see also Liebenberg at note 1, p.79.

³⁹³See General Comment No. 3, Para.3.

³⁹⁴Liebenberg at note 21, p.79.

³⁹⁵Ibid.

The demands of most human rights advocates and victims of human rights violations typically involve either direct or indirect appeals for effective legal protection or redress.³⁹⁶ The advantage of legislation is that it is usually more detailed and specific than open-textured constitutional norms.³⁹⁷ Thus, the task of concretizing these vague and general rights in the constitution and international human rights adopted by Ethiopia and converting the same into legally consumable commodities arises. And hence, legislation can play an important role in ensuring that both the public and private sector respect these prohibitions and by providing effective, accessible remedies in the domestic fora.³⁹⁸

For instance, Ethiopia gave effect to the constitutionally entrenched right to work or labour³⁹⁹ with Labour Proclamation that embrace around 191 detailed and specific articles. And Art 41(5) of the constitution is also specifically addressed by legislation in relation to persons with disabilities.⁴⁰⁰ This proclamation embodies 14 articles totally. It is enacted to enhance the employment opportunities of persons with disabilities on equal manner and is designed to prohibit discrimination on the ground of their status which is lacking directly under article 25 of the FDRE constitution.⁴⁰¹ Besides that, the proclamation seems to convert the duty of the government under art 41(5) of the constitution.⁴⁰² It also provides for the rights of persons with disability to reasonable accommodation,⁴⁰³ to occupy a vacant post in any office,⁴⁰⁴ to participate in a training programme⁴⁰⁵ and preferences⁴⁰⁶ are given to them. One can see that

³⁹⁶Donnelly at note 392, p.77.

³⁹⁷Liebenberg at note 21, p.80.

³⁹⁸Tsegaye at note 336, p.289, see also Liebenberg at note21, p.78.

³⁹⁹Labour Proclamation No. 377/2003, Neg. Gaz. 3. 10th year, No.12, 2004. For instance, the Preamble of the proclamation Para. 1 reads that: ‘...is necessary to guarantee the right of the workers and employers; and the 3rd paragraph states the rights of workers to, health and safety, working condition and work environment. It is further elucidated under Para.4 that “The proclamation was enacted by taking account into the Political, Social and Economic policies of the government and to be consistent with International Conventions and other legal commitments (including, may be Constitution art. 42, 35(5), (a), (b) (8)) to which Ethiopia is a party with a view to translating into practice. It is hence, avowed that one can see, the importance of legislation in giving effect to vague and too general Constitutionally enunciated socio-economic rights including International Human Rights ratified by Ethiopia as per art 9(4) if they are vague.

⁴⁰⁰Right to Employment of Persons with Disability, Proclamation No. 568/2008, Neg. GaZ.14th year, No. 20, 2008.

⁴⁰¹Id, Art 2(4) and Para. 3.

⁴⁰²From duty of the government under Art 41(3) to the Right of the disabled persons to employment.

⁴⁰³Id, see Art 2(5) and Para.2 of proc. No. 568/2008.

⁴⁰⁴Id, 4(1), (a).

⁴⁰⁵Id, 41(b).

legislation is pivotal in giving content to some socio-economic rights that are vague and too broad and it can also clearly set concrete remedies as evidenced in the above proclamations, thus, it is undoubtedly instrumental in ensuring the justiciability and enjoyment of the right to work and work related rights when infringed by the government or private parties.

It can also be argued that the constitution merely requires more definitive legislation and that when such a governmental prerogative is rooted in the constitution it must be broad. These socio-economic rights are, however, simply too broad and vague to form the basis for more detailed legislation.⁴⁰⁷ Therefore, the absence of subordinate legislation aptly impaired the adjudication of socio-economic rights and claim a remedy for its violation in our Court of law. Tsegaye also argues that in the course of protecting human rights, including socio-economic rights in domestic fora, the tasks that are involved can thus be summarized as follows, ‘constitutional guarantee’, ‘legislative protection’, ‘judicial application’ and ‘executive implementation.’⁴⁰⁸ Thus, one can see that the role of legislation in according protection to constitutionally guaranteed socio-economic rights to get application before a court of law and an enabling tool for citizens to claim and enjoy their constitutional rights without any difficulty. Unless, constitutionally guaranteed vague and general socio-economic rights are backed by legislation, their enjoyment remains a mere wish which can never be realized. Hence, legislative protection ensures that no horizontal or even vertical violation can occur with impunity; as a result state usually incurs the duty to proscribe any act or omission that poses a threat to rights.⁴⁰⁹ For example, accessible and effective national remedies are the primary means of protecting economic and social rights.⁴¹⁰ Constitutional incorporation of socio-economic rights does not of itself ensure compliance; states are required to ensure appropriate mechanisms for redressing violations of these rights through legislation.⁴¹¹ Thus, legislation is crucial in concretizing the exact remedies in the domestic plane so as to enable

⁴⁰⁶Id, 4(2).

⁴⁰⁷Twibell at note 324, p.441-442.

⁴⁰⁸Tsegaye at note 336, p.307.

⁴⁰⁹Id, p.308.

⁴¹⁰Liebenberg at note 21, p.55.

⁴¹¹Mathew Craven, ‘The UN Committee on Economic, Social and Cultural Rights’, in *Economic, Social and Cultural Rights: A text book second revised ed.* A. Eide et al (ed.), Martinus Nijhoff Publishers (2001), p.456 and see also Shelton at note 209, p.8-9.

the victim to get an easy access to the court of law and enjoy his right thereby contributing to the enhanced justiciability of socio-economic rights in Ethiopia.

III. Absence of Cases: This is particularly related to the specific individual claims that might arise in relation to the enjoyment of socio-economic rights in particular states. And this is also pertains to lack of normative development.⁴¹² Meaning, the idea of case law is mainly attached to the absence of law (i.e. an absence of case law frequently being equated with an absence of law).⁴¹³ No emerging cases at local court decided on socio-economic rights that really did call for national appreciation and scholarly discussion in our national fora.⁴¹⁴ This evidences the underdeveloped jurisprudence of our local courts on these rights.

IV. Courts Lack Jurisdiction: In relation to the problem with poor legislative drafting, courts lack jurisdiction to directly adjudicate those implied socio-economic rights enshrined under chapter ten ‘National Policy Principles and Objectives.’ This is because these rights are only the guideline for the organs of the government and are not directly justiciable rights which lead to the incapacity of the courts to deal with directly, thus judges should look for indirect justiciability.

V. Absence of Constitutional Reference by Judges: There is also a problem that most of our judges abstain from referring to constitutional provisions because they believe that constitutional matters are under the mandate of the House of Federation (HOF).⁴¹⁵ They refer to Art 83 and 84 of the constitution and argue that it is the HOF that has the duty to deal with constitutional interpretation. And also they justify that involving in such matters is trespassing into other organs duty which politicizes the judiciary; hence, judges should be neutral and should retreat from delving into politics. But, with the researcher’s view this is not a problem because Art 83 and 84 are about constitutional disputes, but referring to constitutional provision is not a task of interpretation. A reference to constitutional provisions has to be made because there are no subordinate laws that elaborate socio-economic rights guaranteed

⁴¹²Craven at note 411, p.467.

⁴¹³Ibid.

⁴¹⁴ Interview with Almawu Wole, Judge of Federal Supreme Court Cassation Division on Oct.20/10/2010.

⁴¹⁵Ibid.

by the constitution. In addition, adjudicating socio-economic rights is not delving into politics, for instance, if a reference is made to the General Comment No.3, paragraph10, of the UN which states that “a minimum core obligation to ensure the satisfaction of at the very least, minimum essential level of each of the rights is incumbent on every state party.” Thus, giving power for courts to handle these cases is not involving them into the duty of others organ, rather letting them do what they are legally empowered to do.⁴¹⁶ Also a recent UN publication noted that ‘it is not primarily the nature of economic and social rights that denies judicial enforcement but the lack of competence or willingness of the adjudicating body to entertain, examine and pronounce on claims affecting these rights.’⁴¹⁷ Therefore, it is primarily the failure of national courts to give judicial consideration to economic and social rights, which has meant that those rights have remained largely meaningless in practice.⁴¹⁸ It is the constitutional duty of our courts to identify ways or means and devise the mechanism of ensuring the justiciability and enforcement of international and constitutionally entrenched socio-economic rights on the domestic arena.

VI. Lack of Awareness: This factor is attributed to both judges and the public at large. As has been discussed earlier, the FDRE constitution has only entrenched three socio-economic rights that are directly justiciable. The other impliedly guaranteed socio-economic rights are far from judicial scrutiny. The public, including, judges are not aware of the existence of justiciable socio-economic rights.⁴¹⁹ This clearly impairs citizens to boldly claim their rights. Hence, it is the duty of the government, to enhance the awareness of citizens through promotion that help them to claim their constitutionally and internationally⁴²⁰ guaranteed socio-economic rights. The public should first claim his right, and then judges will play their second role in the adjudication of the victim’s right to food, health, work, education.

⁴¹⁶See art 9(2), judges have duty to obey and ensure the supremacy of the constitution, Art 13(1) and (3), empower judges to respect and enforce and even interpret the constitutions in light of international human rights instruments to which Ethiopia is party and art 9(4) further enable courts to boldly cross-refer to ratified treaties and entertain cases involving socio-economic rights, but not yet done by our courts in the area of socio-economic rights.

⁴¹⁷Coomans at note15, p.3.

⁴¹⁸Ibid.

⁴¹⁹Tadele at not 390, see also Nega at note 389 and Almawu at note 414.

⁴²⁰Art 9(4) the FDRE constitution remedy the situation, when there is terseness of the existing economic and social rights, hence, ICESCR, CRC, ACHPR are part and parcel of the law of the land.

VII. Demanding Nature of the Rights: It is submitted that socio-economic rights are demanding rights; meaning, they are resource dependent at their fulfillment stage, which is also undoubtedly true for civil and political rights.⁴²¹ This notion is clearly related to the above ground, for the judges with whom I made an interview answered me that socio-economic rights as only demanding right (need state action), which seem to blurred their eyes, to look they other duty of the state to respect and protect which are resource independent. For instance, socio-economic rights could be negatively protected, that is prohibiting unlawful eviction (duty to respect on the part of the state) and protecting against others (duty to protect against third party.)⁴²²

For instance, duty to respect pertaining to right to housing; can be negatively protected without state positive action. Thus, the duty to respect and protect are not resource demanding, however, the judges failed to draw a clear line among the duties incumbent up on state parties to ICESCR. It is avowed that the language of progressive realization of the rights set forth in the covenant should depend entirely on the resources availability to a state, and should not be invoked by states as grounds for failing to implement a right when resources were available. Hence, care should be taken not to distort the meaning attached to the language of “progressive realization” which by it self has a limitation.⁴²³ The other issue is that minimum threshold, is an immediate obligation that can be enforced and guilty of states in such instances are established independent of resources.⁴²⁴ It is clear therefore that Ethiopian courts should boldly move towards enforcing these minimum-core rights of individuals to sustain their life and let them live with human dignity. In doing so, the country has to exhaust the available resources and even in the absence of resources should claim for international assistance and cooperation.⁴²⁵ Simply blaming socio-economic rights only on the demanding nature of the rights, by putting aside the other duty of a state cannot relief the state from shouldering its duty. Thus, socio-economic rights should not be seen only from duty ‘to

⁴²¹Koch at note 14, p.3-4.

⁴²²Leckie at note 45, 155-156.

⁴²³Alston and Quinn at note 129, p.174.

⁴²⁴See General Comment No.3, Para. 10.

⁴²⁵Craven at note 157, p.141.

fulfill' angle rather other duties of the state to 'respect' and to 'protect' should also be taken into account.

Herein above, it has been well elucidated that there are factors contributing to the underdeveloped judicial scrutiny of economic and social rights. This problem will be alleviated using the integrated approach that works by bringing together the two sets of rights and accords a balanced protection as has been recognized impliedly in our constitution. Besides, the generous constitutional recognition of human rights including socio-economic rights, there is underdeveloped justiciability of these rights on the domestic arena. It is thus, better to look at whether our courts have played any role, used any means to boost the justiciability of socio-economic rights using their constitutional mandate.

The role of courts in the enforcement of human rights enunciated in the constitution is one of the controversial issues in Ethiopia.⁴²⁶ Yet, it is promising that the Federal Supreme Court Cassation Division has in the case of *Tsedale Demise V Kifle Demise*⁴²⁷ boldly interpreted expansively best interest of child clause of the supreme law of the land and the Child Rights Convention. And also in the case of *Abadit Lemlem V Municipal City of Zalanbasa and others*⁴²⁸ the same Court in the cassation division, courageously claimed its judicial power and decided on the issue of justiciability of 'right to housing'⁴²⁹ in which the court protected the victim from unlawful interference on the side of the government and private party; however, it did not directly refer to provisions dealing with socio-economic constitutional provisions, but decided the case on the basis of art 79(2) and 37 of the FDRE constitution. This is, totally whether the issue is a justiciable matter or not; pertaining to the decision of the lower Court (Tigrai Supreme Court's decision). It gives us a quick glance that to note the

⁴²⁶Assefa Fiseha, 'The Concept of Separation of Powers and its Impact on the Role of Judiciary in Ethiopia', in *Ethiopia Constitutional Law Series* Vol. III, Faculty Law, (2010), p.24.

⁴²⁷*Tsedale Demise V. Kifle Demise* Federal Supreme Court Cassation Division File No. 23632(2000).

⁴²⁸*Abadit Lemlem V. Municipal City of Zalanbasa and Others* Federal Supreme Court Cassation Division File No 48217(2003).

⁴²⁹'Right to housing' is used by the researcher and not directly pointed out as of 'right to housing' by the Cassation Division, still this shows there is a retreat by judges to boldly claim the right as directly justiciable. This can be inferred from the failure of judges to cite the provision that directly addresses the issue as well. However, by any means the decision of the cassation division vindicated the victim to claim back her money and house snatched by the municipal city officials and third party (private persons). (File NO.48217/2003).

statement made by the lower court and how they viewed socio-economic rights that is: “one cannot get house and money from the government and the matter is clearly administrative matter, hence, cannot be seen by regular courts.”

One can see that, how the Tigray Supreme Court willingly relinquished its constitutional mandate.⁴³⁰ It is therefore, possible to argue that judges are retreating from adjudicating or applying constitutional provisions to the contrary what the constitution it self provides.⁴³¹ However, the court seemed to have been overly willing to restrict its own jurisdiction, and ignored cases that squarely fall in its normal adjudicative power.⁴³² The judiciary’s duty in ‘respecting and enforcing’ the rights and freedoms cannot be meaningfully enjoyed by the right holders unless it is involved in interpreting the scope and limitation of those rights.⁴³³ It is plain that no case yet decided by courts even at the cassation division level using indirect approach to justiciability. Thus, one can courageously argue that, the role of the court is nonexistent; besides, the existing means that can help the court to enhance the justiciability of economic and social rights. Therefore, courts need to be optimistic enough to keep doing what it can to respect, protect, promote and fulfill all human rights always.⁴³⁴

The reason that, the researcher said the role of court is nonexistent, our judges are not even doing what the constitution empowers them and the above cases cannot be taken as a ground for the existing development of local jurisprudence. To conclude this way will instantly result in an overstatement. Hence, much is expected from Ethiopian courts to boost the justiciability of socio-economic rights on the national fora. This could be done through, first, courts should utilizes the means entrenched in the FDRE constitution. Second, they should shoulder their constitutional obligation and clearly know their boundary. Finally, they should draw lessons from others jurisdictions jurisprudence, if it is of great importance in enhancing the justiciability of socio-economic rights. However, our courts are not utilizing the indirect

⁴³⁰Takele Soboka, ‘Judicial Referral of Constitutional Disputes in Ethiopia’s from Practice to Theory’, in *Ethiopia Constitutional Law Series*, Vol. 3, Faculty of Law, (2010), p.74.

⁴³¹Art 10, 13(1) of the FDRE Constitution aptly tells us that the court at least, has role in interpreting the provisions of human rights entrenched in the constitution.

⁴³²Takele at note 443, p.74.

⁴³³Assefa at note 439, p.25.

⁴³⁴Tsegaye at note 340, p.306.

approach to justiciability⁴³⁵ so as to enhance the justiciability of the rights in their day to day activities. This was due to the believe that making socio-economic rights justiciable as claimable individual right seem to imposing unbearable burden on the government,⁴³⁶ this totally contradicts with what the constitution provides and even, our constitution do not have such a vision, when we see the constitutionalization of socio-economic rights and duty imposed by the constitution on the state organs in respecting and enforcing socio-economic rights. It can also be evidenced and rebutted that other civil and political rights have budgetary implication, for instance, right to voting,⁴³⁷ fair trial; legal assistance and etc are rights that need positive state actions at their fulfillment level.⁴³⁸ And judicial application of these rights gives an assurance that in cases of violations; there is a possible remedy by taking one's cases to courts.⁴³⁹

4.6. Drawing Adequate Lessons from the Jurisprudence other Jurisdictions: Through Constitutional Cross Reference to International Treaties

This section is devoted to explain and attempt to reveal what lessons can be learnt from the jurisprudences of other jurisdictions for general discussion about the justiciability and enforcement of socio-economic rights. In doing so, it will attempt to address the issue that whether the Ethiopian courts can draw inspirations from other jurisdictions jurisprudence and whether the FDRE Constitution has created a conducive environment that help the courts to do the same. There is sound justifications for courts to draw inspiration in the interpretation of Bill of Rights and substantial benefit derived from such an approach.

⁴³⁵Tadele at note 401 and Almwawu at note 425.

⁴³⁶Ibid, see also Tsegaye at note 340, p.309.

⁴³⁷Ethiopia in the 2010 "National Election" invested 189.5 million Ethiopian birr, to 'fulfill' the "right to vote" of its citizen at large, from Ethiopian Television at 7:00 PM, May 2010.

⁴³⁸Liebenberg at note 21, p.58, see also Koch at note 39, p.3.

⁴³⁹Tsegaye at note 336, p.308.

This notion is rightly put by Rudolf Von Jhering as follows:

*The reception of foreign legal institution is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from a far when he has one as good or better at home, but only a fool would refuse quinine just because it did not grow in his back garden.*⁴⁴⁰

As has been discussed in the foregoing sections the FDRE constitution is not comprehensive for there are some socio-economic rights missing from. One can thus easily deduce from the above statement that the need for analogies arise because they help courts to elucidate the scope and content of a certain vague right in question. In doing so, courts better understand their constitutional system that is; it may identify a doctrine of foreign law and apply it in articulating the meaning and text of a domestic bill of rights, with suitable modifications if necessary.⁴⁴¹ The FDRE constitution under art 9(4) stipulates that: ‘All international agreements ratified by Ethiopia are an integral part of the law of the land.’ This provision depicts the view that international and regional human rights documents ratified by Ethiopia are embedded in the law of the land.

The interplay between domestic and international law depicts a relationship of dependence of the latter on the former for its implementation. Thus, the domestic legal system must provide a conducive legislative, judicial and administrative framework if treaty-based guarantee are to be translated into reality for domestic beneficiaries.⁴⁴² International law complements, supplements and overrides contrary domestic law in matters involving the protection of human and peoples’ rights. There is, therefore, a need to bring domestic legislation, administrative rules and practices into concordance with international treaties.⁴⁴³ This aspect of conformity is truly evidenced by Art. 13(2) of the constitution which obliges courts to interpret the bill of rights text in conformity with international human right treaties ratified by Ethiopia. The only benchmark to be met by treaties to be part of Ethiopian law is their

⁴⁴⁰Jack Tsen-Talee, *Interpreting bill of rights: The value of a comparative approach*, Vol. 5, No.1, Oxford University press and New York University Press (2007), p.122.

⁴⁴¹Id, p.130.

⁴⁴²Takele Soboka, ‘The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia’, *Journal of Ethiopian Law*, Vol.23, No.1, (2009), p.138.

⁴⁴³Id, p.141.

ratification by the House of Peoples' Representatives. The notion that law passed by the same house will have a legal effect irrespective of their signing by the president warrant the conclusion that the publication, which is made after signature is one of formality but not mandatory precondition of validity.⁴⁴⁴ It is therefore possible to conclude that the only vital procedure for the incorporation of the international and regional treaties in the Ethiopian law is ratification.⁴⁴⁵ This paves the way for our courts to directly apply ratified treaties made part and parcel of the law of the land.⁴⁴⁶

The court by cross-reference, will alleviate the problems surrounding the fact that socio-economic rights provision of the constitution are very scant, vague or too general in their formulation.⁴⁴⁷ Ethiopia has ratified a number of international and regional human rights treaties which explicitly recognizes the right to health, education, food, adequate standard of living; among others, including UDHR, ICESCR, ACHPR, CRC, ACWRC and etc. Above all, the constitution bolsters that these treaties shall be utilized as a guideline for interpretation in maintaining the consistency of the Bill of Rights text with. It is hence possible to argue that every Ethiopian has constitutional rights to provisions of such global human rights documents.

It is the power of courts to interpret rights, to decide their exact content and treaty provisions, this was further rejuvenated by art 3(1) of Federal Courts Proclamation that stipulates 'federal courts shall have jurisdiction over international treaties and settle disputes on the basis of the same.'⁴⁴⁸ This Proclamation further bolsters and extends the jurisdiction of Ethiopian Courts to apply international and regional human rights treaties ratified by Ethiopia. This aspect of cross-reference to international treaties via art 9(4) of the constitution was well grounded in the case of *Tsedale Demise V Kifle Demise*; ⁴⁴⁹ the Federal Supreme Court expansively interpreted the best interest of the child by directly applying art 3(1) of CRC and 36(2) of the constitution and vindicates the victim.

⁴⁴⁴Gebremlak at note 319, p.45 and See also Sisay at note 323, p.147.

⁴⁴⁵Ibid.

⁴⁴⁶Sisay at note 323, p.147

⁴⁴⁷Id, p.1 48.

⁴⁴⁸Federal Courts Proclamation, No. 25/1996, Federal Neg. gaz. 2nd year, No, 13, Addis Ababa (1996).

⁴⁴⁹See at note 427 and see also Assefa Fiseha at note 426, p.24-25.

One can boldly claim that the argument that a treaty ratified should be published in the Negarit Gazeta to be implemented and claimed is rebutted by the Federal Supreme Court cassation division in the decision of the above case. It further reveals the realization of the duty of the judiciary to enforce those fundamental rights and freedoms in Bill of Rights text through judicial application.⁴⁵⁰ The direct incorporation or application of international instruments recognizing socio-economic rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.⁴⁵¹ We come to the conclusion that Ethiopian courts can draw adequate lessons from other jurisdictions jurisprudence using art 9(4), 13(1), and (2) and further benefit from art 60 and 61 of ACHPR. The following discussion will point out some instances in which courts should refer to international treaties.

I. Providing Remedies: The power of the courts to grant, any order; that is, just and equitable, paves the way for the developments of a number of creative remedies. This is to redress violations of socio-economic rights.⁴⁵² However, the Ethiopian constitution on the issue of substantive remedy is silent; hence, the need for drawing inspiration arises in such instances. Thus, Courts should look into the other means remedy via cross reference. There are also a number of Comments on ICESCR which are used as an authoritative interpretation guideline. For instance, General Comment No.9 avowedly stated that states have to take legislative, administrative and judicial remedy to redress violation of socio-economic rights. This enables our courts to turn human rights (socio-economic rights specially) from mere rhetoric to legally claimable rights.⁴⁵³ ‘Everyone should have the right to an effective remedy in case of an alleged violation of his/her fundamental rights as laid down in Art 8 of the

⁴⁵⁰Sisay at note323, p.142 and see art 13(1) of the FDRE constitution.

⁴⁵¹_____ ‘The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol.20, (1998), Rule 26, Art 9(4) of Ethiopian Constitution rejuvenates this approach by making international and regional human rights instruments part and parcel of the law of the land and putting them within the ambit of the judiciary, this undoubtedly enhance socio-economic rights justiciability and enforceability (art 13(1))of the same and art 3(1) of federal courts proclamation also strengthen the same concept.

⁴⁵²Liebenberg at note 21, p.70.

⁴⁵³ Tsegaye at note 336. P.312.

UDHR. “At the minimum, national judiciaries should consider the relevant provisions of international and regional human right laws as an interpretative aid in formulating any decisions that are pertaining to violations of socio-economic rights.”⁴⁵⁴

The other means of ensuring constitutional remedy is through cross-reference to civil and political rights by courts at the time of adjudicating cases on violation of socio-economic rights. In this case most of civil and political rights are dependent on the fulfillment of economic and social rights. For instance, the most fundamental right i.e. right to life to be enjoyed one has to have best attainable mental and physical health and also to have this health status one has to at least get access to adequate food, clean water and shelter because without the fulfillment of these rights, it is more unlikely to survive. This is also what has been revealed by the South African Constitutional Court in the case between the government of South Africa v Grootboom.⁴⁵⁵ The same court also has drawn inspiration from the General Comment of the Committee on Economic, Social and Cultural Rights and the ICESCR provision relating to the right to housing and vindicated the victims.⁴⁵⁶ Therefore, Ethiopian courts in interpreting the constitutionally guaranteed socio-economic rights, they should consult the ICESCR, ACHPR and other international instruments so as to give effect to treaty-based obligation. This enables the courts to give concrete remedies by referring to both international and regional human rights texts ratified by Ethiopia. What should be noted is that there are also a number of provisions in the ICESCR including Art 3, 7(a)(i), 8,10(3), 13(2), etc which would seem to be capable of immediate application by judicial and other organs of the government.⁴⁵⁷

⁴⁵⁴ See the Maastricht Guidelines at note 451, Rule 24.

⁴⁵⁵ Hlako Choma, ‘Constitutional Enforcement of Socio-Economic Rights’ (South African case study) School of Law University of Venda, Thohoyandou 0950, south Africa, Vol.6, No.6(serial No.55) *US-China Law Review* (2009), ISSN 1548-6605, USA, p.44, for further reference see also Constitutional Court of South African Case CCT 11/00).

⁴⁵⁶ Ibid and see also Steiner at note 9, p.333-339.

⁴⁵⁷ See General Comment No.3, para.5.

II. Norm Clarification: It is plain that as Bill of Rights are often embody broad statements of principle; it is arguably inaccurate to conclude that foreign law can shed no light on their text.⁴⁵⁸ The ICESCR and other regional and international treaties protecting socio-economic rights may be a source of interpretation for relevant constitutional norms.⁴⁵⁹ However, a court would have to satisfy it self that any foreign legal principles referred to were consonant with domestic constitutional doctrine.⁴⁶⁰ The Committee on Economic, Social and Cultural Rights developed a number of General Comments on the issues of substance, namely, the right to housing, food, forced evictions, the right of persons with disabilities, the right of the elderly, the right to health and two on the right to education. These all were developed as a result of the Committee's perception of the difficulties facing states in the implementation of the rights in question. This is hence aimed at assisting state party to the ICESCR and other bodies in the implementation of the same. Thus, the General Comment has been the principal tool for normative development of socio-economic rights.⁴⁶¹

The interpretation of the ICESCR by the Committee on the covenant via its General Comments and review of state reports is for instance an influential source for interpretation of economic and social right in the bill of rights. It therefore help national judiciaries to determine the scope and content of the rights protected under the constitution.⁴⁶²

In Ethiopia under art 43(1) one can indirectly claim the right to food which deals with the right to improved standard of living and also art 41 which generally talks about socio-economic rights. Thus, our courts may interpret the right to food, health, housing and etc in light of the obligation of Ethiopia under the ICESCR, ACHPR and CRC.⁴⁶³ If Courts face difficulty in the normative content of the rights and their scope of protection they can refer to the Committee's normative development which are authoritative interpretation that serve as a guideline though not binding. This entirely depends on the attitude of judges toward self-executing nature of international and regional human rights treaties. Article 9 (4), 13(1), (2) of

⁴⁵⁸Tsen-Talee at note, 440, p.129.

⁴⁵⁹Liebenberg at note 21, p.76.

⁴⁶⁰Tsen-Tale e at note 440, p.129.

⁴⁶¹Craven at note 411, p.468.

⁴⁶²Id, 469.

⁴⁶³Vadala at note383, p.193.

the FDRE constitution and Art 3(1) of Federal courts proclamation plainly remedy the situation.

General Comment No. 12 puts duties on state to protect, promote, respect and fulfill the right to food. It is therefore possible to boldly claim that making cross-reference so as to draw inspiration from international and regional human rights treaties in such instances by Ethiopian courts seems mandatory to vindicate the victims of violation.⁴⁶⁴ This inspiration has much help for our courts to afford an adequate protection to the citizens to whom the right is guaranteed and makes a judicial sense of human rights.⁴⁶⁵

A sort of relevance exists between the Ethiopian constitution and international and regional human rights that induces the Ethiopian courts to import a comparative jurisprudence and apply it. That is for instance, interpretation should be made in consonant with the ratified treaties which is designed to maintain a sort of similarity and better protection of the rights on the domestic fora. That is the ‘permissible clause’ one can comprehend from art 9(4) and 13(1) and (2) of the FDRE constitution. Accordingly, with respect to obligations stemming from global human rights laws, the principle of *pacta sunt servanda* dictates that treaties willfully entered into should be fulfilled in good faith.⁴⁶⁶

⁴⁶⁴Id, p.192.

⁴⁶⁵Tsegaye at note 336, p.310.

⁴⁶⁶Vienna Convention on the Law of Treaties adopted on 22 may 1969 and entered into force on 27 January 1980, treaties series, Vol.1155, p.331 and Ibid, art 27 states that ‘A party may not invoke the provisions of its national law as justification for its failure to perform a treaty.

The UN Committee on Economic, Social and Cultural Rights further argued that:

*Legally binding international standards should be operated directly and immediately within the domestic legal system of each state party there by enabling individuals to seek enforcement of their rights before national courts and tribunals.*⁴⁶⁷

Therefore, arguably, the Ethiopian courts as per art 9(4) and 13(1) and (2) of the constitution are justified and hence, the FDRE constitution provided a possible way-out environment for our courts to draw inspiration.

⁴⁶⁷ See General Comment No.9, para. 4.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Considering the literature revised and the analysis made, discussion help the necessary and relevant conclusion and findings drawn are attempted to be presented as herein under.

Economic and social rights are newly emerging areas of human rights that developed at the international arena and far from judicial scrutiny. This is mainly attributed to the bifurcation of the two sets of human rights on the global fora. As a result, socio-economic rights were devoid of justiciability and lacked a pragmatic significance both at the international and national level. Later the United Nations saw the importance of Socio-economic rights and returned back to the doctrine of indivisibility and interdependency of human rights rooted in the UDHR and reaffirmed in many resolutions since that time.

These rights are about the well being of an individual and even are basic rights for the realization of civil and political rights. For instance, a starving man does not care about voting and seeking information. The global and regional human rights instruments emphasized the equal importance and equal value of the two sets of human rights so as to enhance the justiciability of socio-economic rights. This was done primarily to rejuvenate the judicial protection of these rights on the domestic arena by putting them within the reach of Courts.

To mention some of them, the ACHPR, CEDAW, CRC and others reintegrated both sets of human rights and plainly maintained the notion of indivisibility, interdependency and interrelatedness of all human rights which has got wider acceptance currently. The protection accorded to one set of the rights directly enhance the enjoyment the other categories of rights. By the same token, when a certain right is deprived, it undoubtedly marginalizes the enjoyment of the other categories of rights. Hence, it is better to look for the integrated approach to human rights that help us to treat all human rights equally and emphasize on their equal importance. That is exactly the case, emphasized by the European court of Human Rights, Indian Supreme Court, the African Commission on Human and Peoples' Rights, the South African Constitutional Court and UN Human Rights Committee. They adjudicated

socio-economic rights from the angle of civil and political rights there by maintaining the integrated approach to human rights. In the above jurisdictions, the integrated approach has been properly utilized so as to boost the justiciability of socio-economic rights.

The Ethiopian Constitution has entrenched a very scant number of socio-economic rights as directly justiciable human rights. The Constitution further made reference to international and regional human rights treaties ratified by Ethiopia as part of the law of the land. These treaties among others; embodies, ICESCR, CRC, CEDAW, ICCPR, ACHPR. The CRC, ACHPR and CEDAW clearly maintained the indivisibility and interdependency of human rights that truly reveals the workability of integrated approach under the FDRE constitution.

Besides that the FDRE constitution enunciated the two grand categories of rights under the same chapter and put them within the purview of courts. However, it seemed too adhered, towards civil and political rights, thus one can safely say that there is no balanced protection accorded to both sets of rights i.e. the FDRE constitution seems selective in the recognition of socio-economic rights. Chapter ten of the FDRE constitution also enunciated some, but very important classical socio-economic matters, which are not directly justiciable because they are elucidated as state obligations without corresponding individual rights.

The justiciability of the other indivisible socio-economic rights lacked pragmatic significance due to different factors. This did not call for the national attention and scholarly debate on the domestic arena. This is mainly attributed to the following grounds. The first is related to the feature of the constitutionalized socio-economic rights, they are selective, very terse, vague and general in their very nature. And they are also not framed as claimable individual rights except few sub-articles. Second, absence of subordinate legislation that exactly defines the scope and content of these rights and to provide them with the concrete remedies for the violations of the same.

The other thing is that the absence of case and reference to constitutional and international human rights treaties by the Ethiopian courts in their day to day activities. Fourthly, courts lack jurisdiction to directly adjudicate NPPO that embraces implied socio-economic rights

and their failure to see the means enshrined in the constitution. Finally, it relates to lack of awareness on the part of the public

Recommendations

Based on the findings of the research, the following recommendations are forwarded:

- Specialized trainings on both direct and indirect justiciability of socio-economic rights protected by the constitution and ratified treaties should be arranged and given for judges and lawyers of the country.
- Ethiopian courts should draw inspiration and boldly consult international treaties ratified or acceded by Ethiopia. In so doing, they should emulate the jurisprudence of other jurisdictions. This is particularly aimed to:
 - Enhance the justiciability of socio-economic rights on the domestic fora by using indirect justiciability.
 - Rejuvenate the judicial protection of socio-economic rights by boldly claiming their constitutional mandate.
- Ethiopian judges should also approach economic and social rights from the civil and political rights dimensions that will help to clarify the scope of protection and vividness of the content of these rights in the FDRE Constitution. This notion of adjudication has untold contribution in boosting the justiciability of classical socio-economic rights impliedly enunciated in the constitution.
- Judicial activism by the Ethiopian judges should be courageously claimed so as to realize the constitutionally guaranteed rights of citizens. This enables the judges to take further steps in advancing the judicial protection of these rights on the domestic plane.

- The other basic obstacle to the enhanced justiciability of socio-economic rights is lack of subordinate legislation. Therefore, there should be subordinate legislation for the following reasons:
 - To give effect to the treaty-based obligation.
 - To give content and determine the scope of protection of the vaguely worded constitutional socio-economic rights.
 - To enhance the justiciability and enforcement of socio-economic rights.
 - To provide with concrete remedies in case of violation of the rights in question established by the victim.

- Educating the public, which enhance the level of awareness of the public at large that help them to claim and enjoy the rights promised to them by international treaty ratified by Ethiopia and the supreme law of the land.

- Judges should also refer to constitutional and treaty-based human rights guaranteed to the beneficiaries when the need arises in order to dispose the case at hand and remedy the victim without retreating from constitutional interpretation in the areas of chapter three. This would have untold contribution in utilizing the potential of integrated approach implied in FDRE constitution which enhances the justiciability of socio-economic rights and open the fertile ground for the proper utilization of indirect justiciability.

Finally, further Researchers should be encouraged to work on the indirect justiciability of socio-economic rights so as to rejuvenate the jurisprudence of the local courts on socio-economic rights that help for scholarly discussion and national attention.

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