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**ADDIS ABABA UNIVERSITY  
SCHOOL OF GRADUATE STUDIES**

**JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN  
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA**

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**JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN  
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA**

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for the Masters of Law (LL.M) in Human Rights Law Stream**

# **Approval Sheet by the Board of Examiners**

## **Justiciability of Socio-Economic Rights in the Federal Democratic Republic of Ethiopia**

**Approved by Board of Examiners**

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## **DECLARATION**

**Amare Tesfaye**, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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## ACRONYMS

|        |                                                                            |
|--------|----------------------------------------------------------------------------|
| ACHPR  | African Charter on Human and Peoples' Rights                               |
| ACRWC  | African Charter on the Rights and Welfare of the Child                     |
| CCI    | Council of Constitutional Inquiry                                          |
| CEDAW  | Convention on the Elimination of All Forms of Discrimination Against Women |
| CERD   | Convention on the Elimination of All Forms of Racial Discrimination        |
| CESCR  | Committee on Economic, Social and Cultural Rights                          |
| CRC    | Convention on the Rights of Child                                          |
| CUD    | Coalition for Unity and Democracy                                          |
| DPSP   | Directive Principles of State Policy                                       |
| ECHR   | European Court of Human Rights                                             |
| EHRC   | Ethiopian Human Rights Commission                                          |
| FDRE   | Federal Democratic Republic of Ethiopia                                    |
| ICCPR  | International Covenant on Civil and Political Rights                       |
| ICESCR | International Covenant on Economic, Social and Cultural Rights             |
| ICJ    | International Commission of Jurists                                        |
| ILO    | International Labor Organization                                           |
| NGOs   | Non-Governmental Organizations                                             |
| NPPO   | National Policy Principles and Objectives                                  |
| SERAC  | Social and Economic Rights Action/Center for Economic and Social Rights    |
| UDHR   | Universal Declaration of Human Rights                                      |

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## ABSTRACT

Civil and political rights have for years received, both at the international and national levels, much more prominence than socio-economic rights. Ethiopia is no exception in this regard. It is safe to state that, in the realm of civil and political rights, much has been achieved in Ethiopia. Many people freely exercise and enjoy the fundamental rights and freedoms recognized and protected in the Federal Democratic Republic of Ethiopian (FDRE) Constitution and ratified agreements, most of which are civil and political rights. However, the same cannot be said for socio-economic rights. This is because in the existence of such situation in the country, there are not many cases of these rights entertained by the judiciary. In other legal systems, problems related to nature of socio-economic rights, and legitimacy and competency of the judiciary in adjudicating these rights have impeded the judiciary's efforts to enforce these crucial rights meaningfully. In order to explore why the adjudication of socio-economic rights under the Ethiopian legal system is under-developed, this research thus aims at examining and critically analyzing the justiciability of socio-economic rights in Ethiopia. Hence, the justiciability of socio-economic rights in the FDRE Constitution and ratified agreements is analyzed from the perspective of the three normative pre-conditions of justiciability consisting of: claim, setting and remedy elements of justiciability. Accordingly, this research argues that socio-economic rights can be enforced both directly and indirectly in Ethiopia. While the direct way would be grounded on the provisions of substantive part of the Constitution and ratified treaties, the indirect way would be grounded on the provisions found in the National Policy Principles and Objectives of the Constitution as well as cross-cutting rights. Therefore, Ethiopian courts should adjudicate socio-economic rights.

**Key Words:** Adjudication; Claim; Ethiopia; Justiciability; Remedy; Setting; Socio-economic rights

## CHAPTER ONE

### INTRODUCTION AND OVERVIEW OF THE STUDY

#### 1.1. Introduction

Socio-economic rights relate to an individual social, economic and cultural entitlements, which have been recognized at the international level since the adoption of the Universal Declaration of Human Rights (hereinafter ‘UDHR’) in 1948.<sup>1</sup> It consists of the right to work, right to social security and social insurance, right to an adequate standard of living including food, clothing, housing, and to continuous improvement of the standard of living, right to health, and the right to education, among others.

Soon after the introduction of human rights into international law discourse through the UDHR, the ideological divide between the West and the East found its way into negotiations for the development of the framework for the recognition and protection of human rights. This divide, however, resulted in the creation of a dichotomy of human rights along the existing Cold War groupings with the West placing emphasis on civil and political rights and the East showing a preference for socio-economic rights.<sup>2</sup> This has been followed by the adoption of the first legally binding international instrument on 16 December 1966<sup>3</sup> that established States legal obligations to protect a number of socio-economic rights.

Although the value of socio-economic rights for the survival of an individual is uncontested, their justiciability<sup>4</sup> has been exposed to debate and dogged the international human rights movement even after the adoption of a separate legal instrument for their protection. This is due to the fact that the International Covenant on Civil and Political

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<sup>1</sup> The UDHR has followed a holistic approach in dealing with human rights by recognizing what has traditionally been seen as two distinct sets of rights: civil and political rights as well as economic, social and cultural rights.

<sup>2</sup> Solomon T. Ebobrah, “The Future of Economic, Social and Cultural Rights Litigation in Nigeria,” *CALS Review of Nigerian Law and Practice*, Vol.1 (2) (2007), pp.109-110.

<sup>3</sup> ICESCR, Adopted and opened for signature and ratification by General Assembly Resolution No. 2000A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

<sup>4</sup> By ‘justiciability’ mean the question of whether the courts can, or sometimes will, provide remedy for aggrieved individuals claiming a violation of a particular right.

Rights (hereinafter 'ICCPR') provide for a complaint procedure at the time of its adoption, but none has existed for the International Covenant on Economic, Social and Cultural Rights (hereinafter 'ICESCR').<sup>5</sup> This differentiation in relation to the ability to bring forward individual and group claims under the two categories of rights has had a profound effect on the characterization of the two sets of rights differently both at the international level and domestically. As a result, some view socio-economic rights as aspirational and non-justiciable rights and civil and political rights as immediately realizable and justiciable rights. Nevertheless, this distinction has been discredited in different World Conferences on Human Rights by concluding that all human rights are universal, interdependent, interrelated and indivisible<sup>6</sup> and by the involvement of the judiciary in the adjudication of socio-economic rights in some legal systems like South Africa. In addition, the adoption of an additional protocol for ICESCR in 2009 that allows individual complaint procedure for violation of socio-economic rights discredits the differentiations made at the time of the adoption of the two covenants.

However, this does not mean that the controversies regarding the justiciability of socio-economic rights is over since there still remains much ambivalence and much debate, both internationally and nationally, regarding the character and concept of them. Especially, domestically in many countries, there have been constitutional debates on the justiciability of socio-economic rights based on issues of competency and legitimacy of the judiciary in adjudicating them and based on their own nature. Nevertheless, since 1990s, African States have succeeded in giving more attention and renewed status to those rights through the incorporation of them in their constitutions with their own modes of constitutionalization of rights.<sup>7</sup>

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<sup>5</sup> Philip Alston, "No Right to Complain about Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant," in Asbjorn Eide and Jan Helgesen (eds.), *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address-Essays in Honour of Torkel Opsahl* (1991), p. 89.

<sup>6</sup> For instance, the 1993 Vienna World Conferences on Human Rights declares the universality, interdependent, interrelatedness and indivisibility of all human rights.

<sup>7</sup> There are, generally, three principal modes of alternatives for the constitutionalization of socio-economic rights including the exclusion of socio-economic rights from the constitution, inclusion in the directive principles of state policy or explicit incorporation in the substantive part of the constitution. On this point see Yoram Robin and Yuval Shany, "The Case for Judicial Review over Social Rights: Israeli Perspectives," *Israel Affairs*, Vol.14, No. 4 (2008), pp. 682, 686; see also Asha P James, *The Forgotten*

The translation of human rights into domestic constitutional language, however, does not avoid the hierarchical classification of rights existed at the international level. Quite similar to the practice at the international level, most national constitutions in Africa recognize civil and political rights as immediately enforceable rights. However, socio-economic rights are pieced together with other political aspirations and policy statements as non-justiciable fundamental objectives and directive principles of state policy<sup>8</sup>, though most Constitutions may also incorporate at least some of them in the substantive part as justiciable rights.

The 1994 Federal Democratic Republic of Ethiopia (hereinafter 'FDRE') Constitution has also incorporated socio-economic rights both in its substantive part dealing with "Fundamental Rights and Freedoms"<sup>9</sup> and in the National Policy Principles and Objectives (hereinafter 'NPPO') of the Constitution<sup>10</sup>, which is commonly known in other legal systems as Directive Principles of State Policy (hereinafter 'DPSP'). The protection of socio-economic rights in Ethiopia also extends to ratified international agreements.

Although their incorporation in the substantive part of the Constitution has given them equal status with those of civil and political rights at least theoretically, the inclusion of them in the NPPO creates doubt as to their actual legal status. This is due to the fact that provisions found in DPSP are generally considered as guidelines by which the organs of the state have performed their functions, and are not legally enforceable before court of law.<sup>11</sup> Consequently, some consider socio-economic rights provided for in the DPSP as

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*Rights: the Case for the Legal Enforcement of Socio-Economic Rights in the UK National Law* (2007) p. 2 Available at [http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW\\_SE\\_rights.pdf](http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW_SE_rights.pdf) last visited on 24 July 2010; Eric C Christiansen, "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa," *UCLA Journal of International La & Foreign Affaiars*, Vol. 13 (2008), p. 375.

<sup>8</sup> Solomon T. Ebobrah, (note 2 above), p. 110.

<sup>9</sup> FDRE Constitution, 1995, Article 40-43 (1), Proclamation No. 1, *Negarit Gazeta*, 1<sup>st</sup> Year, No. 1.

<sup>10</sup> *Id.*, Article 89-91.

<sup>11</sup> Bertus De Villiers, "Directive Principles of State Policy and Fundamental Rights: the Indian experience," *South African Journal on Human Rights*, Vol. 8 (1992), pp. 29 & 37; see also Osita C. Eze, *Human Rights in Africa: Some Selected Problems* (1984), pp. 27-30.

non-justiciable. This is also true to Ethiopian scholars like Rakeb Messele<sup>12</sup>, who consider the socio-economic rights found in the NPPO of the FDRE Constitution as mere aspirations that only direct the government in the implementation of the Constitution, and are not enforceable before court of law. The characterization of socio-economic rights as non-justiciable would inevitably contribute to the violation of them in our legal system. Therefore, this research tries to explore whether the socio-economic rights provided for in the FDRE constitution as well as ratified international human rights instruments are justiciable or not.

## **1.2. Background of the Study**

When I took the course ‘Socio-Economic Rights’, which created the opportunity for me to write a term paper on “the competency and legitimacy of the judiciary in adjudicating socio-economic rights under the FDRE Constitution”, I came to understand the controversies involved in the justiciability of socio-economic rights both at the international and domestic level. However, I perceived, these controversies have not prevented countries like South Africa from incorporating socio-economic rights in their constitution and in adjudicating them by the judiciary. Similarly, in Ethiopia, socio-economic rights are protected by the FDRE Constitution via incorporating them in its both substantive part and NPPO and by integrating ratified international agreements into domestic law. However, the jurisprudence of Ethiopian courts in the adjudication of these rights, even in the face of clear violations, is under-developed. Adding to the problem, I also understand that there is no research that was done on the justiciability of socio-economic rights in our legal system to rectify the deficiency in the judicial practice. Thus, I was inspired to conduct this research.

## **1.3. Statement of the Problem**

The FDRE constitution has provided protection to socio-economic rights by incorporating them both in the substantive part dealing with ‘Fundamental Rights and Freedoms’ and in the NPPO. They have also obtained protection through their inclusion

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<sup>12</sup> Rakeb Messele, *Enforcement of Human Rights in Ethiopia*, Research Sub-contracted by Action Professionals’ Association for the People (APAP) (2002), p. 29, Electronic Copy available at <http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf> last visited on 11 December 2009.

in ratified human rights instruments. Nevertheless, these have not avoided the prevalence of their violations in the country. For instance, there are many people living on the streets exposed to starvation, many people dying due to their inability to bear expenses for medications, and many people being arbitrarily evicted from their home. Although there are such situations in the country, the justiciability jurisprudence of socio-economic rights in our legal system is under-developed, due to the fact that there are not many cases of these rights entertained by the judiciary.

In other legal systems, the under-development of the justiciability jurisprudence of socio-economic rights is attributed to the absence of jurisdiction of the judiciary to see cases involving these rights. In those States, three reasons are raised for ousting the jurisdiction of the judiciary from adjudicating socio-economic rights issues. Firstly, it has been said that, due to its very nature, socio-economic rights are inherently different from civil and political rights. They are considered as rights that impose positive obligations on the part of the state, have vague normative content, are dependent upon the availability of resources and are progressively realizable.<sup>13</sup> Second, allowing the judiciary to adjudicate socio-economic rights would violate the doctrine of separation of power, dwarfing the political capacity of the people and creating the danger of politicization of the court and thus is not democratically legitimate.<sup>14</sup> The last objection directed against the exercise of judicial power over cases pertaining to socio-economic rights is related to its institutional competency. According to this line of argument, courts are institutionally ill-situated to adjudicate in complex polycentric socio-economic disputes raising sensitive issues of resource allocation.<sup>15</sup> However, why the adjudication of socio-economic rights under the Ethiopian legal system is under-developed?

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<sup>13</sup> International Commission of Jurists (hereinafter 'ICJ'), "Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experience of Justiciability," *Human Rights and Rule of Law Series*, No.2 (2008), pp. 9-12.

<sup>14</sup> Diane A. Desierto, *Justiciability of Socio-Economic Rights: Comparative Enforcement of Economic, Social and Cultural Rights in Domestic Courts* (2006), p. 5; see also Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights," *South African Journal of Human Rights*, Vol. 20 (2004), p. 390; Yoram Robin and Yuval Shany, (note 7 above), p. 689; Cecile Fabre, "Constitutionalizing Social Rights," *Journal of Political Philosophy*, Vol. 6 (1998), p. 316; Ellie Palmer, *Judicial Review, Socio-Economic Rights and Human Rights Act* (2007), p. 26.

<sup>15</sup> Diane A. Desierto, (note 14 above); see also Marius Pieterse, (note 14 above), pp. 389-391; Yoram Robin and Yuval Shany, (note 7 above), p. 689.

This research, therefore, attempts to ascertain whether the socio-economic rights provided for in the FDRE Constitution as well as ratified international agreements are justiciable and enforceable before court of law. In order to address this issue, this research attempts to answer the following questions:

- What challenges and controversies are involved in the justiciability of socio-economic rights?
- What normative and institutional frameworks are there for the protection of socio-economic rights in Ethiopia?
- Does the Ethiopian legal system provide for justiciable socio-economic rights?
- What is the effect of incorporating socio-economic rights in the NPPO of the FDRE Constitution?
- Why the jurisprudence of the adjudication of socio-economic rights is under-developed in Ethiopia?
- What problems are there in the adjudication of socio-economic rights before Ethiopian courts?

#### **1.4. Objectives of the Study**

The inclusion of socio-economic rights in the Constitution and the ratification of international agreements that provide protection to these rights is the first step for their enforcement. However, the existence of different controversies in relation to their suitability for judicial adjudication has created doubt on their justiciability. Hence, the aim of this study is examining and critically analyzing the justiciability of socio-economic rights in Ethiopia. In particular it seeks:

- To examine the controversies involved in the justifiability of socio-economic rights;
- To critically investigate the modalities of constitutinalizing socio-economic rights under the FDRE Constitution and evaluate the legal implications of such model;
- To investigate the level of protection provided for socio-economic rights in Ethiopia;

- To assess the justiciability of socio-economic rights provided for in the different normative frameworks in Ethiopia;
- To analyze the existing justiciability jurisprudence of socio-economic rights in Ethiopia; and
- To recommend some measures that should be taken by the government, courts, litigants as well as other human rights activists to ensure the better protection of socio-economic rights by the judiciary in Ethiopia.

### **1.5. Scope of the Study**

The study covers the justiciability of socio-economic rights found in the FDRE Constitution and international agreements ratified by Ethiopia. Thus, reference to wider debate and jurisprudence in respect of the justiciability of socio-economic rights is limited to the extent that they clarify and consolidate the status of socio-economic rights in these normative frameworks under the Ethiopian legal system. The study does not also deal with regional states constitutions, though most of the arguments presented here might be relevant to those constitutions. Besides, both federal and regional legislative bodies have the power to issue legislation relating to human rights that are compatible with the provisions of the Constitution. As a result, there are ordinary legislations that provide for specific justiciable socio-economic rights in Ethiopia. This research however does not discuss such legislations in any depth. Moreover, the study does not intend to analyze their enforceability before international and regional human rights monitoring bodies. It is limited to the rights suitable for adjudication before Ethiopian courts.

### **1.6. Research Methodology**

In order to achieve its objectives, this study places emphasis on an analysis of the relevant available literature on the subject and relies on practical source of research. In relation to literature, it specifically relies on examining international human rights instruments, general comments, books, research studies, journals and academic articles, and domestic laws that have some relevance to the study. In addition, various internet sites have been consulted for relevant data and information. The jurisprudence of other

countries and international treaty monitoring bodies in the adjudication of socio-economic rights are also reviewed for better analysis of issues.

As far as the practical source is concerned, this study uses interview to examine the feelings and attitudes of judges and other stakeholders in relation to the enforceability of socio-economic rights before court of law. The approaches that have been followed in conducting the interview with the participants are semi-structured and non-directional in order to allow myself to further investigation by introducing additional questions not anticipated at the start of the interview and to explore subjective meanings participants attach to the issues. The study also tries to analyze some relevant available cases.

### **1.7. Significance of the Study**

The study will have both legal and social significance. Its legal significance relates to its role in the implementation of the provisions of the Constitution. That is, as it can be seen from Article 13 (1) of the FDRE Constitution, any organ of the government has the obligation to enforce the fundamental rights and freedoms set in chapter three of the Constitution. This study will thus serve the judiciary as an interpretative guide of their obligations in the constitution and consequently will contribute for the enforcement of the Constitution and ratified international human rights instruments.

The social significance, on the other hand, is related to its contribution in the promotion of the realization of socio-economic rights and the resulting benefit that the right holders will get. It will provide individuals and civil society organizations with necessary knowledge about socio-economic rights litigation and enables them to lodge complaints in cases where there is a violation of these rights.

In general, this research will have the following significance:

- It is hoped that this research will serve as an interpretative guide for the judiciary in Ethiopia and as an advocacy tool for civil society organizations.
- It will create awareness among the holders of the rights about the enforcement of their socio-economic rights before the judiciary in Ethiopia.

- It will be used by the legislature and the executive branch of the government as reference material in the making of policies and in the drawing of budgets. That is, it will awaken these two organs to give due consideration for the enforcement of socio-economic rights provided for in the Constitution as well as ratified international agreements.
- It will provoke more research on the subject matter and will be used as research material for future researchers and as secondary source for students.

### **1.8. Limitation of the Study**

The first constraint that encountered this study is lack of relevant materials on the subject matter under the Ethiopian legal system. However, the research made an attempt to remedy this problem to a lesser extent by resorting to materials written in other legal systems and trying to juxtapose them with the provisions of FDRE Constitution and ratified international agreements to meet the objectives of this study. Besides, the absence of a full-fledged internet access for conducting the research is also another limitation of the study. The lack of cooperation among government as well as NGOs to conduct interview, which is very decisive for viewing the practice, has also been a big challenge. Moreover, the under-development of the jurisprudence of socio-economic rights adjudication in our legal system has also negative effect in the conduct of the research. Last but not least, the financial limitation is also a challenge in the conduct of this research.

### **1.9. Organization of the Study**

The research paper is organized in five chapters. Accordingly, the first chapter provides general introduction and overview of the study, which includes introduction, background of the study, statement of the problem, objective of the study, scope of the study, research methodology, significance of the study, limitation of the study and organization of the study.

The second chapter is devoted to discuss the concepts and controversies involved in the justiciability of socio-economic rights in general. To address this issue, the challenges to

justiciability of socio-economic rights, which are related to the nature of these rights themselves, the legitimacy and competency of the judiciary in adjudicating these rights are dealt under this chapter. The nature of State Parties' obligations under the ICESCR is also discussed in this chapter.

The protection of socio-economic rights in the Federal Democratic Republic of Ethiopia is examined under the third chapter. Thus, the normative and institutional frameworks for socio-economic rights in the Ethiopian legal system, the legal status and level of protection of socio-economic rights in Ethiopia are scrutinized in this chapter. The natures of State obligations regarding socio-economic rights and the limitations in the exercise of these rights in Ethiopia are also discussed under this chapter.

The fourth chapter is exclusively devoted to discuss the justiciability of socio-economic rights in the Federal Democratic Republic of Ethiopia. Accordingly, the kind of justiciability of socio-economic rights including direct and indirect justiciability, elements of justiciability of socio-economic rights consisting of the claim, setting and consequence of the claim elements of justiciability are dealt in this chapter. The justiciability of socio-economic rights found in the FDRE Constitution and ratified international agreements is analyzed from the perspective of the three elements of justiciability to comprehend whether there is justiciable guarantee of socio-economic rights in Ethiopia. The benefits of justiciable constitutional guarantee of socio-economic rights, the justiciability jurisprudence of socio-economic rights in Ethiopia and the role of indirect justiciability in enhancing the direct justiciability of socio-economic rights in Ethiopia are also discussed in this chapter.

The last chapter includes general conclusions and a couple of recommendations that bridge the gap between the legal possibility and the practice on the justiciability of socio-economic rights in the country.

## **CHAPTER TWO**

### **CONCEPTS AND CONTROVERSIES INVOLVED IN THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS**

#### **2.1. Introduction**

Though the enforcement of civil and political rights by the judiciary is uncontested in both international and different domestic legal systems, the adjudication of socio-economic rights by the same organ is debated, resulting sometimes in the characterization of them as non-justiciable rights. Thus, this chapter strives to see the concepts and controversies involved in the justiciability of socio-economic rights by analyzing differing arguments on the issue.

To logically address the issue at hand, the chapter is divided into four major topics. Accordingly, the first topic tries to introduce the issue and indicate the contents of the chapter. The second topic addresses the controversies involved in the justiciability of socio-economic rights by specifically analyzing the challenges to justiciability of such rights. Nature of State obligations regarding socio-economic rights is discussed in the third topic. Finally, the chapter ends with conclusion.

## 2.2. Challenges to Justiciability of Socio-Economic Rights

According to the ICJ<sup>16</sup> the term “justiciability” means that people who claim to be victims of violations of rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have any remedy to be enforced.<sup>17</sup> The close reading of this definition reveals the existence of three cumulative pre-conditions required to be fulfilled for a certain right to be considered as justiciable. Accordingly, there should be a right that can be claimed by the victim when violated or to be likely violated; second, there should be an independent and impartial body able to receive a complaint of violation of the claimed right; and lastly, there should be remedy available to be granted and enforced. Hence, to ascertain the justiciability of socio-economic rights, it is vital to evaluate them in light of the aforementioned pre-conditions of justiciability.

However, some scholars and academicians as well as different States have considered and treated socio-economic rights as not capable of being invoked before court of law and hence are not justiciable on the basis of three assumptions:<sup>18</sup>

- ✓ Socio-economic rights are inherently different from civil and political rights;
- ✓ The judiciary is not the legitimate place for adjudicating socio-economic rights;
- and

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<sup>16</sup> Different scholars have provided a definition to the term “justiciability” while dealing with socio-economic rights. For instance, Wall defines justiciability as ‘the ability of an individual to take a case against a state in breach of its obligations.’ See Illan Wall, “The Aspirational Nature of Economic, Social and Cultural Rights; an Examination of an Unsound Case, the Logical and Factual Misconceptions of Rights,” *Cork Online Law Review*, No.1 (2004), p.1 available at [http://www.ucclawsociety.com/corl/index.php?option=com\\_content&task=view&id=63&Itemid=76](http://www.ucclawsociety.com/corl/index.php?option=com_content&task=view&id=63&Itemid=76) last visited on July 16, 2010; Scott and Macklem also defines justiciability as ‘...a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place and at a given time as well as on its changing character and evolving capability, may be broadly defined as the extent to which a matter is suitable for judicial determination.’ See C. Scott and P. Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in the New South African Constitution,” *University of Pennsylvania Law Review*, No.1 (1992), p, 17. However, the writer prefers to use the definition provided by the ICJ for the following reasons. First, the definition provided by the ICJ inculcates the three preconditions required to be met for considering a certain right justiciable. Second, it is inclusive of the definitions provided by others. Lastly, it is more detail, clear and precise than the definitions propagated by other scholars.

<sup>17</sup> ICJ, (note 13 above), P.1.

<sup>18</sup> Solomon T. Ebobrah, (note 2 above); see also ICJ, (note 13 above), p. 3; Aoife Nolan et al., *The Justiciability of Social and Economic Rights: An Updated Appraisal*, originally Prepared for the Human Rights Consortium (August 2007), p. 8 available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1434944](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944) last visited on 24 July 2010.

- ✓ The judiciary is incompetent to properly adjudicate and enforce socio-economic rights.

This indicates that the challenges to the justiciability of socio-economic rights arises not from their evaluation in accordance with the aforementioned elements of justiciability, rather the challenges involved in their adjudication, which have been boiled both in the international arena as well as in domestic legal systems. Thus, the credibility of the proposed assumptions by the proponents of non-justiciability of these rights is critically examined in the following sub-sections.

### **2.2.1. Challenges to Justiciability Associated with Nature of Socio-Economic Rights**

One set of argument raised against the justiciability of socio-economic rights is that, due to their very nature, they are considered as inherently different from civil and political rights.<sup>19</sup> The proponents of this argument have presented the traditional dichotomies existed between the two sets of rights to support their position and subsequently characterize socio-economic rights as aspirational goals that merely direct the government in the making of laws and policies as well as in the drawing of budget. According to them, the prominent discrepancies between the two sets of rights consists of distinctions between rights that require State intervention and State abstention for their realization, between rights perceived to be resource demanding and others viewed as cost free, between rights that lack precise normative content and those that have sufficient clarity, and between rights that could only be secured overtime and those that could be immediately implemented.<sup>20</sup> These dichotomies are interrelated with each other.

Consequently, while it is generally taken for granted that judicial remedies for violations of civil and political rights are essential and hence uncontested, the justiciability of the

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<sup>19</sup> Aoife Nolan et al., (note 18 above), p. 9; E.W. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights," *Netherlands Yearbook of International Law*, Vol. 9 (1978), pp. 69-105; Bossuyt, "La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels," *Human Rights Journal*, Vol. 8 (1975), pp. 783-813 as cited by G.J. H. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views," in P. Alston and K. Tomasevski (eds), *The Right to Food* (1984), p. 103.

<sup>20</sup> G.J. H. van Hoof, (note 19 above), p. 97; see also Ida Elisabeth Koch, "The Justiciability of Indivisible Rights," *Nordic Journal of International Law*, Vol. 72 (2003), pp. 5-6.

other half of the indivisible rights, namely socio-economic rights, are usually questioned and some times even denied.<sup>21</sup> However, the deep scrutiny of the dichotomies presented by the opponents of justiciability of the latter rights, as it can be seen in the following few pages, indicates that socio-economic rights must also be approached in exactly the same way as civil and political rights.

#### **2.2.1.1. The Positive Nature of Socio-Economic Rights**

The first argument made against the justiciability of socio-economic rights purports to stem from the distinctions frequently drawn between civil and political rights on the one hand, and socio-economic rights on the other hand, based on the substantive nature of the rights concerned.<sup>22</sup> Accordingly, some argue that the latter rights are non-justiciable due to the fact that they are positive rights that establish obligations for the State to take positive action towards some end, while the former rights are justiciable since they are negative rights that create a right to be left alone, that carve out a realm of liberties in which a person is protected from State intrusion.<sup>23</sup>

This distinction is traditionally drawn and premised on the idea that the State is merely required to refrain from interfering with individuals' exercise of civil and political rights, whereas socio-economic rights impose positive obligations on the State to act, whether by providing services, money or other benefits necessary to ensure that such rights can in fact be enjoyed.<sup>24</sup> For instance, according to Vierdag and Wiik, while the exercise of the right to freedom of expression and religion does not require the State to supply printing works, news papers or broadcasting, and churches, respectively for their realization<sup>25</sup>, the

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<sup>21</sup> Ida Elisabeth Koch, (note 20 above), p. 3.

<sup>22</sup> Katherine Barrett Wiik, "Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States," *William Mitchell Law Review*, Vol. 32 (2009), p. 900.

<sup>23</sup> Ibid; Horacio Javier Etchichury, "Argentina: Social Rights, Thorny Country, Judicial Review of Economic Policies Sponsored by the IFIs," *American University International Law Review*, No.22 (2006), pp. 101-106.

<sup>24</sup> Martha Jackman, "Charter Remedies for Socio-Economic Rights Violations: Sleeping Under the Box?" forthcoming in: Kent Roach (ed.), *Taking Remedies Seriously* (2010), p. 5; for scholars like Vierdag the main difference between civil and political rights on the one hand, and socio-economic rights on the other hand lies on the question of inaction and action on the part of the state. For him the former require State abstention while the latter require State action for their realization. On this point see E.W. Vierdag, (note 19 above), pp. 80-81.

<sup>25</sup> E.W. Vierdag, (note 19 above), pp. 88-89 (according to him freedom expression does not imply any positive obligation of the State).

exercise of the right to education, on the other hand, requires a State to establish schools that meet a minimum standard in order to give effect its realization.<sup>26</sup> Thus, since negative obligations require the government to refrain or abstain from interfering with the enjoyment of a right and positive obligations demand the government to undertake affirmative action to give effect to the right, the provision of remedies by the judiciary for the violations of the former obligations are less intrusive into the executive and legislative domains than the latter.<sup>27</sup> That is, while the enforcement of negative rights is seen to be within the traditional purview of courts, it is argued that the judicial enforcement of positive rights raises issues of institutional legitimacy and competency, which will be discussed in sub-section 2.2.2 below, that render socio-economic rights non-justiciable.<sup>28</sup> As a result, violations of socio-economic rights are characterized as matters of social policy, rather than fundamental human rights, which governments alone are empowered to address free from judicial interference.<sup>29</sup>

However, though the distinction between the two sets of rights owes its origin in part at least to the post war decision to split the 1948 UDHR<sup>30</sup> into two separate treaties of the ICCPR<sup>31</sup>, and the ICESCR<sup>32</sup>, the downgrading of the latter rights into second class by making them beyond the reach of the court due to their positive nature is hardly convincing.

First, the characterization of socio-economic rights as positive rights is the product of the traditional conception of human rights that considers human rights as safeguards aimed at protecting the individual from the power of the State,<sup>33</sup> an idea of natural law theory.<sup>34</sup>

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<sup>26</sup> Katherine Barrett Wiik, (note 22 above).

<sup>27</sup> Remember Philip Daniel Miamingi, *Inclusion by Exclusion? An Assessment of the Justiciability of Socio-Economic Rights under the 2005 Interim National Constitution of the Sudan*, (2008, Unpublished LLM Thesis, University of Pretoria), p. 10.

<sup>28</sup> Malcolm Langford, “*The Justiciability of Social Rights: From Practice to Theory*” in Malcolm Langford (eds), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008), p. 3 as cited in Martha Jackman, (note 24 above).

<sup>29</sup> Ibid.

<sup>30</sup> UDHR, 1948.

<sup>31</sup> ICCPR, Adopted on 19 December 1966 and entered into force on 23 March 1976.

<sup>32</sup> ICESCR, (note 3 above).

<sup>33</sup> Christopher Mbazira, “Bolstering the Protection of Economic, Social and Cultural Rights under the Malawian Constitution,” *Malawi Law Journal*, Vol. 1, Issue 2 (2007), p. 225; Sandra Liebenberg, “Adjudicating the Positive Duties Imposed by Economic, Social and Cultural Rights,” A Review of the

Nevertheless, this conception of human rights is wrong since modern human rights have not been inspired by the natural law theory alone,<sup>35</sup> and an exclusive focus on the defensive function of human rights primarily benefits those groups that already enjoy access to social power and resources, and leave those that have been marginalized for long<sup>36</sup> that is against the aim and purpose of modern human rights movement.

In addition, the assertion that civil and political rights impose negative obligations, while socio-economic rights give rise to positive ones is based on a misconception of the nature of both sets of rights; because the realization of both sets of rights does not as a whole offer a single model of obligation or enforcement.<sup>37</sup> Hence, some times civil and political rights require the State to act positively. For instance, an individual's political right to vote cannot be ensured unless the State organize periodic elections, establish vote-counting systems, and fund the control of all due formalities of the process. Similarly, in order to grant an individual a fair trial, the State is required to establish court system and make court resources available to the defendant. All these obligations impose a positive duty on the part of the State and require considerable government expenditure even if they are civil and political rights. This is aptly pointed out by Alston that, "in today's world, ensuring the exercise of civil and political rights will often involve significant State intervention and the incurring of considerable public expenditure in order to establish, for example, a system of courts, to train police officials, and to establish a

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International Centre for the Legal Protection of Human Rights, *Interights Bulletin*, Vol. 15, No.3 (2006), p. 109; Mathew C. R. Craven, *The International Covenant of Economic, Social and Cultural Rights: A Perspective on its Development* (1995), pp. 10-11 as cited in Ellen Wiles, "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law," *American University International Law Review*, No. 22 (2006), p. 45.

<sup>34</sup> According to the natural law theory the state may not interfere with the individual's freedom and liberty since it advocates that the individual must be placed in a bracket beyond the reach of the State. On this point see C Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1967) as cited in Christopher Mbazira, (note 33 above).

<sup>35</sup> This is because the International Bill of Rights, for instance, was inspired by a need for solutions to moral and political problems caused by the Two World Wars and the emergence of dictatorship. On this point see Christopher Mbazira, (note 33 above); Mathew C.R Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its Development* (1998), p.11.

<sup>36</sup> Sandra Liebenberg, (note 33 above).

<sup>37</sup> This is affirmed by the ICJ who explains that:

neither economic, social and cultural rights nor civil and political rights as a whole offer a single model of obligations or enforcement...The traditional distinction that civil and political rights impose only negative duties and socio-economic rights entail only positive duties, for states, is inaccurate. Every human right imposes an array of positive and negative obligations on the part of the state. On this point see ICJ, (note 13 above), p. 10.

system of safeguards against potential abuse of rights by state officials themselves”.<sup>38</sup> Conversely, socio-economic rights claim the State to refrain from interfering in their enjoyment when they are being already enjoyed by the individual. A classic example for this is the right to housing, which protects the individual from arbitrary eviction by the State.

Moreover, the argument that socio-economic rights are positive is based on the traditional understanding that they entail only the obligation to fulfill on the part of the State.<sup>39</sup> In fact, human rights impose tripartite obligation on the part of the State consisting of the duty to respect, protect and fulfill.<sup>40</sup> Traditionally, socio-economic rights have been conceived of as imposing only an obligation to fulfill on the State, while civil and political rights are usually considered as rights that can be complied with merely by showing respect.<sup>41</sup> However, this is unsound given that the former can be complied with merely by showing respect like that of some civil and political rights. For example, the right to housing can be complied with by abstaining from arbitrary eviction when it has been already enjoyed by the individual. On the other hand, civil and political rights may require State initiatives for protecting and fulfilling their realization.<sup>42</sup> For instance, the protection of the right to life may require a State investigate crimes committed by third parties, and the fulfillment of the right to life may require the adoption of positive measures to reduce infant mortality and to increase life expectancy.<sup>43</sup> This is also long-established by the Human Rights Committee in its General Comment No.6 on the right to life, in which it states that:

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<sup>38</sup> Philip Alston, *Development of the Rule of Law: Prevention Versus Cure as a Human Rights Strategy*, in Development, Human Rights and the Rule of Law, Report of the International Commission of Jurists Conference held in the Hague (1981), pp. 31, 52.

<sup>39</sup> Mariette Brennan, “To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option,” *Queensland University Tech. Law and Justice Journal*, Vol. 9, No. 1 (2009), p. 71; Remember Philip Daniel Miamingi, (note 27 above), p. 11.

<sup>40</sup> Mariette Brennan, (note 39 above); Sandra Liebenberg, (note 33 above); Asbjorn Eide, “Realization of Social and Economic Rights and the Minimum Threshold Approach,” *Human Rights Law Journal*, Vol. 10, No. 1-2, (1989), p. 35; Asbjorn Eide, “*Economic, Social and Cultural Rights as Human Rights*” in A. Eide et al (eds.), *Economic, Social and Cultural Rights* (2<sup>nd</sup> ed, 2001), p. 23; Ida Elisabeth Koch, (note 20 above), p. 9.

<sup>41</sup> Ida Elisabeth Koch, (note 20 above), p. 9.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

It would be desirable for states parties to take all positive measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.<sup>44</sup>

Besides, the traditional distinction between positive and negative rights has been also discredited under international human rights law, and replaced by the recognition that all human rights are interdependent and indivisible, and that governments have a corresponding duty to respect, protect and fulfill socio-economic rights on an equal footing with civil and political rights.<sup>45</sup>

In conclusion, the discussions so far made indicates that the challenge to the justiciability of socio-economic rights based on this artificial distinction fails to take into account the very nature of both rights since both of them have budgetary implications for their realization, making them to hold some positive nature. Therefore, even if socio-economic rights require relatively greater State action for their realization than do civil and political rights, this does not circumvent their enforceability before court of law as it only detach them in terms of degree than in terms of kind.<sup>46</sup>

### **2.2.1.2. Resource Demanding Rights**

Another argument advanced by the proponents of non-justiciability of socio-economic rights is related to their resource demanding nature for their realization. They argue that those rights are not justiciable as their implementation has cost implications.<sup>47</sup> According to them, civil and political rights are free that did not cost much because their main contents are assumed to be obligations of States not to interfere with the integrity and the

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<sup>44</sup> Human Rights Committee on Civil and Political Rights (hereinafter 'Human Rights Committee'), The Right to Life, General Comment No. 6, (Sixteenth session, 1982), para.5.

<sup>45</sup> Committee on Economic, Social and Cultural Rights (hereinafter 'CESCR'), The Domestic Application of the Covenant, General Comment No. 9, (Nineteenth session, 1998), UN Doc. E/C.12/1998/24 (1998), para. 10; see also ICJ (note 13 above), pp. 42-49.

<sup>46</sup> Philip Alston and Gerard Quinn, "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social, and Cultural Rights (Working Paper on Obligations)," *Human Rights Quarterly*, Vol. 9 (1987), p. 156.

<sup>47</sup> Christopher Mbazira, (note 33 above), p. 229; Ilias Trispiotis, "Socio-Economic rights: Legally Enforceable or Just Aspirational?" *Option 1826*, Issue 8 (2010), p.1 available at [http://www.ucl.ac.uk/opticon1826/archive/issue8/articles/Article\\_Laws\\_-\\_Ilias\\_Social\\_equality\\_Publish\\_.pdf](http://www.ucl.ac.uk/opticon1826/archive/issue8/articles/Article_Laws_-_Ilias_Social_equality_Publish_.pdf) last visited on 08 October 2010.

freedom of the individual. The implementation of socio-economic rights, in contrast, is held to be costly since they are understood as rights that require the State to provide welfare to the individual.<sup>48</sup> Thus, it is argued that even if a violation of socio-economic rights was to be heard before the courts, any decision would still be unenforceable owing to budget constraints,<sup>49</sup> which results for the denial of justiciability to these rights.

Apparently, in any country, resources are inevitably scarce and since some socio-economic rights are positive in nature, it has been suggested that budgetary constraints can make their enforcement problematic.<sup>50</sup> However, the claim that one set of rights is costless while the other always involves the expenditure of resources is clearly wrong and is not a powerful motivator to prevent the enforcement of socio-economic rights by the judiciary. To begin with, like socio-economic rights there are civil and political rights, as it can be seen in the preceding section, that claim resources for their full realization, because whether or not a right is cost free depends on the obligations in question, rather than the classification of the right imposing that obligation.<sup>51</sup> For instance, the provision and maintenance of the infrastructure essential to the realization of civil and political rights such as the right to fair trial and election rights certainly entail expenditure. Besides, some socio-economic rights can also be upheld by the courts without any severe budgetary impact, because they can be also realized without a need for resource expenditure attributable to the fact that they also impose an obligation to respect on the part of the State and claim the State to refrain from interference with the enjoyment of the rights. In addition, justifying the justiciability and genuineness of a right on the basis that it is cost free, may lead to the rejection of the entire human rights corpus due to the fact that guaranteeing most human rights in practice is cost intensive and burdensome.<sup>52</sup>

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<sup>48</sup> Asbjorn Eide, (note 40 above), p. 10; G.J. H. van Hoof, (note 19 above), p. 103; Aoife Nolan et al., (note 18 above), p. 10; ICJ (note 13 above), p. 11; M Bossuyt, "The Legal Distinction between Civil and Political Rights and Economic, Social and Cultural Rights," *Human Rights Journal*, Vol. 8, p. 783 as cited by Christopher Mbazira, (note 33 above), p. 228.

<sup>49</sup> Mariette Brennan, (note 39 above), p. 75.

<sup>50</sup> Ibid.

<sup>51</sup> Aoife Nolan et al., (note 18 above), p. 10; Christopher Mbazira, (note 33 above), p. 228.

<sup>52</sup> As pointed out by Holmes and Sunstein, all rights are positive in the sense that they have budgetary implications. In Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes?* (1999), Chapter 1 as cited in Ida Elisabeth Koch, (note 20 above), p. 11.

Therefore, the denial of justiciability to socio-economic rights as a result of their dependency on resource expenditure for their realization is unfair. Hence, the role of the courts should not be brushed aside because there are budgetary implications since any single case that came before the judiciary has budgetary considerations. Thus, while it is true that some obligations with respect to socio-economic rights are more likely to entail the expenditure of resources than efforts to ensure civil and political rights, as we can see in the preceding section, this difference between the two sets of rights is of degree than of nature.<sup>53</sup>

#### **2.2.1.3. Vague and Imprecise Normative Content**

The other gripe to the justiciability of socio-economic rights points to their vagueness and imprecision. These rights are considered as vague and uncertain in character and are difficult to adequately define their normative content, because it is claimed that the rights are by nature, open-ended and indeterminate, which results for a lack of conceptual clarity about them.<sup>54</sup> Hence, it is argued that in the absence of a precise elaboration of the normative content of each socio-economic right, the determination of a violation of such norms will be difficult to conclude, except in extraordinary circumstances involving explicit abuses of power.<sup>55</sup> That is, clearly identifying both the core and supplemental contents of these rights norms as well as the obligations attached to each entitlement is a prerequisite for their adjudication.<sup>56</sup> Without such identification it is indeed difficult if not foolhardy, to even attempt to delineate which deeds and inactions could constitute actual violations of these rights, because to conclude that violations had occurred or are likely to occur, it would seem reasonably obvious that some clarity regarding the entitlements and obligations involved.<sup>57</sup> However, it is believed by the opponents of justiciability of socio-economic rights that such clarity is lacking under this group of rights, because while civil and political rights provide clear guidance on what is required in order to implement them, socio-economic rights only set out aspirational and political

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<sup>53</sup> Philip Alston and Gerard Quinn, (note 46 above).

<sup>54</sup> ICJ, (note 13 above), p. 10; Christopher Mbazira, (note 33 above), p. 229; Mariette Brennan, (note 39 above), pp. 69-70.

<sup>55</sup> Scott Leckie, "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 20 (1998), p. 87.

<sup>56</sup> *Id.*, p. 88.

<sup>57</sup> *Ibid.*

goals. Consequently, it is said that, the normative content of the latter rights is supposedly variable and devoid of the certainty required for adjudication, which makes the adjudication of such rights impossible and thus are not justiciable.<sup>58</sup>

Although lack of specificity regarding the exact content of socio-economic rights, and therefore of the legal obligations stem from them, would certainly seriously impede their judicial enforcement, it does not mean that it cannot be adjudicated before court of law.

First, the question of content and scope of a right is not a problem exclusively related to socio-economic rights. The determination of every right is vulnerable to being labeled as insufficiently precise due to the formulation of many legal rules in broad and vague terms.<sup>59</sup>

In addition, many civil and political rights are vague and open-textured in their formulation.<sup>60</sup> For instance, the question as to what amounts to inhuman and degrading treatment, free speech, freedom of expression and so on cannot be answered with precision.<sup>61</sup> Nevertheless, this problem has been rectified to a certain extent through many years of adjudication by domestic courts and international treaty monitoring bodies.<sup>62</sup> Accordingly, Koch agrees that:

Our present understanding on civil and political rights as fairly precise rights is due to the fact that treaty bodies such as the Human Rights Committee, via individual petition procedures, gradually have defined the legal content of the rights. For example, the expressions such as in a democratic society, inhuman and degrading treatment and so on are linguistically an imprecise expression that has been clarified in practice.<sup>63</sup>

However, similar advantage has not been given for socio-economic rights either at the international level or at national level though it is believed that it will help in clarifying their normative content; because as Sandra Liebenberg has pointed out,

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<sup>58</sup> ICJ, (note 13 above), p. 10.

<sup>59</sup> Ibid.

<sup>60</sup> Aoife Nolan et al., (note 18 above), p. 11; Christopher Mbazira, (note 33 above), p. 229; Mariette Brennan, (note 39 above), p. 70.

<sup>61</sup> Christopher Mbazira, (note 33 above), p. 229.

<sup>62</sup> Ibid; Mariette Brennan, (note 39 above), p. 70; Ida Elisabeth Koch, (note 20 above), p. 8.

<sup>63</sup> Ida Elisabeth Koch, (note 20 above), p. 6.

It is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity...The fact that the content of many social and economic rights is less well-defined than civil and political rights is mere reflection of their exclusion from process of adjudication than of their inherent nature.<sup>64</sup>

Thus, while critics can argue that socio-economic rights are not as precisely defined as civil and political rights, it cannot argue that socio-economic rights are not justiciable since the imprecision is not the result of their inherent nature rather the denial of provision of similar advantage in the process of adjudication like that of civil and political rights for them.

Moreover, in recent years, the Committee on Economic, Social and Cultural Rights (here in after 'CESCR') has issued a series of General Comments which are meant to help clarifying the scope and content of the rights contained in the ICESCR. These comments are a clear indication that such rights are capable of definition,<sup>65</sup> and can also be used by courts to define the scope of disputed socio-economic rights presented before them. For instance, the South African Constitutional Court has used General Comment No.15 on the right to water to resolve *Mazibuko case*.<sup>66</sup>

Furthermore, the open-textured framing of socio-economic rights can also have benefits since it will provide the court with an opportunity to respond adequately to individual circumstances and historical developments concerning their meaning over time.

In sum, the vagueness and imprecision of socio-economic rights does not justify the denial of their justiciability. So, they should be treated in the same way as civil and political rights as far as their adjudication is concerned since to deny their justiciability is equal to limiting the opportunities for elaborating their normative content.

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<sup>64</sup> Sandra Liebenberg, "Social and Economic Rights," in M. Chaskalson et al (eds.), *Constitutional Law of South Africa* (1996), p. 41 as cited in Aoife Nolan et al., (note 18 above), p. 11.

<sup>65</sup> Mariette Brennan, (note 39 above), p. 70.

<sup>66</sup> See *City of Johannesburg v L Mazibuko* (Case No. 489/08, Supreme Court of Appeal, Republic of South Africa, 25 March 2009), para. 17.

#### 2.2.1.4. Progressively Realizable Rights

This is another protest to justiciability of socio-economic rights. These rights are characterized as rights that can be realized only progressively as they are dependent on the availability of State resources. It has been argued that, as it has been seen in section 2.2.1.1 above, State obligations arising from civil and political rights require abstention on the part of the State to ensure for compliance, while the obligations arising from socio-economic rights require positive acts and above all the commitment of financial resources.<sup>67</sup> This apparent difference in State undertakings underlie the belief that the former rights involve immediate obligations whereas the latter rights which require policy action and resources have relativism and aspirationalism built into them.<sup>68</sup> Thus, a number of authors suggest that this distinction makes it easier to subject civil and political rights to justiciability but not socio-economic rights. Accordingly, many States, like Namibia, Nigeria, Uganda and India, have treated socio-economic rights as long term development goals and aspirations<sup>69</sup> and incorporated them in the DPSP of their Constitution. According to this view, the progressive realization requirement for the enforcement of these rights create problem in their adjudication due to their vagueness regarding the timeline for State compliance that hinders the judiciary to hear the matter and render decisions upon the finding of violations; because it does not actually know the exact obligations required from the State.<sup>70</sup> In contrast, civil and political rights are considered as absolute and immediately realizable.<sup>71</sup> Consequently, while the former rights are treated by some commentators like Vierdag as non-justiciable, the latter rights are treated in the contrary.<sup>72</sup>

However, the deep scrutiny of the nature of both sets of rights proves the aforementioned allegation is wrong as the association of negative obligations with civil and political

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<sup>67</sup> E.W. Vierdag, (note 19 above), p. 78.

<sup>68</sup> Michael K. Addo, “*Justiciability Re-examined*,” in Ralph Beddard and Dilys M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement* (1992), p. 102.

<sup>69</sup> Idowu Mopelola Ajibade, *Promoting Economic, Social and Cultural Rights: A Critical Step to Achieving Human Security in Nigeria* (June 2006), p. 25 Electronic Copy available at <http://ssrn.com/abstract=1547424> last visited on 24 June 2010.

<sup>70</sup> Mariette Brennan, (note 39 above), p. 70.

<sup>71</sup> E.W. Vierdag, (note 19 above), p. 103.

<sup>72</sup> ICJ, (note 13 above), p. 12.

rights and positive obligations with socio-economic rights is tricky and hence irrelevant for issue of justiciability.

To begin with, it is difficult to dispute that the full realization of all human rights, whether civil and political rights or socio-economic rights, will invariably be a progressive undertaking, because the reality shows that the full realization of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary societal structures. The argument that these rights require only abstention on the part of the State and can be achieved without significant expenditure is patently at odds with reality.<sup>73</sup> This is also confirmed by the Human Rights Committee in its General Comment on the right to life, in which it states that, “the right to life encompasses wide-ranging positive obligations, some of which are clearly of a progressive nature”.<sup>74</sup>

Secondly, there are some socio-economic rights that are capable of immediate obligation like that of the right not to be discriminated against in the enforcement of these rights<sup>75</sup>; because as the CESCR in its General Comment No.3 asserts that:

While the covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.<sup>76</sup>

This has been also affirmed by the Limburg Principle on the implementation of the ICESCR<sup>77</sup>, because this Principle under its Principle 8 provides that:

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<sup>73</sup> G.J. H. van Hoof, (note 19 above); Scott Leckie, (note 55 above), p. 93.

<sup>74</sup> Human Rights Committee, General Comment No.6, (note 44 above).

<sup>75</sup> Ida Elisabeth Koch, (note 20 above), p. 8.

<sup>76</sup> CESCR, The Nature of State Parties Obligation, General Comment No.3, adopted on 14/12/90, (5<sup>th</sup> Session, 1990), U.N. Doc. E/1991/23, Para.1.

<sup>77</sup> In 1986 the International Commission of Jurists, the Maastricht Centre for Human Rights of the University of Limburg (the Netherlands) and the Urban Morgan Institute for Human Rights, College of Law, University of Cincinnati (Ohio, USA) convened a group of distinguished experts in international law to consider the nature and scope of the obligations of States Parties to the International Covenant on Economic, Social and Cultural Rights (CESCR). This meeting, which was attended, among others, by some members of the then newly constituted ECOSOC Committee on Economic, Social and Cultural Rights and by staff members of the United Nations and Specialized Agencies, resulted in the adoption of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. See Limburg Principles on the Implementation of the ICESCR, UN doc E/CN.4/1987/17, Annex, reprinted in: *Human Rights Quarterly*, Vol. 9, (1987).

although the full realization of the rights recognized in the covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable overtime.

Besides, the opponents to justiciability of socio-economic rights do not also take into account the minimum core obligations required to be ensured for the satisfaction of, at the very least, minimal essential levels of each of the rights. Such obligations are not only immediate but also applicable irrespective of the availability of resources of the concerned State.<sup>78</sup>

Lastly, this allegation for considering socio-economic rights non justiciable does not also take into consideration the prohibition of retrogressive measures in the implementation of the progressive obligation of the State for the realization of these rights. For instance, if the government has cut the budget that should have been allocated to improve social service and divert it to procurement of weapons worth hundreds of million of dollars or squander it for an extravagant anniversary of its advent to power, it has taken retrogressive measures. In such cases, the State is precluded from raising scarcity of resources as excuses for its failure to implement socio-economic rights. In addition, though the right to health is progressively realizable, the State is required to abstain from demolishing the only health care service available for certain section of the society, without arranging another option for them.

Therefore, though it is traditionally viewed under socio-economic rights that the term ‘progressive realization’ is utilized in the obligations regime, this does not affect the legal nature of the assumed duties, nor does it imply that no immediate obligations exist with regard to these rights. Thus, the denial of justiciability based of this characterization of socio-economic rights is hardly persuasive.

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<sup>78</sup> Idowu Mopelola Ajibade, (note 69 above), p. 25-26; on this point see also, for instance, the CESCRs assertion on the right to health, in CESCR, General Comment No 14, The Right to the Highest Attainable Standard of Health, (22<sup>nd</sup> Session, 2000), E/C.12/2000/4 (2000), paras. 43-45.

### **2.2.2. Challenges to Justiciability of Socio-Economic Rights Associated with Legitimacy of the Judiciary**

It is argued that, the protection of socio-economic rights are considered as the task for the legislature and executive branches of the government and empowering of the court to adjudicate those rights would have, thus, the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy to make decisions concerning allocation of resources; and, it is also said that, allowing the court to involve in adjudicating socio-economic rights is politically illegitimate.<sup>79</sup> This sub-section, therefore, reviews these two arguments against the legitimacy of the judiciary in adjudicating socio-economic rights and evaluates their credibility.

#### **2.2.2.1. Violation of the Doctrine of Separation of Power**

The separation of powers principle rests in the basic notion that the powers and responsibilities of governing a State should be spread across the three branches of government. With power being shared, it is hoped that corruption of State actors can be avoided.<sup>80</sup> In order for the principle to work, each branch must only act within their capacity and not encroach on another's domain. Separation of powers 'encompasses the notion that there are fundamental differences in governmental functions, which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another.'<sup>81</sup> The legislature lays down the general principles that the government endorses, the executive decides how to implement them and the judiciary serves to oversee and review the application of those principles to ensure they accord with the rule of law.<sup>82</sup> With the adjudication of socio-economic rights, the lines between the different government branches blur and critics argue that this can threaten the democratic legitimacy of the State.

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<sup>79</sup> Marius Pieterse, (note 14 above), pp. 389-390; see also Henry J Steiner et al, *International Human Rights in Context (Law, Politics, Morals): Text and Materials* (3<sup>rd</sup> ed, 2007), p. 316; John Cantius Mubangizi, "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation," *African Journal of Legal Studies*, Vol. 2, No.1 (2006), p. 3; Yoram Robin and Yuval Shany, (note 7 above), pp. 688-693; Ellie Palmer, (note 14 above), pp. 26-27.

<sup>80</sup> Mariette Brennan, (note 39 above), p. 72.

<sup>81</sup> P B Kurland, "The Rise and Fall of the "Doctrine" of Separation of Powers," *Michigan Law Review*, Vol. 85, (1986), pp. 592, 593 as cited in Mariette Brennan, (note 39 above), p. 72.

<sup>82</sup> Ida Elisabeth Koch, (note 20 above), p. 30.

Since socio-economic rights are political, legislative matters involving primary issues of resource distribution, the power of the court to review the action of the legislative or the executive concerning their implementation and enforcement constitutes an illegitimate intrusion into the policy affairs of the elected branches of government and a breach of the traditional doctrine of the separation of powers<sup>83</sup>; because these rights require making political choices, setting priorities, allocating resources and rearranging budgets. Such decisions should be left to the political bodies in a domestic system, not to courts, since they relate to policy issues and the implementation of political arrangements, which are the powers of the other two branches of the government.<sup>84</sup>

The reasons propounded by the opponents of justiciability of socio-economic rights relating to the separation of power doctrine are hardly convincing due to their representation of strict conception of separation of power that avoids the other side of the coin, that is checks and balances, for true democracy and their failure to consider the possible negative consequences that may accrue from ousting the jurisdiction of courts in adjudicating these rights. Thus, the following few discussions reveal the defects existed in their arguments and show how the judiciary is legitimate in dealing with issues of socio-economic rights without transgressing its power.

To begin with, the strict conception of separation of power proposes an instrumentalist reduction of human rights to tools for guaranteeing majority rule in social decision making.<sup>85</sup> This position ignores the potential minority protection attributes of socio-economic rights, which are also designed to serve as a counter balance to majority rule and to protect the minority from the tyranny of the majority in relation to distribution related decisions.<sup>86</sup> Thus, since socio-economic rights are important in the protection of the marginalized part of the society and for the enforcement of the civil and political rights as well, there should be a system by which the actions of the legislature as well as the executive are reviewed for ascertaining their compliance with rule of law. So, the

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<sup>83</sup> Ellie Palmer, (note 14 above), pp. 26-27.

<sup>84</sup> Diane A. Desierto, (note 14 above), p. 5; Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006), p. 5.

<sup>85</sup> Yoram Robin and Yuval Shany (note 7 above), p. 690.

<sup>86</sup> Ibid.

adjudication of socio-economic rights by the judiciary could be considered as checks and balances over the acts of the other branches and not be considered as violation of separation of powers doctrine.<sup>87</sup>

In addition, the adjudication of socio-economic rights by the judiciary should not also be considered as illegitimate by the mere fact of the existence of resource allocation due to the fact that there are also civil and political rights that claim resources for their enjoyment like the right to fair trial and election rights<sup>88</sup>; because resource allocation and its distributive consequences form part of the ordinary course of rights enforcement.<sup>89</sup> The existence of negative obligations in relation to socio-economic rights should not be also forgotten.

Besides, the exclusion of socio-economic rights from the reach of the judiciary also undermines the most widely accepted principles of indivisibility, interdependence and interrelatedness of the rights, which have been accepted and included in different regional<sup>90</sup> and international<sup>91</sup> human rights instruments, in different world conferences of human rights<sup>92</sup> as well as in domestic Constitutions of the State<sup>93</sup>.

Moreover, the jurisprudence of the South African Constitutional Court on socio-economic rights shows the possibility of their adjudication without any violation of the doctrine of separation of power because the court only reviews the appropriateness of the

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<sup>87</sup> Ibid.

<sup>88</sup> Ida Elisabeth Koch, (note 20 above), pp. 6, 9; see also Diane A. Desierto, (note 14 above), p. 36.

<sup>89</sup> Diane A. Desierto, (note 14 above), p. 36.

<sup>90</sup> See for instance Africa (Banjul) Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), adopted on 27 June 1981 and entered into force on 21 October 1986; African Charter on the Rights and Welfare of the Child, OAU Doc. Cab/Leg/24.9/49 (1990), Entered Into Force Nov. 29, 1999.

<sup>91</sup> For instance, UDHR (note 30 above); see also Convention on the Rights of the Child (hereinafter 'CRC'), Adopted and opened for signature, ratification and accession by General Assembly Resolution No. 44/25 of 20 November 1989 and entered into force on 2 September 1990, Convention on the Elimination of all forms of Discrimination against Women (hereinafter 'CEDAW'), adopted on 18 December 1979 and entered into force on 3 September 1981, Convention on the Elimination of all forms of Racial Discrimination (hereinafter 'CERD'), Adopted and opened for signature and ratification by General Assembly Resolution No. 2106(XX) of 21 December 1965 and entered into force on 4 January 1969.

<sup>92</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>93</sup> See for instance the FDRE Constitution and the 1996 South African Constitution. Both of them recognize both civil and political rights as well as socio-economic rights in their substantive part.

government policies and programmes. It does not try to involve in the drawing of budgets as well as in the making of policies.<sup>94</sup> For instance, the Constitutional Court of South African in the *Grootboom case*<sup>95</sup> issued a declaratory order specifically requiring the government to undertake a comprehensive and coordinated State housing programme to realize the right of access to adequate housing progressively. This shows that the judiciary is capable of entertaining issues of socio-economic rights without transgressing the power of either the legislative or the executive branches of the government.

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

#### **2.2.2.2. Issues of Political Legitimacy**

The second objection relating to the legitimacy of the judiciary is that allowing the court to involve in the adjudication of socio-economic rights is politically illegitimate. According to this view, in most jurisdictions, judges are not elected and are thus neither directly accountable to the people in the same way as the legislature, nor indirectly accountable in the same way as the executive. Thus, allowing them to review the action of the executive and the legislative branches is dwarfing the political capacity of the people by unelected judges.<sup>96</sup> In order to show this assertion the former Philippines Supreme Court Justice Santiago Kapunan says that:

The empowerment of the court to declare an act of the executive or legislative branch illegal is equal to the thwarting of the will of the elected representatives of the people in the executive or legislative branches of the government, which will

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<sup>94</sup> John Cantius Mubangizi, *Constitutionalization and Justiciability of Social Rights, Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience* (VII World Congress of the International Association of Constitutional Law, Athens 11-15 June 2007), pp. 5-8 available at <http://www.enelsyn.gr/papers/w13/Paper%20by%20Prof.%20John%20Cantius%20Mubangizi.pdf> last visited on February 5, 2010.

<sup>95</sup> *Republic of South Africa v. Grootboom and others* (Case CCT 11/00, Constitutional Court of South African, Johannesburg, 4 October 2000), para. 99.

<sup>96</sup> Marius Pieterse, (note 14 above), p. 390.

dwarf the political capacity of the people expressed through their representatives in the policy making branches of the government and to deaden their sense of moral responsibility.<sup>97</sup>

Besides, the opponents of justiciability of socio-economic rights argue that, allowing courts to deal with socio-economic policy issues is permitting them to become part of a process of political bargaining between competing domestic actors about the allocation of resources, which would create the danger of politicization of the courts.<sup>98</sup>

However, these reasons lack persuasiveness for the following reasons. Firstly, the belief that allowing courts to adjudicate socio-economic rights could dwarf the political capacity of the people is erroneous. To begin with, the foremost mandate of the judiciary is not dwarfing the political capacity of the people rather ensuring the respect of the same through the enforcement of the Constitution, which is also the expression of the people. Next, the court does not interfere on decisions that are constitutional rather on decisions and programmes that are not in line with the Constitution. On top of that, the duty of the judiciary is not serving the majority rather rendering justice through the application of rule of law. Thus, there is no legitimate leeway to the judiciary for acting in a way that dwarf the political will of the people.

Secondly, the involvement of the judiciary in socio-economic matters would create the danger of politicization is also problematic since the disallowance of the court could create the same effect. That is, the illegitimacy of the power of the judiciary to adjudicate such issues would have the effect of making the judiciary as the mouth that express the will of the legislature and the executive only<sup>99</sup> because it is not allowed to order unconstitutional decisions and policies of the legislature and executive. It thus enables

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<sup>97</sup> See *Kilosbayan Inc. and Others v. Teofisto Guingona Jr and Others.*, (G.R.No.113375, May 5, 1994) (Kapunan, J., dissenting) as cited in Diane A. Desierto, (note 14 above), pp. 17-18.

<sup>98</sup> Diane A. Desierto, (note 14 above); see also Yoram Robin and Yuval Shany, (note 7 above), p. 689, Fons Coomans, (note 84 above).

<sup>99</sup> Ida Elisabeth Koch, (note 20 above), pp. 16, 29.

powerful interest groups to exert considerable influence over the political process, without introducing necessary checks and balances against the resulting decision.<sup>100</sup>

Finally, the exclusion of the judiciary from the discourse of constitutionally protected socio-economic rights will result for the loss of the right of the State to take the first opportunity to consider the issue by its own because the exhaustion of domestic remedies required in different treaties can be met easily. Thus, it does not only disturb the politics of the State but also its own sovereignty.

The discussions so far made indicate the absence of a persuasive reason that would exclude the court from adjudicating issues of socio-economic rights. Therefore, the adjudication of those rights by the judiciary is legitimate.

### **2.2.3. Challenges to Justiciability of Socio-Economic Rights Associated with Competency of the Judiciary**

The last objection directed against the exercise of judicial power over cases pertaining to socio-economic rights is related to its institutional competency. According to this line of argument courts are institutionally ill-situated to adjudicate in complex polycentric socio-economic disputes raising sensitive issues of resource allocation.<sup>101</sup> This competency issues focus on problems related to the viability of courts as fora for determining socio-economic rights. These alleged failings include both procedural limitations and informal problems.<sup>102</sup> The procedural limitations consists of the inability of making all affected parties as part of the proceeding due to logistic reasons, the unforeseeability of all possible consequences of the decision in relation to the individual litigants between whom justice must be done, and the possible inadequacy of the evidence before a court to reflect the many competing interests implicated in the matter.<sup>103</sup> On the other hand, the informal problems are the inability of the courts to evaluate and choose between various,

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<sup>100</sup> Yoram Robin and Yuval Shany, (note 7 above), p. 691.

<sup>101</sup> L. Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review*, Vol. 92, (1998), p. 353 as cited in Ellie Palmer, (note 14 above), p. 27; see also Marius Pieterse, (note 14 above), pp. 389-390; Yoram Robin and Yuval Shany, (note 7 above), p. 692.

<sup>102</sup> Eric C Christiansen, (note 7 above), p. 374.

<sup>103</sup> Marius Pieterse, (note 14 above), p. 393; see also Ellie Palmer, (note 14 above), p. 27; Henry J Steiner et al., (note 79 above), p. 316; Yoram Robin and Yuval Shany, (note 7 above), p. 692.

equally valid and equally complex, policy options, and the judges' lack of economic expertise in deciding matters with budgetary consequences and specific specialist expertise in cases where the realization of the right requires specific technical or specialist field.<sup>104</sup> In addition, the judiciaries inability to execute its findings itself and is therefore dependent on the executive cooperation for its judgments to have any credibility or impact in reality is also considered by some scholars as a reason for the incompetence of the judiciary in the adjudication of socio-economic rights.<sup>105</sup>

Although the relevancy of these arguments in warning the judiciary to be cautious in the determination of cases involving resource allocations is undeniable, they do not warrant the incompetence of the judiciary in adjudicating socio-economic rights due to different reasons.

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

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<sup>104</sup> Ibid.

<sup>105</sup> Marius Pieterse, (note 14 above), p. 394.

Secondly, the lack of professional expertise does not also indicate the incompetence of the judiciary. Although poring over budget reports and assessing welfare policies require some specific skills, there is no reason why specialized judges could not be trained to acquire those skills, or could not seek advice from independent experts.<sup>106</sup> The first option may seem irrelevant for countries like Ethiopia, though it is useful, due to the difficulty of providing training to judges and make the latter to deal every thing by itself, which would intensify the backlogs, existed in the judiciary. However, the second option can be applied to solve the judges' lack of professional expertise, which is actually done in matters of civil and political rights that require special skills for their realization. For instance, if there is deprivation of an individual right to vote as a result of his /her mental disorder and if the latter alleges violation of his/her right illegally, the court should consult medical practitioners to ascertain the mental disorder of the individual. Thus, there is no reason why relevant professionals are not consulted to enforce socio-economic rights like that of the civil and political rights in case when there is a need for specialists for their enforcement.

As far as the third objection is concerned, there is a misunderstanding of the role of the judiciary, because the judiciary is not expected to execute its judgments even in the case of civil and political rights, which is the responsibility of the executive branch of the government. Thus, though the enforcement of the finding of the judiciary is dependent upon the cooperation of the executive, it does not affect the competence of the court to deal with socio-economic rights since it is applicable only after the determination of the findings by the judiciary.

Therefore, due to the reasons so far discussed, there is no reason for ousting the jurisdiction of the court from adjudicating socio-economic rights. However, when the issue in the dispute is complex, whether in civil and political matters or socio-economic matters, the judge would be obliged to assume more caution in rendering judgments. So, the complexity of the issues involved does not deprive the competence of the court and consequently, courts have the competence to adjudicate cases involving socio-economic rights.

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<sup>106</sup> Henry J Steiner et al., (note 79 above), p. 317.

### **2.3. The Nature of State Obligations Regarding Socio-Economic Rights**

Socio-economic rights have got an explicit recognition in different international human rights instruments like the UDHR, CERD, CEDAW, CRC and most importantly the ICESCR, as well as regional human rights instruments such as the ACHPR, European Social Charter<sup>107</sup>, and American Convention on Human Rights<sup>108</sup> including the Additional Protocol in the Area of socio-economic rights<sup>109</sup>. These rights are also widely incorporated in national legislations of many legal systems though they are not to the same extent as civil and political right. However, as the discussion of the preceding section reveals, this explicit recognition of these rights does not relieve them from the downgrading and characterization of them as non-justiciable rights.

As we can see from the discussions so far made, much of the debate about the justiciability of socio-economic rights emanate from the nature of State obligations, most importantly from the wording of the provisions of Article 2 (1) of the ICESCR, because it is the foundational and fundamental international human rights instrument solely devoted for these rights. It is hence without doubt that dealing with the nature of State obligations is as vital as dealing with justiciability of socio-economic rights. This section, therefore, tries to address the nature of State obligations regarding socio-economic rights under the ICESCR.<sup>110</sup>

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<sup>107</sup> European Social Charter, 1961 (this charter has been revised in 1966, which entered into force on 1 July 1999).

<sup>108</sup> American Convention on Human Rights, 1969 (socio-economic rights are found in Chapter III of this convention entitled “Economic, Social and Cultural Rights” consisted solely of Article 26).

<sup>109</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), adopted on 1988 and entered into force on 16 November 1999.

<sup>110</sup> The writer’s choice of the ICESCR to deal with the nature of state obligations regarding socio-economic rights is not either incidental or arbitrary. First, this covenant is the foundational and fundamental international human rights instrument that exclusively devoted for these rights. Second, much of the debate about the justiciability of socio-economic rights centers from the nature of state obligations imposed by Article 2 (1) of this covenant. Third, unlike civil and political rights, socio-economic rights originate from the international legal system and transplanted to domestic legal systems. And lastly, this covenant is the only human rights instrument ratified by Ethiopia that claim distinct form of obligation, other than that required for the realization of civil and political rights, on the part of the state for the realization of its substantive rights.

### 2.3.1. Categories of State Obligations

The general legal duties of States parties to give effect to their obligations under the ICESCR are laid down in Article 2, which reads as, “each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

Different scholars like Clarence Dias in helping to clarify some misunderstandings and misconceptions about Article 2 (1) of ICESCR draw four category checklists of obligations under ICESCR. These consist of obligation to respect, protect, promote and fulfill each right contained in the covenant,<sup>111</sup> obligation of commission and omission, obligation of conduct and of result, and lastly obligation of immediacy and progressive realization.<sup>112</sup> These categories of States parties’ legal undertakings are interrelated and to some extent overlapping, but, as noted by the Committee, they have distinctive features that will be described below.

#### 2.3.1.1. Obligation to Respect, Protect, Promote and Fulfill

The CESCR has classified the different levels of State obligations by stating that every socio-economic right, as with every human right, includes duties to respect, duties to protect, duties to promote and duties to fulfil.<sup>113</sup> This interpretation of State obligations has also been reflected in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>114</sup> under its guideline 6. This guideline, however, does not include the

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<sup>111</sup> The precise scope of the obligation has been clarified in CESCR, General Comment No 3, (note 76 above); see also Scott Leckie, (note 55 above), pp. 90-108.

<sup>112</sup> Clarence J. Dias, “*Towards Effective Monitoring of Compliance with Obligation and Progressive Realization of ESCR*,” as cited in Idowu Mopelola Ajibade, (note 69 above), p. 24.

<sup>113</sup> Malcolm Longford and Jeff A. King, “*Committee on Economic, Social and Cultural Rights: Past, Present and Future*,” in Malcolm Longford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008), p. 484.

<sup>114</sup> The International Commission of Jurists, the Maastricht Centre for Human Rights and the Urban Morgan Institute for Human Rights convened early 1997, on the occasion of the tenth anniversary of the Limburg Principles, another workshop which especially focused on the relevance of a ‘violations approach’ in order to strengthen the monitoring of the CESCR. The objective of this workshop was to get a better

duties to promote as an obligation of the State while it has been inculcated under the duties to fulfill according to the CESC. This classification is based on different assumptions about the relationship between the right-holder, his/her access to the protection afforded by a right, potential threat to that access, and the role of the State.<sup>115</sup>

Obligation to respect requires refraining from interfering with the enjoyment of the rights. It focuses on preventing the State from unduly intervening in the enjoyment of a particular freedom or entitlement.<sup>116</sup> Nevertheless, to prevent the interference, the State may still have to take proactive measures, for example, to prevent State agents from acting in certain ways, or to provide reparation if a duty has been breached.<sup>117</sup> Judicial intervention to ensure compliance with duties to respect socio-economic rights is not substantially different from traditional notions of civil and political rights litigation. This is particularly the case when potential victims already have access to essential provisions, such as food, housing, work, income and health care.<sup>118</sup> This obligation of the State has been endorsed by different treaty monitoring bodies as well as domestic courts. For instance, the African Commission on Human and Peoples' Rights (hereinafter the 'African Commission') endorsed the notion of duties to respect the enjoyment of socio-economic rights in *the Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria* (hereinafter 'SERAC') case.<sup>119</sup>

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understanding of the concept of violations of economic, social and cultural rights, to compile a catalogue of types of violations of these rights and to use this catalogue to develop a set of guidelines which may further assist mechanisms that monitor economic, social and cultural rights, notably the Covenant Committee. Accordingly, the Maastricht Guidelines on Violations of Economic, Social and Cultural rights (hereinafter 'Maastricht Guidelines') was adopted in 1997. See Maastricht Guidelines, (Maastricht, January 22-26, 1997).

<sup>115</sup> ICJ, (note 13 above), p. 42.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> The Commission in this case stated that:

The obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.

See SERAC and CESR v. Nigeria (Communication No.155/96, African Commission, October 13-27, 2001), para. 45.

Under the duty to protect, the State is required to prevent third parties from unduly interfering in the right-holder's enjoyment of a particular freedom or entitlement. Emphasis is therefore placed on State action that is necessary to prevent, stop, or obtain redress or punishment for third party interference.<sup>120</sup> This is thus encompassing responsibility on States to regulate the behavior of third parties so that the possibility that private persons, acting within the private domain, can violate these rights is precluded.<sup>121</sup> The way this issue is addressed within the Maastricht guidelines is by using private employers as an example of the third-party actors involved. However, school administrators, teachers, doctors, landlords, or other private actors capable of violating socio-economic rights also could have been used as illustrations.<sup>122</sup> Judicial intervention to ensure compliance with duties to protect socio-economic rights is similar to litigation that seeks to require the State to protect against the acts or failure to act of third parties in the sphere of civil and political rights.<sup>123</sup> This has been confirmed by the African Commission in the SERAC case in which it found a violation of this obligation as a result of the State's failure to regulate and prevent the conduct of a private oil company which polluted natural resources and destroyed the traditional means of livelihood of the Ogoni people. The Commission held that the State had failed in its duties to protect the rights to health, to a clean environment, and to protect against the degradation of the people's wealth and natural resources.<sup>124</sup>

Obligation to promote deals with raising awareness as to the right and procedures for asserting and protecting the right (e.g. through human rights education), creating and publicizing opportunities for participation, and capacity building to enable meaningful participation.<sup>125</sup>

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<sup>120</sup> ICJ, (note 13 above), p. 45.

<sup>121</sup> Victor Dankwa et al, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 20, No. 3 (August 1998), p. 714.

<sup>122</sup> Ibid.

<sup>123</sup> ICJ, (note 13 above), p. 45.

<sup>124</sup> *SERAC and CESR v. Nigeria*, (note 119 above), paras. 55, 57, 58 & 66.

<sup>125</sup> Clarence J. Dias, (note 112 above) as cited in Idowu Mopelola Ajibade (note 69 above), p. 25.

The last obligation, obligation to fulfill, requires States to take appropriate measures towards the full realization of the right.<sup>126</sup> That is, the obligation to fulfill socio-economic rights relates closely to the duty of States to devote the maximum of its available resources towards the progressive realization of the rights established under Article 2(1) of the ICESCR. This duty emphasizes that a comprehensive set of interventionary measures requires action by States, including those relating to legislation, administration, budget, and the judiciary.<sup>127</sup> This formulation stresses the positive nature of the obligations assumed under the ICESCR and asserts that a failure to undertake positive interventions could result in violations of these rights.<sup>128</sup> For instance, the State is in violation of its treaty obligation if it has failed to provide free, compulsory primary education as required by Article 13 (2/a/) of ICESCR. This is particularly the case when such access is limited or nonexistent. Therefore, emphasis is placed on State action directed at identifying problematic situations, providing relief, and creating the conditions that would allow right-holders to manage their own access to the provisions protected by rights.<sup>129</sup> The duty to fulfil socio-economic rights also includes an obligation to remove obstacles to the full enjoyment of socio-economic rights. It also requires the implementation of measures to modify discriminatory social and cultural patterns which result in the disadvantage of vulnerable groups.<sup>130</sup>

#### **2.3.1.2. Obligation of Omission and Commission**

Obligations of commission basically mean that States are supposed to take positive measures to ensure the realization of socio-economic rights. For instance, investing on education by building more schools would be an obligation of commission.<sup>131</sup> Obligations of omission, on the other hand, are negative duties of States which deal with

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<sup>126</sup> Ibid.

<sup>127</sup> ICJ, (note 13 above), p. 48.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Id, p. 49.

<sup>131</sup> Idowu Mopelola Ajibade, (note 69 above), p. 25; see also Maastricht Guidelines, (note 114 above), Guideline 15.

non-interference and respect for socio-economic rights. For example, respecting the right to belong to and hold meeting with trade unions.<sup>132</sup>

### **2.3.1.3. Obligation of Conduct and Result**

As pointed out by the CESCR in its general comments, the legal obligations laid down in Article 2 of the Covenant include both “obligations of conduct and obligations of result”.<sup>133</sup> The obligations of conduct require some form of action reasonably calculated to realize the enjoyment of particular right. With regard to the means that States parties should use to comply with the obligation to take steps, Article 2(1) of the Covenant refers to “all appropriate means, including particularly the adoption of legislative measures”. Thus, it is for States parties themselves to assess what are the most appropriate measures, in addition to legislation, to fulfill their treaty obligations under the Covenant. However, the Committee holds that such measures include, but are not limited to, administrative, financial, educational, and social measures”.<sup>134</sup> The provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable is also another measure that is considered appropriate by the Committee. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies”.<sup>135</sup>

The leeway provided to State parties to choose the means by themselves in pursuing their own obligations under the covenant indicates the inclusion of an obligation of result under Article 2 (1), because an obligation of result leaves the State with freedom of choice of the means to be used to achieve the results required by the obligation.<sup>136</sup> It requires States to ensure that the steps they have taken and appropriate measures they

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<sup>132</sup> Idowu Mopelola Ajibade, (note 69 above), p. 25; see also Maastricht Guidelines, (note 114 above), Guideline 14.

<sup>133</sup> See CESCR, General Comment No 3, (note 76 above), para. 1.

<sup>134</sup> Id, para.7.

<sup>135</sup> Id, para.5.

<sup>136</sup> Id, paras. 4-9.

have adopted do produce the desired result.<sup>137</sup> The phrase ‘any appropriate means’ found in this article is a sign of the existence of such obligation.<sup>138</sup>

#### **2.3.1.4. Immediacy and Progressive Realization**

Most often where the dispute lies in relation to the judicial enforceability of rights incorporated in the covenant is with regard to obligation of immediacy and of progressive realization. Many States have interpreted Article 2 (1) solely to mean obligation of progressive realization. Hence, they consider rights contained in ICESCR as long-term development goals and aspiration.<sup>139</sup>

It can be pointed out in general that, unlike Article 2 (1) of the ICCPR<sup>140</sup>, which imposes a legal duty of immediate enforcement of the rights guaranteed, Article 2 (1) of the ICESCR acknowledges the constraints due to the limit of available resources by allowing for progressive realization of the rights recognized in the covenant. However, it would not only be a serious oversimplification, but legally incorrect, to conclude that the ICESCR only entails duties of progressive implementation with no obligation of immediate action. In fact, as the CESCR pointed out, the concept of progressive realization constitutes recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.<sup>141</sup> Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.<sup>142</sup> 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 socio-economic rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être* of the Covenant which is to

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<sup>137</sup> Ibid; see also, Malcolm Longford and Jeff A. King, (note 113 above), p. 483.

<sup>138</sup> Id, para.4; Philip Alston and Gerard Quinn, (note 46 above), p. 185.

<sup>139</sup> Idowu Mopelola Ajibade, (note 69 above).

<sup>140</sup> Article 2(1) of the ICCPR states that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>141</sup> CESCR, General Comment 3, (note 76 above), para. 9.

<sup>142</sup> Ibid.

establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.<sup>143</sup> In addition, the nature of the rights per se, the way in which they are phrased, the views of the drafters, and the opinions expressed to date by the CESCR show that the nature and extent of the legal obligations that States parties have assumed in ratifying or otherwise adhering to the Covenant are much more dynamic. This means, *inter alia*, that, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.<sup>144</sup> One of these obligations of immediacy is the undertaking in Article 2 (2) to guarantee that the rights contained in the Covenant are exercised without discrimination.<sup>145</sup> A second such obligation is the undertaking in Article 2 (1) ‘to take steps’, which in itself is not qualified or limited by other considerations.<sup>146</sup> This legal obligation means that while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>147</sup> In addition, there are a number of provisions of the Covenant, including articles 3, 7(a) (i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3), which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.<sup>148</sup> Moreover, the committee pointed out that there is ‘minimum core’ obligations to ensure the satisfaction of, at the very least, minimal essential levels of each of the rights”. Such minimum core obligations are not only immediate but are also non-derogable. They apply irrespective of the availability of resources of the country concerned.<sup>149</sup>

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<sup>143</sup> Ibid.

<sup>144</sup> Id, para. 1.

<sup>145</sup> Ibid.

<sup>146</sup> Id, para.2.

<sup>147</sup> Ibid.

<sup>148</sup> Id, para. 5.

<sup>149</sup> Ibid.

Therefore, it can be said that, Article 2 (1) of the ICESCR not only require State Parties to secure the full realization of the rights recognized in the covenant progressively but also claims an immediate action to be taken for the realization of some of the rights depending on the circumstance of the case.

### **2.3.2. Minimum Core Obligations**

The minimum core concept suggests that there are degrees of fulfillment of a right and that a certain minimum level of fulfillment that takes priority over a more extensive realization of the rights.<sup>150</sup> Framed in more simplistic terms, the minimum core approach seeks to confer a minimum legal content for socio-economic rights.<sup>151</sup> This obligation establish that notwithstanding the relative wealth of a given country, minimum core obligations are incumbent on all States to secure minimum essential levels of each right found in the ICESCR, because this concept entails a definition of the absolute minimum needed, without which the right would be unrecognizable or meaningless. Thus, every State that has accepted legal obligations, therefore, agrees that under all circumstances, including in time of resource scarcity, basic minimum obligations and corresponding essential rights remain in place.<sup>152</sup>

While the progressive realization of ICESCR rights constitutes the primary obligation of Contracting States, the CESCR has also made it clear in General Comment 3 that States are required to ‘ensure the satisfaction of, at the very least, minimum essential levels of each of the rights....’ It continued by stating that any “State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>153</sup> In this regard the CESCR has further specified that, since article 2 (1) requires each State party to take the necessary

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<sup>150</sup> David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence,” *South African Journal of Human Rights*, Vol. 19, No. 1 (2003), p. 13.

<sup>151</sup> Karin Lehmann, “In Defense of the Constitutional Court: Litigating Socio Economic Rights and the Myth of the Minimum Core,” *American University International Law Review*, Vol. 22 (2006), p. 163.

<sup>152</sup> Victor Dankwa et al., (note 121 above), p. 717; see also Maastricht Guidelines, (note 114 above), Guideline No.9.

<sup>153</sup> CESCR, General Comment 3, (note 76 above), para. 10.

steps ‘to the maximum of its available resources’, a State must, in order to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>154</sup> However, as emphasized by the Committee, even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.<sup>155</sup>

The minimum core content thus serves as a minimum threshold applying to all individuals in all situations. It constitutes a necessary, but not sufficient component of States’ obligations under the Covenant, as they must also strive progressively towards full realization of all socio-economic rights. However, the problem with regard to minimum core obligations is the absence of a clear demarcation between it and obligations that are deemed to be realized progressively. That is, there is difficulty in crafting the minimum core content of a certain right with clarity. Nevertheless, this can be rectified to a certain extent by using the General Comments issued by CESCR, though some times CESCR is inconsistent in its General Comments, to specify the minimum core of rights to help States in identifying the minimum core of each right and accordingly comply with their obligations.<sup>156</sup> In addition, this problem can be diminished through many years of adjudication by courts.

Therefore, though Article 2 (1) of ICESCR allows States a degree of latitude in terms of the implementation of human rights obligations and this margin of discretion permits some leverage in terms of the manner by which States pursue the implementation of their obligations, it never removes the States' duty to ensure the enjoyment of universal minimum standards of these rights. In other words, States cannot use these provisions as a pretext for violations of the ICESCR.

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<sup>154</sup> Ibid.

<sup>155</sup> Id, para.11.

<sup>156</sup> For instance see CESCR, General Comment No 14, (note 78 above), para. 43 (b)-(e).

### 2.3.3. Retrogressive Measures

A retrogressive measure is one that directly or indirectly results in a negative backward step in relation to a right recognized by the covenant.<sup>157</sup> The CESCR has devoted some attention to the prohibition on States of deliberately introducing retrogressive measures.<sup>158</sup> The underlying principle is that if the ICESCR requires the progressive realization of the rights enshrined in it, while acknowledging the necessary gradual character of their full enjoyment, States cannot take steps to retard or eliminate their realization.<sup>159</sup> As a standard for normative comparison, the prohibition of retrogression means that any measure adopted by the State that suppresses, restricts or limits the content of the entitlements already guaranteed by law, constitutes a *prima facie* violation.<sup>160</sup> It entails a comparison between the previously existing and the newly passed legislation, regulations or practices, in order to assess their retrogressive character.<sup>161</sup>

While the prohibition on retrogression is not absolute, under the jurisprudence of the CESCR, the State has the burden of proving that the measures were taken in pursuit of a pressing goal, that they were strictly necessary, and that there were no alternative or less restrictive measures available. In other words, retrogressive measures are deemed to be breaches of the duty of progressive realization, unless the State can prove, under heightened scrutiny, that they are justified.<sup>162</sup>

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<sup>157</sup> Robert Larsson, *The Justiciability of Socio-Economic Rights-Courts as Protector of Economic and Social Rights: A Case of South Africa*, (2009, Unpublished Master Thesis, Lund University), p. 22.

<sup>158</sup> See CESCR, General Comment No. 3, (note 76 above), Para. 9; General Comment No. 13, The Right to Education (Twenty-First Session, 1999), U.N. Doc. E/C.12/1999/10 (1999), Para. 45; General Comment No. 14, (note 78 above), Para. 32; General Comment No. 15, The Right to Water (Twenty-Ninth Session, 2003), U.N. Doc. E/C.12/2002/11 (2003), Para. 19; General Comment No. 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, Paragraph 1 (C), of the Covenant), U.N. Doc. E/C.12/GC/17 (2006), Para. 27; General Comment No. 18, The Right to Work, (Thirty-Fifth Session, 2006), U.N. Doc. E/C.12/GC/18 (2006), Para. 21. See, also, Maastricht Guidelines, (note 114 above), Guideline 14(e).

<sup>159</sup> ICJ, (note 13 above), p. 29.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

## **2.4. Conclusion**

It has been argued and traditionally accepted that socio-economic rights are non-justiciable. The proponents of such view have presented different arguments that they consider appropriate in supporting their view.

Firstly, it has been said that, due to its very nature, socio-economic rights are inherently different from civil and political rights. They are considered as rights that impose positive obligation on the part of the State, have vague normative content, dependent upon the availability of resources and progressively realizable. However, the deeper scrutiny of the nature of human rights generally indicates that this characterization of socio-economic rights is hardly convincing due to the existence of tripartite obligations (the duty to respect, the duty to protect and the duty to fulfill) in the realization of every right. Thus, there is positive obligation on the part of the State even in the realization of civil and political rights. In addition, the vagueness of the wording of rights is not only attributable to socio-economic rights since there are also civil and political rights that are vaguely worded. Moreover, every right has minimum core that are required to be realized irrespective of resource constraints. Furthermore, there are some rights that imposes immediate obligation for their realization like the right not to be discriminated in the implementation of socio-economic rights.

Secondly, it is said that allowing the judiciary to adjudicate socio-economic rights would violate the doctrine of separation of power, dwarfing the political capacity of the people and create the danger of politicization of the court and thus is not democratically legitimate. The deep inspection of these reasons indicate their representation of strict concept of separation of power, which is not the only thing for the reflection of true democracy since the latter advocates for the protection of fundamental rights including socio-economic rights, the protection of minority groups of the society, and allows checks and balances. The existence of some civil and political rights claiming resource for their enjoyment also shows the legitimacy of the judiciary in adjudicating matters involving resource implications like socio-economic rights.

Lastly, it is argued that the procedural limitations and the informal problems that encountered the judiciary deprive its competence in adjudicating socio-economic rights. However, the existence of similar problems in the adjudication of some civil and political rights and the courts ability of solving them can analogously applied even in the case of socio-economic matters like the consulting of other concerned professionals. Thus, those problems could only impose an obligation on the judiciary to be cautious in the adjudication of socio-economic rights but not deprive its competence. Therefore, due to the reasons so far discussed, there is no reason for ousting the jurisdiction of the court from adjudicating socio-economic rights.

As far as the nature of State obligations regarding socio-economic rights is concerned, Article 2 (1) of the ICESCR provides four categories of obligations consisting of obligation to respect, protect, promote and fulfill each right contained in the covenant, obligation of commission and omission, obligation of conduct and of result, and lastly obligation of immediacy and progressive realization. As discussed, these categories of States parties' legal undertakings are interrelated and to some extent overlapping but they also have distinctive features. Though Article 2 (1) of ICESCR allows States a degree of latitude in terms of the implementation of human rights obligations and this margin of discretion permits some leverage in terms of the manner by which States pursue the implementation of their obligations, it never removes the States' duty to ensure the enjoyment of universal minimum standards of these rights. That is, each right has minimum core that are required to be realized irrespective of the scarcity of State resources. Besides, this article prohibits the adoption of deliberately retrogressive measures by the State.

## **CHAPTER THREE**

### **THE PROTECTION OF SOCIO-ECONOMIC RIGHTS IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA**

#### **3.1. Introduction**

Despite the existence of controversies apropos the justiciability of socio-economic rights, they are integrated in international human rights instruments as well as in domestic legal documents dealing with human rights. This bolstering of protection to these rights via legal instruments has a paramount importance in boosting their justiciability before the judicial or quasi-judicial bodies. Hence, understanding the protection accorded to socio-economic rights in Ethiopia is as vital as clarifying their justifiability as it is a precondition for the latter. This chapter is thus exclusively dedicated to address the issue of protection of these rights in Ethiopia.

To accurately address the issue at hand, the chapter is therefore divided into eight major topics including the introduction and conclusion. Accordingly, while the first topic introduce the chapter, the second and third topics discusses the normative and institutional frameworks for socio-economic rights in Ethiopia, respectively. The fourth topic tries to depict the legal status of these rights in Ethiopia. The level of protection provided to these rights as well as the nature of State obligations regarding the same in Ethiopia is scrutinized in the fifth and sixth topic, correspondingly. The seventh topic is devoted to examine the limitations existed in the exercise of socio-economic rights in Ethiopia. Some concluding notes wrap-up the chapter.

#### **3.2. The Normative Framework for Socio-Economic Rights in Ethiopia**

Although there has been sizzling debate on whether socio-economic rights should be recognized as human rights in general and as justiciable matters in particular, nowadays, these rights are recognized in many international and national legal instruments as human rights. Accordingly, these rights have been integrated in some legal instruments under Ethiopian legal system. The legal framework for the protection of socio-economic rights

in Ethiopia thus derives from the universal and regional human rights instruments as well as the domestic legislations dealing with human rights issues including the Constitution. The following part, therefore, considers the legal frameworks of socio-economic rights in Ethiopia.

### **3.2.1. The 1995 FDRE Constitution**

The FDRE Constitution has devoted one third of its total provisions, starting from Article 13 to 44, to a subject dealing with ‘Fundamental Rights and Freedoms’. This Constitutional Bill of Rights provides the fundamental legal framework for the protection of human rights in Ethiopia. Although this Constitutional Bill of Rights contains provisions concerning socio-economic rights as well as solidarity rights (traditionally also known as ‘third generation rights’), the bulk of the rights contained in chapter III of the FDRE Constitution are mainly civil and political rights. Nevertheless, this shows the approach followed by the FDRE Constitution in dealing with human rights is a “holistic approach”<sup>163</sup> that makes it similar to that of the ACHPR. Even if the provisions dedicated for socio-economic rights are small in number as compared to that of the civil and political rights counterparts, their incorporation in the Constitution shows the protection provided for these rights.

The FDRE Constitution has incorporated these rights both in the substantive part of its provisions as well as in the NPPO of the State. Thus, the following few pages are devoted to discuss the specific rights included in the FDRE Constitution.

#### **3.2.1.1. Socio-Economic Rights in the Substantive Part of the Constitution**

In so far as specific socio-economic rights are concerned, Article 40 of the FDRE Constitution provides for the right to property. It ensures the ownership right of every Ethiopian citizen over ‘private property’<sup>164</sup>, which includes the right to acquire, to use

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<sup>163</sup> By ‘holistic approach’ mean the inclusion of all the three traditional generation rights (civil and political rights, socio-economic rights, and solidarity rights) in a single human rights instrument or document.

<sup>164</sup> ‘Private property’ according to Article 40(2) mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common. However, its inclusiveness of property acquired by

and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.<sup>165</sup> However, this right may be limited by legislations that are enacted to protect the public interest.<sup>166</sup> It also protects arbitrary deprivation of private property and the right to commensurate compensation to the value of the property where it is expropriated by the government for public purposes.<sup>167</sup>

Article 41 of the FDRE Constitution provides for ‘economic, social and cultural rights’.<sup>168</sup> The rough look at of the title of this article may seem that all the rights that fall under the realm of socio-economic rights are incorporated in the provisions though deep scrutiny of them reveals the absence of specific right of such category. However, the usage of general terms and the incorporation of some indicative lists could have help for the inclusion of unlisted rights that have been recognized in treaties ratified by Ethiopia like that of the ICESCR.<sup>169</sup> This can, for instance, be seen from the wording of Article 41 (4), which contain a phrase “... to provide to the public health, education and other social services”. This is an open-ended provision which allows for the inclusion of other rights

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donation or succession is doubtful since they are not produced by the labor, creativity, enterprise or capital of an individual citizen, associations or communities.

<sup>165</sup> FDRE Constitution, (note 9 above), Article 41(1).

<sup>166</sup> Ibid.

<sup>167</sup> Id, Article 40 (8).

<sup>168</sup> Id, Article 41, it contains 9 sub-articles dealing with socio-economic rights. It reads as follows:

1. Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory.
2. Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.
3. Every Ethiopian national has the right to equal access to publicly funded social services.
4. The State has the obligation to allocate an ever increasing resource to provide to the public health, education and other social services.
5. The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged , and to children who are left without parents or guardian.
6. The State shall pursue policies which aim to expand job opportunities for the unemployed and the poor and shall accordingly undertake programmes and public works projects.
7. The State shall undertake all measures necessary to increase opportunities for citizens to find gainful employment.
8. Ethiopian farmers and pastoralists have the right to receive fair price for their products, that would lead to improvement in their conditions 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.
9. The State has the responsibility to protect and preserve historical and cultural legacies, and to contribute to the promotion of the arts and sports.

<sup>169</sup> ICESCR has been ratified by Ethiopia on 11 June 1993 and entered into force on 11 September 1993.

that would fall in the realm of socio-economic rights through interpretation<sup>170</sup>; because Article 13 (2) of the FDRE Constitution provides that the interpretation of the rights and freedoms, including that of the socio-economic rights, should be in line with the ratified international human rights instruments. The wording of Article 41 (4 & 5) also acknowledge the nature of socio-economic rights as progressively realizable since they impose an obligation on the State to allocate its ever increasing resource for their realization. This does not, however, relieve the State from fulfilling its minimum core obligations required under the ICESCR.<sup>171</sup>

Labor rights are also provided under the Constitution.<sup>172</sup> These include the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests though it permitted only for certain category of workers<sup>173</sup>; the right to express grievances, including the right to strike<sup>174</sup>, the right to equal pay for equal work<sup>175</sup>, and the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay and to remuneration for public holidays<sup>176</sup>. The right to work under healthy and safe work environment is also protected.<sup>177</sup> The close reading of the provisions of Article 42 of the FDRE Constitution shows that the rights are only for those who already have job not for those who are unemployed.<sup>178</sup> However, such kind of problem could be solved by looking at ICESCR and other relevant human rights treaties which Ethiopia has adopted. The provisions of Article 41 (6) and (7) of the FDRE Constitution have also some help with regard to the rights of unemployed since they impose an obligation on the State to take all necessary measures to expand job opportunities for them.

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<sup>170</sup> See Sisay 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), pp. 139-140.

<sup>171</sup> CESCR, General Comment No. 3, (note 76 above), para. 10; see also Yoram Robin and Yuval Shany, "The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?" *Israel Law Review*, Vol.37, No.2-3 (2003-2004), p. 338.

<sup>172</sup> FDRE Constitution, (note 9 above), Article 42.

<sup>173</sup> Id, Article 42 (1a); the category of persons who are permitted to form trade unions and other associations are 'factory and service workers, farmers, farm laborers, other rural workers and government employees whose work compatibility allows for it and who are below a certain level of responsibility.'

<sup>174</sup> Id, Article 42 (1b); the right to express grievances, including the right to strike is also only allowed to the category of persons mentioned at note 10.

<sup>175</sup> Id, Article 42 (1d).

<sup>176</sup> Id, Article 42 (2).

<sup>177</sup> Ibid.

<sup>178</sup> See Sisay Alemahu, (note 170 above), pp. 140.

The last provision that deals with socio-economic rights, which is found in the substantive part of the Constitution, is Article 43 (1) of the FDRE Constitution. Although the title of this article (The Right to Development) falls under the category of solidarity rights, it contains a phrase “... the right to improved living standards”, which is also relevant in the realization of socio-economic rights. This phrase enables for the inclusion of implicit rights, like the right to adequate food, housing, clothing, clean water, through interpretation in line with ICESCR.<sup>179</sup> Therefore, there is a wide margin for deriving other rights from the phrase ‘...improved standard of living’.

### **3.2.1.2. Socio-Economic Rights in the National Policy Principles and Objectives**

In addition to the provision of socio-economic rights found in the substantive part of the Constitution, there are also other provisions dealing with socio-economic rights<sup>180</sup> though they are not included under the heading of ‘Fundamental Rights and Freedoms’ rather under the ‘NPPO’. The socio-economic rights included under this part are health<sup>181</sup>, welfare and living standards<sup>182</sup>, education<sup>183</sup>, clean water<sup>184</sup>, housing<sup>185</sup>, food<sup>186</sup> and social security<sup>187</sup>. The inclusion of these rights under the principles and objectives of the State (economic and social objectives) give raises to question their justiciability. However, since the justiciability issue is beyond the ambit of this chapter, the writer will discuss this issue under chapter four.

### **3.2.2. International Human Rights Instruments**

Another issue that should be raised here is about international human rights instruments. Socio-economic rights are an essential part of the normative international system of

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<sup>179</sup> ICESCR, (note 3 above), Article 11(1) according to which the right to ‘adequate standard of living’ includes the right to adequate food, clothing and housing. With regard to the right to clean water see CESCR, General Comment No. 15 (note 158 above); see also Sisay Alemahu, (note 170 above), p. 140.

<sup>180</sup> FDRE Constitution, (note 9 above), Article 89 and 90.

<sup>181</sup> Id, Article 89 (8) and Article 90 (1).

<sup>182</sup> Id, Article 89 (8).

<sup>183</sup> Id, Article 90 (1).

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

human rights.<sup>188</sup> They have been incorporated in the UDHR starting from Article 22 to 27 of its provisions, universal and regional conventions on human rights, and in a plethora of human rights treaties aimed at the eradication of discrimination and the protection of certain vulnerable groups.<sup>189</sup> That is, the first important instrument to proclaim this protection was the UDHR, which incorporated a wide range of these rights, without distinguishing them from the civil and political rights. And latter on the ICESCR was adopted which exclusively incorporate socio-economic rights. Hence, at the universal level, the UDHR and the ICESCR<sup>190</sup> are singled out as the most important sources of socio-economic rights. In addition, various other international human rights instruments contain provisions which are directly related to socio-economic rights and which have been ratified by Ethiopia. CERD<sup>191</sup>, for example, prohibits discrimination on the basis of racial or ethnic origin with respect to socio-economic rights<sup>192</sup> and CEDAW<sup>193</sup> affirms the applicability of the full range of these rights for women<sup>194</sup>. Similarly, CRC<sup>195</sup> upholds and affirms the applicability of many of the rights contained in the ICESCR to children.<sup>196</sup> A broad range of worker-related rights has been also developed under the auspices of the International Labour Organization (ILO) and enshrined in the ILO Conventions and other legal instruments.<sup>197</sup> Besides, at the regional level, the ACHPR<sup>198</sup> recognizes socio-economic rights from Article 15 to 18 of its provisions without making any distinction either in the protection or enforcement of these rights with the civil and political rights. That is, it has treated both sets of rights equally even if the provisions of socio-economic rights are numerically small as compared with the civil and political rights counterparts. Though it was drafted at the time of the ideological controversies of

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<sup>188</sup> Martin Scheinin, “*Economic and Social Rights as Legal Rights*,” in Asbjorn Eide et al. (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2<sup>nd</sup> ed, 2001), p. 29.

<sup>189</sup> Ibid.

<sup>190</sup> See ICESCR, (note 3 above), Article 6-15.

<sup>191</sup> CERD has been ratified by Ethiopia on 23 June 1976 and entered into force on 23 July 1976.

<sup>192</sup> See CERD, (note 91 above), Article 5(e).

<sup>193</sup> CEDAW has been ratified by Ethiopia on 10 September 1981 and entered into force on 10 October 1976.

<sup>194</sup> See CEDAW, (note 91 above), Article 11-14.

<sup>195</sup> CRC has been ratified by Ethiopia on 14 May 1991 and entered into force on 13 June 1991.

<sup>196</sup> See CRC, (note 91 above), Article 24-32.

<sup>197</sup> Scott Leckie & A Gallagher (eds.), *Economic, Social and Cultural Rights: A legal Resource Guide* (2006), p. xv; see also Martin Scheinin, (note 188 above).

<sup>198</sup> ACHPR has been acceded by Ethiopia and entered into force on 2 June 1998 by proclamation No. 114/1998.

the Cold War (which had led to the adoption of ICESCR separately from ICCPR)<sup>199</sup>, the ACHPR recognizes the indivisibility and interrelatedness of civil and political rights and socio-economic rights. It is recognized that civil and political rights cannot be disassociated from socio-economic rights in their conception as well as universality, and that the satisfaction of the latter is a guarantee for the enjoyment of the former.<sup>200</sup> Thus, it is said that, one category of right cannot survive without the other.<sup>201</sup>

According to Article 9 (4) of the FDRE Constitution, “all international agreements ratified by Ethiopia are an integral part of the law of the land”. This means that the provisions of human rights treaties, which Ethiopia has ratified, are part and parcel of the law of the land. Hence, the provisions of human rights instruments like UDHR, ICESCR, CERD, CEDAW, CRC, ACHPR, ACRWC, that deals with socio-economic rights are also relevant to know the socio-economic rights entrenched in the constitution. Thus, by making international human rights instrument an integral part of the law of the land, Article 9 (4) extends the protection of socio-economic rights in Ethiopia. This argument could also be supplemented by the provision of Article 13 (2) of the FDRE Constitution, which advocates for the interpretation of the provisions of Chapter III of the Constitution in consistence with the principles of UDHR, ICESCR, ICCPR and other international instruments adopted by Ethiopia.<sup>202</sup> Consequently, we can say that, the socio-economic rights protected in the FDRE Constitution are not limited only to the provisions of both the substantive and NPPO parts of the Constitution but also to relevant provisions of international instruments ratified by Ethiopia.

Therefore, everyone living in Ethiopia is not only entitled to the protections provided for in the substantive and NPPO part of the Constitution, but also in those ratified international human rights instruments. This would thus provide the beneficiaries or

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<sup>199</sup> The 'Cold War' had led to the division of the world into the eastern and western blocs, with the belief that the eastern bloc was more committed to economic, social and cultural rights and the western was more committed to civil and political rights, and that putting those classes of rights would lead to the non-ratification of such incorporating instrument. But these assumptions were wrong. See Christopher Mbazira, “A Path to Realizing Economic, Social and Cultural Rights in Africa? A Critique of the New Partnership for Africa's Development,” *African Human Rights Law Journal*, Vol. 4 (2004), P.37.

<sup>200</sup> See ACHPR, Preamble, para. 8.

<sup>201</sup> Christopher Mbazira, (note 199 above).

<sup>202</sup> See Sisay Alemahu, (note 170 above), pp. 146-147.

right-holders with an opportunity to choice of an instrument that offers a higher protection to invoke socio-economic rights issues before the court.

### **3.2.3. Ordinary Legislations**

The protection of socio-economic rights is also found in domestic legislations other than the text of the Constitution. That is, apart from the international and regional (in Africa) human rights instruments that Ethiopia has ratified as a member of the international community and the provisions of FDRE Constitution dealing with socio-economic rights, there are also separate legal provisions or code of law that are made for socio-economic rights protection.

The most important legislations that exist in the country to protect socio-economic rights include legislation governing such rights as the right to work (Labour Proclamation No. 377/2003 and its two amendment proclamations /Labour (Amendment) Proclamation No. 466/2005 and Labour (Amendment) Proclamation No. 494/2006/; and the Federal Civil Servants Proclamation No. 515/2007), the right to housing and land (Proclamation Providing for the Expropriation of Urban Lands and Extra Houses 47/1975; Re-enactment of Urban Lands Lease Holding Proclamation No. 272/2002; Condominium Proclamation 370/2003; and Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005), the right to health (Drug Administration and Control Authority Proclamation 176/1999; Public Health Proclamation 200/2002; HIV/AIDS Prevention and Control Council and the HIV/AIDS Prevention and Control Office Establishment Proclamation 276/2002; and Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009), and social security rights (Public Servants' Pensions Proclamation No.345/2003 and its amendment proclamation, i.e., the Public Servants' Pensions (As Amended) Proclamation No. 633/2009; and Social Security Agency Re-establishment Proclamation No.495/2006). These legislations are not the only laws existed to govern issues of socio-economic rights in the country and hence are not exhaustive lists.

Besides, there are legislations that are enacted to deal with the socio-economic rights of some vulnerable groups of the society. For instance, the Proclamation concerning Right

to Employment of Persons with Disability Proclamation No. 568/2008 specifically provides for the employment of persons with disabilities. The Proclamation aims to protect and promote the rights of these persons to appropriate training, employment opportunities and salary, and to prevent any workplace discrimination.<sup>203</sup>

In addition to the aforementioned legal rules that utterly dedicated for the protection of socio-economic rights, there are also laws and policies on the protection of these rights which exist in a rather scattered manner in both Federal and Regional legislations. For instance, the Civil Code of Ethiopia enshrines provisions relating to these categories of rights like property rights.

Though there is a wide array of ordinary legislations providing protection to constitutionally-protected rights, this paper does not discuss them in any depth.

### **3.3. Institutional Frameworks for Socio-Economic Rights in Ethiopia**

As far as the institutional framework is concerned, Article 13 (1) of FDRE Constitution provides that, “all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter”. Pursuant to this provision, the primary institutions responsible for the protection, promotion, and enforcement of human rights in general, and socio-economic rights in particular, are the legislature, the executive, and the judiciary, both at the Federal and State level. For instance, the legislature can make protective laws and facilitate the enjoyment of rights; the executive, on its part, has the role of respecting human rights and preventing violations by others; and the judiciary enforces rights by determining entitlements, punishing violators, and by redressing the victims.<sup>204</sup> However, the role of the court in the adjudication of these rights and consequently in the enforcement of the same is challenged, as seen in the second chapter, though what stands do the Ethiopian courts have on the issue is out of the realm of this chapter and as result deferred to be

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<sup>203</sup> International Labour Organization, *Ethiopia Country Profile: Employment of People with Disabilities: the Impact of Legislation (East Africa)*, (March, 2004), p. 5, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_107836.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_107836.pdf) last visited on 08 October 2010.

<sup>204</sup> Tsegaye Regassa, “Making Legal Sense of Human Rights: the Judicial Role in Protecting Human Rights in Ethiopia,” *Mizan Law Review*, Vol. 3 No.2 (September 2009), p. 303.

considered in the fourth chapter of this research. Nevertheless, the above provision indicates that the primary institutions that are custodian of the human rights norms in Ethiopia are the mainstream institutions in charge of rights administration.<sup>205</sup> Therefore, any attempt at strengthening the institutional framework for the better protection of human rights including socio-economic rights must start with strengthening these mainstream institutions, because strengthening law making and law enforcement institutions as well as courts will go a long distance in the effort to their better protection.<sup>206</sup>

Besides, there are other institutions that are established to handle human rights issues like the Ethiopian Human Rights Commission (EHRC) and the Institution of the Ombudsman as per Article 55 (14) and Article 55 (15) of the FDRE Constitution, respectively. These institutions, however, are not a stand-in to the mainstream institutions rather they are complementary to the work of the latter institutions. Thus, these institutions have a secondary role as compared to the role of the mainstream rights administration institutions.<sup>207</sup> The EHRC, for instance, is an institution whose promotional task looms larger than its protection and remedial tasks.<sup>208</sup> In addition, as it can be understood from its establishment Proclamation No. 210/2000, it focuses on a general problem rather than specific cases which might be taken as aberrations.<sup>209</sup> Moreover, it is crucial to note that the sanction that the EHRC or the Institution of the Ombudsman has at its disposal is the mobilization of shame on institutions that perpetrate abuse or neglect of rights through publicizing a report while also doing the best it can to cooperate with institutions working towards securing relief to specific victims of abuse.<sup>210</sup> Considering these factors, it is only safe to conclude that these institutions serve as consciences of the system since they

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<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Id, p. 304.

<sup>208</sup> See Frans Viljoen, “*Mechanisms for Realising Rights under the Bill of Rights*,” in Nel and Bezuidenhout (eds), *Policing and Human Rights*, (2<sup>nd</sup> ed, 2002), pp. 75-83 as cited in Tsegaye Regassa, (note 204 above), p. 304.

<sup>209</sup> Tsegaye Regassa, (note 204 above), p. 304.

<sup>210</sup> Ibid.

stimulate the latter into doing more towards a better protection of human rights in Ethiopia.<sup>211</sup>

The significant role of non-governmental organizations (NGOs) and their immense contributions towards the betterment of human rights situations should not also be neglected.<sup>212</sup> These institutions help in fostering the human rights culture through training, education, and dissemination of information, though universities and higher educational institutions also share this responsibilities, in stimulating the State commitment to the human rights values through technical assistance and capacity building schemes, and in making interventions to facilitate the enjoyment of some rights by the public such as through counseling and legal aid services to victims, through conducting policy research and lobbying, etc.<sup>213</sup>

### **3.4. The Legal Status of Socio-Economic Rights in Ethiopia**

The determination of the legal status of socio-economic rights depends on the modalities of their constitutionalization as well as the usage of the terms of their formulations. That is, their locus in the Constitution as well as the preciseness of their formulation is very important in the determination of their legal status.<sup>214</sup> Sometimes reference may be obtained in the preamble or in the objectives and principles of the Constitution, or in the substantive part of the Constitution, or the Constitution may not totally made reference in any of its part.<sup>215</sup> Thus, in this section, the writer will discuss the legal status of socio-economic rights in the FDRE Constitution.

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<sup>211</sup> Ibid.

<sup>212</sup> See Frans Viljoen, (note 201 above), p. 79 as cited in Tsegaye Regassa, (note 204 above), p. 304.

<sup>213</sup> Tsegaye Regassa, (note 204 above), p. 304-305.

<sup>214</sup> Osita C. Eze, (note 11 above), p. 27.

<sup>215</sup> Id, pp. 27-34.

### **3.4.1. Modalities of Constitutionalization of Socio-Economic Rights**

There are, generally, three principal modes of alternatives for the constitutionalization of socio-economic rights. These are: exclusion of socio-economic rights from the Constitution, inclusion as directive principles of state policy, or explicit incorporation in the substantive part of the Constitution.<sup>216</sup>

#### **3.4.1.1. Exclusion of Socio-Economic Rights in the Constitution**

As the name of the title indicates, there is no socio-economic rights provision in the Constitution and the Constitution is mainly devoted for the civil and political rights. The reason for the marked absence of socio-economic rights provisions in the Constitution may be attributable to the obligation of the States to provide material means for their enjoyment, unlike that of the civil and political rights, which attempt to limit the encroachment of the State and its instruments on human rights.<sup>217</sup> Thus, underdeveloped States opt for their exclusion in the Constitution since they believe that it would be futile to encourage litigation based on infractions of socio-economic right.<sup>218</sup> This line of reasoning lacks persuasiveness and difficult to sustain. First, it fails to properly scrutinize the nature of both civil and political rights as well as that of socio-economic rights; because there are some civil and political rights that requires the State to provide material means for their enjoyment like the right to fair trial, and the right to vote and be elected, and there are also socio-economic rights that require the State to refrain from encroaching their enjoyment like the right to be free from arbitrary eviction. Second, there are developed States, like United States and Canada, which fails to constitutionalize socio-economic rights for reasons not attributable to resource.<sup>219</sup>

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<sup>216</sup> Yoram Robin and Yuval Shany, (note 7 above), pp. 682, 686; see also Eric C Christiansen, *South Africa's Use of Constitutional rights Adjudication to Remedy Persistent Economic Inequalities: an Essay*, p. 3 Electronic Copy available at <http://ssrn.com/abstract=1477523> last visited on 21 December 2009; Asha P James, (note 7 above); Yoram Robin and Yuval Shany, (note 171 above), pp. 302-303; Eric C Christiansen, (note 7 above), p. 375.

<sup>217</sup> Osita C. Eze, (note 11 above), p. 31.

<sup>218</sup> Ibid.

<sup>219</sup> For instance, according to Sunstein, there is chronological, cultural, institutional and realist explanations for the lack of socio-economic guarantee in the American Constitution. See Cass R. Sunstein, "Why Does

The exclusion of socio-economic rights from the Constitution creates some problems. First, it gives the legislature, and probably also administrative agencies, to cut-down social service and to impinge upon economic and social interests without having to face meaningful standards of judicial review.<sup>220</sup> Second, claims directed at the government to improve social conditions lack constitutional support. This seriously weakens the positions of individuals and NGOs committed to the promotion of economic and social causes. That is, petitions seeking to the respect, protection and fulfillment of, at least, basic needs could be failed by reason of inadequate constitutional grounds.<sup>221</sup> Third, it also influences social perceptions of entitlements and perpetuates the image of socio-economic rights as charity-type privileges, which the government can accord or deprive at its discretion since they have been excluded from the dominant constitutional discourse.<sup>222</sup> Therefore, this form of constitutionalization of socio-economic rights is not advisable for States that want to provide effective protection to these rights.

#### **3.4.1.2. Inclusion of Socio-Economic Rights as Directive Principles of State Policy**

Unlike the first model, this model allows for the incorporation of socio-economic rights in the Constitution though it is not in the substantive part. Most of the time, this form of constitutionalizing socio-economic rights is adopted by countries that want to oust the jurisdiction of the judiciary.<sup>223</sup> Normally provisions contained in the DPSP are considered as guidelines by which the organs of the State have performed their function, and are not legally enforceable before court of law. That is, DPSP cannot be enforced by court action or at an individual instigation. Thus, they do not provide a basis of legal action if programmes have not been undertaken in line with the DPSP.<sup>224</sup> However, this does not mean that they are not important because they provide a framework for understanding the intention of the legislature and can be used in the interpretation of legislations or the

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the American Constitution Lack Social and Economic Guarantees?" *Chicago Public Law and Legal Theory Working Paper*, No.36 (2003).

<sup>220</sup> Yoram Robin and Yuval Shany, (note 171 above), p. 329.

<sup>221</sup> *Id.*, p. 330.

<sup>222</sup> *Ibid.*

<sup>223</sup> For instance, Namibia, Uganda and India have incorporated socio-economic rights under the DPSP and oust the jurisdiction of the court by an explicit provision.

<sup>224</sup> Bertus De Villiers, (note 11 above), pp. 29 & 37; see also Osita C. Eze (note 11 above), pp. 27-30.

substantive parts of the Constitution.<sup>225</sup> That is why Aalian and McKeever consider them as minimum level of protection.<sup>226</sup>

Generally, DPSP have two characteristics: first, they are not enforceable before court of law and, therefore, should they have been ignored or infringed, the aggrieved have no legal remedy to compel positive State action. Second, the principles are fundamental to the governance of the country and oblige any government organ to act in accordance with them.<sup>227</sup>

#### **3.4.1.3. Inclusion of Socio-Economic Rights in the Substantive Part of the Constitution**

This kind of constitutionalizing socio-economic rights advocates for their explicit incorporation in the substantive part of the Constitution like that of the civil and political rights. The South African Constitution can be mentioned as an example for this model.<sup>228</sup> This enables to avoid the problems that may accrue from the exclusions of socio-economic rights from the Constitution and to maintain the jurisdiction of the court that may be ousted as a result of the inclusion of socio-economic rights in the DPSP. Therefore, the provisions contained in the substantive part of the Constitution are enforceable before court of law and can be used as a base for legal action. Thus, an individual who thinks that his/her right has been violated by the government can instigate court action against the latter on the bases of constitutional provisions.

#### **3.4.1.4. Modalities of Constitutionalizing Socio-Economic Rights in Ethiopia**

As the writer tried to discuss in section 3.2.1, the FDRE Constitution has incorporated certain provisions concerning socio-economic rights (from Article 40 to 43(1)) in its substantive part under the heading of “Fundamental Rights and Freedoms”, which also contains a bulk of civil and political rights. In addition, socio-economic rights are also found in the NPPO of the Constitution. This show that, the modes of constitutionalizing

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<sup>225</sup> Id, p. 37.

<sup>226</sup> Ni Aolain and Mc Keever, *Thinking Globally Acting Locally: Enforcing Socio-Economic Rights in Northern Ireland*, as cited by Asha P James, (note 7 above), p. 5.

<sup>227</sup> Bertus De Villiers, (note 11 above), p. 34.

<sup>228</sup> Asha P James, (note 7 above), p. 2.

socio-economic rights followed by the FDRE Constitution is of two kinds: inclusion in the substantive part of the Constitution, and inclusion as NPPO.

Although their incorporation in the substantive part of the Constitution have give them equal status with that of the civil and political rights, at least theoretically, the inclusion of them as NPPO create doubt as to their actual legal status. Accordingly, some scholars like Rakeb Messele<sup>229</sup>, considers them as mere aspirations that only directs the government in the implementation of the Constitution and are not enforceable before court of law. According to the view of the writer, the mere fact of the incorporation of socio-economic rights as NPPO does not affect their judicial enforceability. However, since the judicial enforceability of these rights is beyond the purview of this chapter, the writer defers it for chapter four.

### **3.4.2. The Formulation of Socio-Economic Rights in the Constitution**

The preciseness of the formulations of socio-economic rights is also important, in addition to their locus in the Constitution, in the determination of their status.<sup>230</sup> As we can see from the provisions of the FDRE Constitution, the socio-economic rights are formulated in general and in some cases vague terms. For instance, as Sisay Alemahu pointed out, the Constitution incorporates socio-economic rights under the crudely-formulated provisions of Article 41.<sup>231</sup> Without specifically listing and defining these rights, the article generally requires the creation of equal opportunities to freely chosen means of livelihood and the allocation of ever-increasing resources for health, education and other social services.<sup>232</sup> Article 43 (1) also contains a phrase “...the right to improved living standards” without any indicative lists as to what it consists of. The usage of such kind of terms would create difficulty in the determination of the normative contents of the rights and in the development of their jurisprudence of justiciability. In order to indicate the problems of using vague terms, Philip Alston says that:

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<sup>229</sup> Rakeb Messele, (note 12 above).

<sup>230</sup> Osita C. Eze, (note 11 above).

<sup>231</sup> Sisay Alemahu, *The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia*, p. 4, Electronic copy available at: <http://ssrn.com/abstract=1530825> last visited on 08 October 2010.

<sup>232</sup> Ibid.

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 the rights as formulated in the covenant and the resulting lack in the clarity as to their normative implications.<sup>233</sup>

Although the usage of vague and general terms has some drawbacks, their importance should not also be underestimated. It is argued, for example, that certain socio-economic rights can be read into the broad provisions of Article 41.<sup>234</sup> That is, it would permit for the inclusion of implied rights by way of interpretation especially to countries, like Ethiopia, that makes international agreements an integral part of the law of the land and allows the consideration of international human rights instruments in the interpretation of the substantive part of their Constitution. For instance, according to Dejene Girma, under Article 41 (3) and (4), the publicly funded social services to which all Ethiopian nationals have the right to equal access and which the government is obligated to provide can be interpreted to include housing services.<sup>235</sup> Under Article 41 (5), the term assistance can be interpreted to include housing provisions if the category of people mentioned are in need of them.<sup>236</sup> However, some argue that, the poor formulation of the article increases the ambivalence regarding the justiciability of this group of rights as it is difficult to clearly delineate the precise scope of the rights.<sup>237</sup>

Nevertheless, the usage of general terms under the FDRE Constitution in the formulation of socio-economic rights does not have the effect of reducing their constitutional status as compared to that of the civil and political rights for different reasons. First, their normative content can be determined by looking at ratified international instruments like ICESCR and the General Comments of the ratified treaty monitoring bodies concerning the relevant socio-economic rights. Second, there are also civil and political rights that are formulated in general terms like ‘with in a reasonable period of time’, ‘impartial

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<sup>233</sup> Philip Alston, (note 5 above), p. 86.

<sup>234</sup> S Yeshanew, “The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia,” *Journal of Ethiopian Law* (forthcoming) as cited in Sisay Alemahu, (note 231 above).

<sup>235</sup> Dejene Girma Janka, *The Realization of the Right to Housing in Ethiopia*, (22 October 2007, Unpublished LL.M Thesis, Pretoria University), p. 20.

<sup>236</sup> Ibid.

<sup>237</sup> Sisay Alemahu, (note 231 above).

judge’, ‘human dignity’ and so on. Third, the socio-economic rights are formulated in a way that does not contain claw-back clauses unlike that of the civil and political rights, which helps them to be self-executing.<sup>238</sup>

### **3.5. Level of Protection of Socio-Economic Rights in Ethiopia**

As we have seen in section 3.4.1.4, the FDRE Constitution has incorporated socio-economic rights both in its substantive part as well as in its NPPO. Unlike most regional<sup>239</sup> and international<sup>240</sup> human rights instruments that contain provisions specifically addressing socio-economic rights, and some domestic constitutions<sup>241</sup>, the FDRE Constitution has incorporated these rights in the form of an imposition of duties on the part of the State. This can be understood from the close reading of most of the provisions of the Constitutions on socio-economic rights, which contain the phrase “the State has the obligation, or the State shall pursue or the State shall undertake etc” instead of “every persons or every Ethiopian has...” or other similar phrases indicating the right.

According to the view of the writer, this form of incorporation would weaken the level of protection due to the fact that it would create a doubt as to the exact rights of an individual, and it is difficult to prove violations of his/her rights; because the person may be required to prove the failure of the State though there is violation of the right. That is, proofing the failure of the State is more difficult as compared to that of the violations of one’s right due to the existence of possibilities of violation without the existence of failure on the part of the State or without having sufficient evidence showing the failure of the State. However, one may argue that this form of incorporation is preferable since the rights that could accrue to the individuals are already incorporated in different human rights instruments that Ethiopia has ratified. Hence, it is better to indicate the specific obligation of the State rather than what the individuals already have due to the absence of those obligations in other human rights instruments.

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<sup>238</sup> By ‘self-executing’ does not mean that legislations are not necessary for the enforcement of the rights rather their absence does not hinder the enforcement of the rights.

<sup>239</sup> See for instance, ACHPR; ACRWC; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003.

<sup>240</sup> See for instance, ICESCR, CEDAW, and CRC.

<sup>241</sup> See for instance, South African Constitution, 1996.

Although the latter argument could not be disregarded as a result of its indication of the relevance of other human rights instruments in the implementation of constitutional provisions concerning socio-economic rights, it fails to see the gaps existed in those instruments and the purposes of having constitutional guaranteed rights. Thus, the failure to incorporate the socio-economic rights in the form of rights rather than State obligations should not be attributed to the existence of other applicable instruments.

Another factor that would weaken the level of protection is the lack of precision of the formulations of the rights incorporated in the Constitution. As we can see from the provisions of the Constitution, there are some rights that are formulated in general and in some cases vague terms. For instance, Article 41 (4) of the FDRE Constitution contains a phrase “... and other social services.” The usage of such kind of terms would create difficulty in the determination of the normative contents of the rights specially when there is no any indicative list as to what it consists of.<sup>242</sup> However, though the usage of vague and general terms has some drawbacks, their importance should not also be underestimated. It would permit for the inclusion of implied rights by way of interpretation<sup>243</sup>, which would extend the level of protection provided under the Constitution. Hence, the usage of general terms under the Constitution does not necessary weaken its level of protection though it may create doubt as to its exact normative content of the right.

The absence of claw-back clauses in the Constitution regarding socio-economic rights is also important in strengthening the level of protection accorded to these rights since the government cannot cut-down them by enacting legislations as it pleases.

Moreover, the existence of provisions that acknowledge the applicability of other relevant human rights instruments have also some help in extending the protections of socio-economic rights under the Constitution.

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<sup>242</sup> However, the existence of some indicative lists like “...the public health, education and other social services,” under Article 41 (4) of the FDRE Constitution may have some help in determining the normative contents of the right to get social services.

<sup>243</sup> For instance, the usage of phrases like ‘... and other social services’ under 41 (4) of the FDRE Constitution allows for the inclusion of other implied rights that falls under the realm of this phrase. On this point see Sisay Alemahu, (note 231 above).

Therefore, the discussions so far made indicates the existence of strong level of protection accorded to socio-economic rights if it has been put into practice effectively with the exception of some draw backs attributable to the form of incorporation of the rights.

### **3.6. Nature of State Obligations Regarding Socio-Economic Rights in Ethiopia**

As discussed in chapter two, human rights provides for three typologies of obligations consisting of the obligation to respect, protect and fulfill.<sup>244</sup> Nonetheless, sometimes the duty to promote is cracked from the duty to fulfill and treated as forming separate type of obligations. For instance, these obligations have been demonstrated in different cases entertained by the human rights treaty monitoring bodies both at the international and regional level. The African Commission, for example, in the SERAC case points out that:

...internationally accepted ideas of the various obligations engendered by human rights indicate that all rights both civil and political rights, and socio-economic rights generate at least four levels of duties for a State that undertakes to adhere to a right regime, namely the duty to respect, protect, promote and fulfill these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.<sup>245</sup>

On the same talking, these typologies of obligations have got a place in some domestic legal systems through an explicit incorporation of them in the Constitution. The 1996 South African Constitution can be a good illustration to this due to the inclusion of an article that explicitly acknowledges the four typologies of State obligations of human rights.<sup>246</sup>

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<sup>244</sup> See Victor Dankwa *et al.*, (note 121 above), p. 713.

<sup>245</sup> See *SERAC and Others v Nigeria* (African Commission, 2001), para. 44, in African Human Rights Law Reports, 2001, p. 60 as compiled in Christof Heyns and Magnus Killander (eds.), *Compendium of Key Human Rights Documents of the African Union* (3<sup>rd</sup> ed, 2007) , p. 255.

<sup>246</sup> See South African Constitution, (note 234 above), Section 7 (2), this section establishes that ‘the state must respect, protect, promote and fulfil the rights enunciated in the Bills of Rights. On this point see Mitra Ebadolahi, “Using Structural Interdicts and the South African Human Rights Commission to Achieve

However, unlike the international and regional human rights instruments and the jurisprudence of their monitoring bodies as well as the South African Constitution, the FDRE Constitution under its Article 13 (1), which is the starting provision of the ‘Fundamental Rights and Freedoms’ included in the Constitution, imposes two typologies of duties on the part of the State organs both at the federal and regional level.<sup>247</sup> These obligations are ‘the duty to respect and the duty to enforce’. This does not, however, mean that these are the only obligations imposed on the State regarding the ‘Fundamental Rights and Freedoms’ in general and socio-economic rights in particular under the FDRE Constitution.

Firstly, there are other typologies of obligations that have been scattered in the rights found either in the substantive part or the NPPO. For instance, the obligation to provide is found in Article 41 (4) and Article 90 (1)<sup>248</sup> of the Constitution, and the obligation to protect and promote are addressed in Article 41 (9) and Article 89 (8)<sup>249</sup> of the Constitution. But, one may argue that since these articles has no general application other than the specific rights addressed by them, the application of the obligation to protect, promote and provide is limited to the rights specified in that specific provision. This argument, however, is not credible due to the application of the obligations in the realization of every rights incorporated in the Constitution. Under the Constitution, for example, the right to health encompasses the obligation to respect via the application of Article 13 (1), which is applicable to all rights found in chapter three of the Constitution as a result of its general applicability, an obligation to promote and respect via the application of Article 89 (8), and an obligation to provide via the application of Article 41 (4). Thus, the four typologies of obligations are imposed on the State with regard to the realization of the right to health in the FDRE Constitution.

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Judicial Enforcement of Economic and Social Rights in South Africa,” *New York University Law Review*, Vol. 83 (2008), pp. 1575-1576.

<sup>247</sup> Article 13 (1) states that:

All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter.

FDRE Constitution, (note 9 above), Article 13(1).

<sup>248</sup> This article reads that, ‘to the extent 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’. See *Id*, Article 90 (1).

<sup>249</sup> This article provides that, ‘government shall endeavor to protect and promote the health, welfare and living standards of the working population of the country.’ See *Id*, Article 89 (8).

Secondly, as indicated in chapter two, the obligation to respect, protect, promote and fulfill are one of the four categories of obligations assumed by State parties' under the provision of Article 2 (1) of the ICESCR. And as Ethiopia is a party to this covenant starting from June 11, 1993, it has these obligations in the implementation of the rights enshrined in the covenant.

Thirdly, both the entitlements and obligations found in the ICESCR are part and parcel of the substantive provisions of the Constitution as per the reading of the provision of Article 9 (4) of the FDRE Constitution. Hence, the obligations imposed on the State in the FDRE Constitution are not thus limited to the provisions of the Constitution but also to the provisions of international agreements ratified by Ethiopia including the ICESCR.

Last but not least, as the African Human Rights Commission pointed out in the SERAC case, the duty to respect, protect, promote and fulfill apply universally to all rights.<sup>250</sup>

Therefore, the discussions so far made indicates that, the obligations imposed on the State regarding socio-economic rights under the FDRE Constitution are not only the duty to respect and enforce but also the duty to protect, promote and fulfill. While these obligations undoubtedly overlap, each of them also imposes a distinctive duty on the State.

Obligation to respect requires refraining from interfering with the enjoyment of the rights. It focuses on preventing the State from unduly intervening in the enjoyment of a particular freedom or entitlement.<sup>251</sup> Thus, it entails an immediate obligation on the State to refrain from interventions in individual's access to, or enjoyment of, socio-economic rights. This duty is violated where the State deprives, for instance, individuals of the access they enjoy to these rights through legislation or conduct.<sup>252</sup> For example, Article 41 (6) places an obligation to pursue policies which aim to expand job opportunities for the unemployed and the poor and shall accordingly undertake programmes and public works projects. The a contrario reading of this provision is that, the government has the

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<sup>250</sup> See SERAC and Others v Nigeria, (note 245 above).

<sup>251</sup> ICJ, (note 13 above), P. 42.

<sup>252</sup> Rakeb Messele, (note 12 above), p. 30.

duty to abstain from arbitrary intervention via the adoption of policies or programs that closes job opportunity for the poor and the unemployed or by arbitrary firing those who are already employed.

The duty to protect requires the State to prevent third parties from unduly interfering in the right-holder's enjoyment of a particular freedom or entitlement.<sup>253</sup> Accordingly, this duty compels the State to prevent third parties from infringing the socio-economic rights of others enshrined in the Constitution. A good example for this can be found under Article 41 (3), which places a duty on the State to prevent third parties from interfering in the enjoyment of once right to equal access to publicly funded social services.

The duty to promote deals with raising awareness as to the right and procedures for asserting and protecting the right, creating and publicizing opportunities for participation, and capacity building to enable meaningful participation.<sup>254</sup> Thus, this requires the State to make the right-holders aware of what socio-economic rights do they have, what obligations do they assume in the exercise of their socio-economic rights and what should be done in case a violation of their socio-economic rights is occurred or likely to occur.

The duty to fulfill requires the State to take positive measures to assist individuals or group of individuals to obtain access to socio-economic rights. This duty includes, as in the instance of Article 41 (5), the allocation of resources for the realization of the socio-economic rights and the direct provision of basic needs when no other alternatives are available to the individuals.<sup>255</sup>

### **3.6.1. Obligation to Enforce**

Another new obligation, in terms of name, framed in the Constitution is the obligation to enforce. According to Article 13 (1) of the FDRE Constitution the State is not only required to respect the rights incorporated in Chapter III of the Constitution but also to enforce them. That is, this is an obligation that claims for the giving into effect of the human rights provisions of the Constitution by the three mainstream institutions. This in

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<sup>253</sup> ICJ, (note 13 above), p. 45.

<sup>254</sup> Clarence J. Dias, (note 112 above) as cited in Idowu Mopelola Ajibade, (note 69 above).

<sup>255</sup> Rakeb Messele, (note 12 above), p. 31.

turn requires for the compliances of the obligation to protect, promote and fulfill since it is difficult to achieve the full enforcement of human rights in general and socio-economic rights in particular, if there is failure on one of the latter obligations. Thus, the writer argues that, the obligation to enforce found in the aforementioned article is a generic name for the obligation to protect, promote and fulfill.

### **3.6.2. Progressive Realization and Retrogressive Measures**

A bumpy look at of the obligations imposed on the State under the Constitution indicates that, it does not qualify the application of socio-economic rights with a view to achieving the full realization of these rights progressively. However, the close comprehension of its provisions illustrates to the contrary. For instance, the wording of Article 41 (4 & 5) of the FDRE Constitution acknowledge the nature of socio-economic rights as progressively realizable since they impose an obligation on the State to allocate its ever increasing resource for their realization. In addition, as a party to the ICESCR, Ethiopia has assumed the obligations imposed on State parties' under this covenant including the 'progressive realization' of the rights.

However, this obligation requires the government to do much more than merely abstain from taking measures. Besides, this does not also relieve the State from fulfilling its minimum core obligations required under the ICESCR<sup>256</sup>, because, as the CESCR pointed out, socio-economic rights will lose their *raison d'être* unless a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon each State Party.<sup>257</sup> Moreover, it imposes an obligation to move as expeditiously and effectively as possible towards that goal. Furthermore, it excludes any deliberate retrogressive measures as pointed out by CESCR. When there is any deliberate retrogressive measure, it would require the most careful consideration and

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<sup>256</sup> CESCR, General Comment No. 3, (note 76 above), para. 10; see also Yoram Robin and Yuval Shany, (note 171 above).

<sup>257</sup> Ibid.

would need to be fully justified by reference to the totality of the rights and in the context of the full use of the maximum available resources.<sup>258</sup>

### **3.7. Limitations in the Exercise of Socio-Economic Rights in Ethiopia**

Despite the claim to universality and inalienability of human rights, there is no absolute right that could be exercised without any limitation since it is necessary for an optimal utilization or enjoyment of rights.<sup>259</sup> Limitations are deviations from the standard manner of dealing with rights imposed primarily to facilitate optimal use or exercise of rights in a context of scarce public resources, space, and time.<sup>260</sup> Thus, they are lawful or acceptable violations of rights.

Limitations can take various forms consisting of restriction, suspension, or derogation. Each of these forms affects the exercise of rights in different ways and to a varying degree. While the first one is pertinent either in time of emergency or normal times, the latter two come into play in extraordinary circumstances. As a consequence, restrictions circumscribe the manner, or place, and the extent to which rights can be enjoyed or exercised in a particular set of circumstances, often in normal times; suspension leads to the temporary non-application of one or more rights because of an unusual difficulty in which a State finds itself; and derogation refers to the possibility of acting in a manner deviating from the accepted standards of behavior vis-à-vis rights, that is, it entails acting like there are no human rights at all.<sup>261</sup>

However, limitations imposed on the exercise of rights are not without limits due to the fact that limits cannot be imposed arbitrarily.<sup>262</sup> Thus, as the African Commission pointed out, ‘where it is necessary to restrict rights, the restriction should be as minimal as

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<sup>258</sup> CESCR, General Comment No. 3, (note 76 above), para. 9.

<sup>259</sup> Gordon Hollamby, “*The Limitation Clause*,” in Nel, F. and Bezuidenhout (eds), *Policing and Human Rights* (2<sup>nd</sup> ed, 2002), pp. 103-118 as cited in Tsegaye Regassa, (note 204 above), p. 313.

<sup>260</sup> Tsegaye Regassa, (note 204 above), p. 313.

<sup>261</sup> *Id.*, 314.

<sup>262</sup> *Ibid.* See also, \_\_\_\_\_, “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,” *Human Rights Quarterly*, Vol. 7, No. 1 (1985), p. 4.

possible and not undermine the fundamental rights...since it is an exception'.<sup>263</sup> Accordingly, it is often accentuated that limitations should meet the requirements of the principles of legality, necessity, rationality, proportionality, and sanctity of life, dignity, and equality.<sup>264</sup> As far as the proportionality and necessity requirements are concerned the African Commission states that:

the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.<sup>265</sup>

In Ethiopia, there is no separate provision in the Constitution dealing with limitations that can be imposed on the exercise of human rights including socio-economic rights and the manner in which limitations can be imposed. The absence of such a 'general limitation clause' might, at first blush, give the impression that human rights are not subject to limitation in Ethiopia. However, it is important to note that the absence might also lead to the arbitrary imposition of limitations giving the right holder no recourse to ensure that the limitation is a justified and reasonable one.<sup>266</sup>

Nevertheless, there are specific limitations built into the provisions recognizing the rights, which can be said as restrictions. For instance, Article 40 (1) provides that '...unless prescribed otherwise by law on account of public interest, the right to property shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise'. Thus, the right to property may be limited by legislations that are enacted to protect the public interest. Nonetheless, while the existence of this provision clarify matters as to

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<sup>263</sup> *Amnesty International and Others v Sudan* (African Commission, 1999), para. 80, in African Human Rights Law Reports, 2000, p. 227 as compiled in Christof Heyns and Magnus Killander, (note 245 above), p. 176.

<sup>264</sup> Tsegaye Regassa, (note 204 above), p. 314.

<sup>265</sup> See *Constitutional Rights Project and Others v Nigeria* (African Commission, 1999), para. 42, in African Human Rights Law Reports, 2000, p. 227 as compiled in Christof Heyns and Magnus Killander, (note 245 above), p. 189; See also *Interights and Others v Mauritania* (African Commission, 2004), paras. 78-79, in African Human Rights Law Reports, 2004, p. 87 as compiled in Christof Heyns and Magnus Killander, (note 245 above), p. 205; *Media Rights Agenda and Others v Nigeria* (African Commission, 1998), paras. 69-70, in African Human Rights Law Reports, 2000, p. 200 as compiled in Christof Heyns and Magnus Killander, (note 245 above), p. 235.

<sup>266</sup> Tsegaye Regassa, (note 204 above), p. 315.

how, what kind of limitation can be imposed upon the exercise of this right, there was no way of weighing the legitimacy (or not) of any limitative law, measure, decision, or actions. However, this did not also permit the wholesale violation of human rights via the enactment of laws as it is illegitimate, erodes public confidence in the rule of law and against the international obligation of the State. This has been confirmed in various cases decided by the African Commission.<sup>267</sup>

In addition, Article 93, which regulates the manner of declaration of emergency, indicates the other two forms of limitations (i.e., derogations and suspensions). So, it is the basic guideline as to how limitations are imposed on rights.<sup>268</sup> It also stipulates the principles of necessity and proportionality as essential in times of suspension and derogation of rights.<sup>269</sup> It further stipulates the rights that are not subject to any limitation, be it suspension or derogation, which consists of the right to protection against cruel, inhuman or degrading treatment or punishment (Article 18), right to equality (Article 25), and right to self-determination (Article 39 /1 &2/).<sup>270</sup> This indicates the absence of socio-economic rights from the list of these rights and hence can be limited in extra-ordinary situations through declaration adopted by the Council of Ministers of the Federal Government as per Article 93 of the FDRE Constitution. Therefore, there is no exception with regard to the limitation of socio-economic rights in situation of state of emergency.

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<sup>267</sup> See for instance the 1998 decision of the African Commission on the case of *Constitutional Rights Project and Others v Nigeria*, in this case the commission pointed out that:

Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.

*Constitutional Rights Project and Others v Nigeria* (African Commission, 1998), para. 58, in *African Human Rights Law Reports*, 2000, p. 191 as compiled in Christof Heyns and Magnus Killander, (note 245 above), p. 185. On this point see also *Amnesty International and Others v Sudan*, 1999 (note 265 above); *Media Rights Agenda and Others v Nigeria*, 1998, (note 265 above), para. 65.

<sup>268</sup> Ibid.

<sup>269</sup> FDRE Constitution, (note 9 above), Article 93 (4/b/).

<sup>270</sup> Id, Article 93 (4/c/), this provision also indicates the prohibition of suspension or derogation regarding the name of the country, though it is not a right (Article 1).

### 3.8. Conclusion

In Ethiopia, socio-economic rights have got protection in the FDRE constitution, which is the supreme law of the land as per its Article 9 (1). The Constitution has done it by incorporating them both in the substantive part dealing with ‘Fundamental Rights and Freedoms’ as well as in the ‘NPPO’. Although the provisions dedicated for socio-economic rights are small in number as compared to that of the civil and political rights counterparts, their incorporation in the Constitution shows the protection provided for these rights. Besides, the incorporation of provisions that deal with the making of international agreements an integral part of the law of the land (Article 9 /4/) and that allows the consideration of international human rights instruments in the interpretations of the rights (Article 13 /2/) extends their protection. Moreover, there are legislations other than the constitution that deals with socio-economic rights. Thus, the normative framework for socio-economic rights in Ethiopia drives from the text of the Constitution, international human rights instruments ratified by Ethiopia and from ordinary legislations.

As far as the institutional framework is concerned, Article 13 (1) of the FDRE Constitution makes the legislature, the executive and the judiciary as the main duty bearer for the realization of the rights incorporated in Chapter III of the Constitution including the provisions of socio-economic rights. The EHRC and the Institute of the Ombudsman have also decisive role in the implementation of human rights in general and socio-economic rights in particular. The roles of NGOs in nurturing the human rights culture through their promotional function are not also overlooked.

The mode of constitutionalizing socio-economic rights followed by the FDRE Constitution is of two kinds: inclusion in the substantive part of the Constitution, and inclusion as NPPO. Though their inclusion in the substantive part does not affect their status save the problems related to their formulation, their incorporation in the NPPO considered by some scholars as depriving their constitutional status, which is not actually the case; because of the absence of a provision ousting the jurisdiction of the court, the clear imposition of an obligation on the court to consider them while enforcing the

substantive part and the existence of political objectives in addition to the socio-economic objectives. The usage of general terms could not also defeat their legal status since it allows for deriving implied rights and their normative content can be determined by referring ratified international human rights treaties and the general comments of the relevant treaty monitoring body.

Although the protection provided to these rights in Ethiopia has some weaknesses due to the modes of incorporation of the rights and the precision of their formulation, the level of protection, generally, can be considered as strong; because of the usage of general terms, which would provide a wide margin for deriving implied rights; the absence of claw-back clauses which would hinder the government from violating the rights at its discretion; the existence of provisions acknowledging the application of other human rights instruments. The recognition of these rights in the law that is considered as the supreme law of the land has also big contribution in strengthening the level of protection.

Regarding the nature of State obligations, the Constitution imposes two typologies of obligations consisting of the duty to respect and enforce. This does not however mean that the obligation to protect, promote and fulfill are not recognized in Ethiopia as they are already assumed under the ICESCR and scattered in different provisions dealing with specific rights. Besides, the writer argues that the duty to enforce requires the State to comply with these three typologies of obligations, thus considering it as a generic name for the duty to protect, promote and fulfill. The progressive realization of these rights is also acknowledged in the Constitution.

Apropos the limitations in the exercise of socio-economic rights, there is no separate provision in the Constitution dealing with limitations and the manner in which limitations can be imposed. However, there are specific limitations built into the provisions recognizing the rights. Article 93 of the FDRE Constitution has also some help since it talks about derogation and suspension of rights in emergency situation, which are the two forms of limitation in addition to restrictions.

## CHAPTER FOUR

### JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

#### 4.1. Introduction

Human rights are most securely protected where they are entrenched as fundamental norms of a supreme constitution through a comprehensive bill of rights with strict amendment requirements and where they are enforceable by courts of law.<sup>271</sup> That is, there are three requirements for a certain right to be considered as provided effective protection in a country. These are: the rights should be entrenched as fundamental norms of a supreme constitution, there should be a strict amendment requirement and they should be capable of being enforced before court of law. As discussed in chapter three, the FDRE Constitution has embodied a wide array of socio-economic rights through the incorporation of them in its provisions and by integrating international agreements ratified by Ethiopia as the law of the land as well as through legislations that are consistent with it. Article 9 (1) of the Constitution provides that, ‘the Constitution is the supreme law of the land and any law, customary practice or decision of an organ of State or a public official which contravenes it shall be of no effect’. Thus, since the socio-economic rights are entrenched in the supreme law of the land pursuant to the provision of Article 9 (1) and they are ‘fundamental rights and freedoms’ as per the title of chapter three of the FDRE Constitution, the first condition is met. As far as the second condition is concerned, Article 105 of the Constitution ends with an extremely stringent requirement for the amendment of its chapter on fundamental rights and freedoms. Thus, what remains to be proved is the last condition, which is the capability of the rights to be enforced by courts. This chapter, therefore, discusses justiciability of socio-economic rights in Ethiopia to prove whether the last requirement is met or not under the Ethiopian legal system.

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<sup>271</sup> Sisay Alemahu, (note 231 above), p. 3.

To accurately address the issue at hand, the chapter is therefore divided into eight major topics including the introduction and conclusion. Accordingly, while the first topic introduce the chapter, the second and third topics discusses the kinds and elements of justiciability of socio-economic rights, respectively. The fourth topic tries to analyse the justiciability of these rights in Ethiopia. The benefits of having justiciable constitutional guarantee of socio-economic rights are scrutinized in the fifth topic. The justiciability jurisprudence of socio-economic rights in Ethiopia is reviewed in the sixth topic. The seventh topic is devoted to examine the role of indirect justiciability in enhancing direct justiciability of socio-economic rights in Ethiopia. Some concluding notes wrap-up the chapter.

## **4.2. Kinds of Justiciability of Socio-Economic Rights**

As outlined in the first and second chapter, justiciability is the extent to which an alleged violation of subjective socio-economic right invoked in a particular case is suitable for judicial or quasi-judicial review at the domestic level. This may vary according to, for example, the characteristics of the case, the wording of the provision that is invoked, the attitude of the judge, the locus of the provision in the Constitution, and the characteristics of the domestic system in particular.<sup>272</sup> Accordingly, socio-economic rights have got an indirect protection in some countries, direct protection in others and an indirect and direct protection in some countries.<sup>273</sup> The next section thus grapples with these issues in that particular order.

### **4.2.1. Indirect Justiciability of Socio-Economic Rights**

As its name indicates, it is the protection of socio-economic rights through the application of civil and political rights and most importantly ‘cross-cutting rights’<sup>274</sup>, like the right to

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<sup>272</sup> Frans Viljoen, “National Legislations as a Source of Justiciable Socio-Economic Rights,” *ESR Review*, Vol. 6, No.3 (2006), p. 6. See also Diane A. Desierto, (note 14 above), p. 4.

<sup>273</sup> According to Sandra Liebenberg, there is either a direct or an indirect way to protect socio-economic rights as justiciable rights within the domestic legal system. On this point see Sandra Liebenberg, *The Protection of Economic, Social and Cultural Rights in Domestic Legal Systems* (2001), pp. 57–78.

<sup>274</sup> ‘Cross-cutting rights’ mean those rights that straddle, underlie or facilitate the exercise of both civil and political rights and socio-economic rights. See Chidi Anselm 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. 337.

equality, due process of law and judicial protection.<sup>275</sup> This kind of justiciability is applied in a country that fails to incorporate socio-economic rights in its Constitution at all or in the substantive part of its Constitution but want to provide minimal protection and in a country that incorporate them as non-justiciable rights and mere guidelines for the proper functioning of the government.<sup>276</sup> However, indirect justiciability can also be applied even in a country that has included socio-economic rights in the substantive part of its Constitution but lack the necessary jurisprudence concerning their enforcement before court of law since it is important to clarify the normative contents of the recognized socio-economic rights and in effect developing their jurisprudence of direct justiciability.

In some domestic legal systems, as indicated above, socio-economic rights are considered as mere aspirations that only direct the government in the designation of programmes, in the making of policies as well as laws, and in the drawing of budgets. Consequently, they incorporate them in the DPSP of their Constitution.<sup>277</sup> Besides, they incorporate a provision that oust the jurisdiction of the court from adjudicating cases on the basis of the provisions found in the DPSP of the Constitution<sup>278</sup> which in effect place socio-economic rights beyond the reach of the court by the mere fact of their inclusion in the DPSP.

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<sup>275</sup> 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. 22.

<sup>276</sup> Asha P James, (note 7 above).

<sup>277</sup> See for instance the constitutionalization of socio-economic rights under the 1950 Constitution of India (incorporates socio-economic rights under the 'Directive Principles of State Policy'), the 1990 Namibian Constitution (socio-economic rights are stipulated as policy objectives in chapter XI of the Constitution entitled 'Principles of State Policy' particularly under Article 95 of the Constitution), the 1995 Constitution of the Republic of Uganda (with the exception of the right to property /Article 26/, the right to education /Article 30/ and labour rights /Article 40/, most of the socio-economic rights are laid down in the preamble of the Constitution under a section entitled 'National Objectives and Directive Principles of State Policy'), and the 1999 Nigerian Constitution (socio-economic rights are listed in chapter II of the Constitution as 'Fundamental Objectives and Directive Principles of State Policy'). On this point see John Cantius Mubangizi, (note 79 above); Idowu Mopelola Ajibade, (note 69 above); Bertus De Villiers, (note 11 above).

<sup>278</sup> See for instance Article 37 of the Indian Constitution, which stipulates as 'the provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'. Indian Constitution, (1950), Article 37, Available at [http://www.servat.unibe.ch/icl/in00000\\_.html](http://www.servat.unibe.ch/icl/in00000_.html) last visited on 25 October 2010; Similarly, Article 101 of the Namibian Constitution states that, 'the principles of state policy contained in this Chapter shall not of and

However, even if the socio-economic rights are included in the DPSP and there is an ouster clause that excludes the court from entertaining cases of socio-economic rights, the judiciary in some domestic legal systems followed an innovative approach for securing the realization of these rights. For instance, the Indian Supreme Court in different cases presented before it has provide indirect protection to the socio-economic rights found in the DPSP of their Constitution via the adjudication of civil and political rights, and most of the time through the broad interpretation of the right to life. This can be substantiated for example from the case of *Olga Tellis & Others v Bombay Municipal Corporation and Others*.<sup>279</sup>

This case concerned petition brought on behalf of pavement and slum dwellers, typically a landless laborer from a rural area who had moved to Bombay to find work even at extremely low wages. The Chief Minister of Maharashtra announced that all pavement dwellers would be evicted and deported to their places of origin and directed the Bombay Municipal Corporation to demolish the dwellings and evict their inhabitants. The petitioners claimed that the decision to demolish violated, among other provisions of Article 21 of the Constitution.<sup>280</sup> They did not argue that they had a right to live on the pavements, but that they had a right to live, and that that right could not be exercised without the means of a livelihood. They therefore sought an order that they could not be

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by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them'. Namibian Constitution, (1995), Article 101 Available at <http://www.orusovo.com/namcon/NamCon.pdf> last visited on 25 October 2010; On the same fashion, Section 6(6/c/) of the Nigerian Constitution provides that, 'the judicial powers vested in accordance with the foregoing provisions of this section -shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'. Nigerian Constitution, (1999), Section 6 (/6c/), Available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> last visited on 25 October 2010. All these provisions indicate the incorporation of an explicit provision that oust the jurisdiction of the court apropos the DPSP.

<sup>279</sup> *Olga Tellis and Others v Bombay Municipal Corporation and Others*, Decision on Merit of the Case (AIR 1986/18, Supreme Court of India, July 10, 1985), Available at [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401006&forum=Supreme%20Court%20of%20India](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401006&forum=Supreme%20Court%20of%20India) last visited on 25 October 2010.

<sup>280</sup> Article 21 provides that:

No person shall be deprived of his life or personal liberty except according to procedure established by law.  
Indian Constitution, (note 278 above), Article 21.

evicted from their shelters without being offered alternative accommodation. The Government argued that it provided housing assistance to the weaker elements of society, but that any allocation of housing had to be made after balancing the conflicting demands of various priority sectors.

The Court upheld the petitioners' argument that the right to life in Article 21 of the Constitution included the right to livelihood. According to the court, although the State was not compellable to provide adequate means of livelihood or work to citizens, any person who was deprived of his right to livelihood except according to just and fair procedure established by law could challenge that deprivation as offending the right to life conferred by Article 21.<sup>281</sup>

In the case of *Paschim banga Khet Samity v. State of West Bengal*<sup>282</sup>, the petitioner sustained serious injuries after falling off a train. He was refused treatment at six successive State hospitals because the hospitals either had inadequate medical facilities or did not have a vacant bed. The Court declared that the right to life enshrined in the Indian Constitution (Article 21) imposes an obligation on the State to safeguard the right to life of every person and that preservation of human life is of paramount importance. This obligation on the State stands irrespective of constraints in financial resources. The Court stated that denial of timely medical treatment necessary to preserve human life in government-owned hospitals is a violation of this right. The Court asked the Government of West Bengal to pay the petitioner compensation for the loss suffered. It also directed the Government to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency.

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<sup>281</sup> *Olga Tellis and Others v Bombay Municipal Corporation and Others*, (note 179 above), para. 37.

<sup>282</sup> *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, Judgement on the Merit of the Case (Case No. 169, Supreme Court of India, 6 May 1996) available at [http://www.escrip.net.org/caselaw/caselaw\\_show.htm?doc\\_id=401236&forum=Supreme%20Court%20of%20India](http://www.escrip.net.org/caselaw/caselaw_show.htm?doc_id=401236&forum=Supreme%20Court%20of%20India) last visited on 25 October 2010.

In the case of *Mohini Jain v. State of Karnataka*<sup>283</sup>, petition was brought to challenge the constitutionality of imposing a "capitation fee" (a fee based on the number of persons to whom a service is provided, rather than the actual cost of providing a service) on those people who wanted to enter a private medical school and were not admitted to the "government seats". In this case the main issues at stake were whether there is a "right to education" guaranteed to the people of India under the Constitution and whether the charging of capitation fee violates this right and/or the equality clause in Article 14 of the Constitution. The Supreme Court held that although the right to education as such has not been guaranteed as a fundamental right under the Constitution, it becomes clear from the Preamble of the Constitution and its Directive Principles, contained in section IV, that the framers of the Constitution intended the State to provide education for its citizens. The court then relates the Directive Principle with Article 14, which requires that the State attempt to implement the right to education within its economic capacity. The court then reasons that this principle creates a constitutional right to education because education is essential to the fulfillment of the fundamental rights of dignity and life. The court links the right to education to the right to life by reasoning that to sustain life a human being requires the fulfillment of all the enabling rights which create life of dignity. In doing this, the court pointed to numerous cases which held that the right to life encompassed more than life and limb, but also dignity and the necessities of life, such as nutrition, clothing, shelter, and literacy. Without dignity, the court explains, the right to life is not fulfilled. It was the court's opinion that one is only able to obtain a dignified life in India through education, making education fundamental to the right to life, and therefore an obligation of the State to fulfil.

The court also held that accessibility to education should be realized for all people, rich or poor. If the government decides to discharge its obligation through private educational

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<sup>283</sup> *Mohini Jain v. State of Karnataka*, Decision on the merit of the Case (1992 AIR 1858, Supreme Court of India, July 30, 1992) (this case is concerned with the right to education), available at [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=888109&forum=Supreme%20Court%20of%20India](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=888109&forum=Supreme%20Court%20of%20India) last visited on 25 October 2010. For further analysis of the approaches of the Indian Supreme Court in the adjudication of socio-economic rights see also the Supreme Court's decisions in *State of Karnataka v Appa Balu Ingale*, (1993) on the right to water, *Samatha v State of Andhra Pradesh*, (1997) on the right to livelihood and *People's Union for Civil Liberties v Union of India and Others*, (2001) on the right to food.

institutions, it has created an agency-relationship, through which it can fulfil its obligations under the Constitution. This private institution is bound by the same requirements and cannot charge higher tuition fees than those established for "government seats". The court found that a "capitation fee" makes education unaffordable and therefore not accessible to the poor. It also held that such a fee is arbitrary and violative of Article 14 (Equality Clause) because it bases admission on income, rather than merit.

Thus, though socio-economic rights are beyond the reach of the court as per Article 37 of the Indian Constitution, the Supreme Court has provided indirect protection to these rights whenever the rights are invoked before it through an expansive interpretation of the right to life.

An indirect justiciability of socio-economic rights is not only employed in domestic legal systems but also in the jurisprudence of international and regional human rights system via the application of cross-cutting rights. This can be evidenced from the various decision of the treaty monitoring bodies on cases presented before them. For instance, in *Gaygusuz v Austria*<sup>284</sup>, the European Court of Human Rights (ECHR) applied the prohibition of discrimination under Article 14 of the European Convention on Human Rights and Article 1 of Protocol No.1 to enforce the right to property and emergency (social) assistance. Mr Gaygusuz was born in Turkey but lived and worked in Austria for eleven years, during which time he made all the necessary contributions to the

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<sup>284</sup> *Gaygusuz v. Austria*, (Application No. 17371/90, ECHR, 16 September 1996), Publication 1996-IV, No. 14, Summery of Judgment Available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/d0cd2c2c444d8d94c12567c2002de990/10e4183d40f47562c1256640004c304a?OpenDocument> last visited on 25 October 2010; see also *International Association Autism Europe v. France*, (Complaint No. 13/2002, ECHR), Summery of Judgment Available at [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=399130&forum=European%20Committee%20on%20Social%20Rights](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=399130&forum=European%20Committee%20on%20Social%20Rights) last visited on 25 October 2010; *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, (Application No. 9214/80, 9473/81, 9474/81, ECHR, 28 May 1985), Publication A 094, Summery of Judgment Available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/d0cd2c2c444d8d94c12567c2002de990/07aaa6fdcb4a44dc1256640004c23d5?OpenDocument> last visited on 25 October 2010; *Schuler-Zraggen v. Switzerland*, (Application No. 14518/89, ECHR, 24 June 1993), Publication A 263, Summery of Judgment Available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/d0cd2c2c444d8d94c12567c2002de990/4cff0192d31501b0c1256640004c2125?OpenDocument> last visited on 25 October 2010 (in all of these cases the commission applied non-discrimination clause to protect socio-economic rights). For further analysis of these cases see also Takele Soboka, (note 275 above), pp. 24-25.

unemployment insurance fund. Upon falling ill, he applied for government emergency advance on his pension, a request which the government rejected because of his nationality. The ECHR adjudged this rejection as discrimination based on the ground of nationality, and found Austria to have violated Mr Gaygusuz's pension and property rights.

Similarly the Inter-American Commission in the case of *Maria Eugenia Morales De Sierra v. Guatemala*<sup>285</sup> found that the Guatemalan Civil Code that allowed husbands to determine whether married women can work was discriminatory and violated the right to equality in relation to women's right to work.

This has been also followed by the Human Rights Committee in the case of *Zwaan-de Vries v. the Netherlands*.<sup>286</sup> In this case, a Dutch legislation which granted unemployment benefits to unmarried women and all men denied the same benefits to married women on the theory that, given their marital responsibilities, married women cannot be 'breadwinners' for a family, which was contested by the petitioner. The Human Rights Committee applied the equality guarantee to protect the rights of married women to social security, and accordingly found the Netherlands in violation of the right to equality in denying the unemployment benefits to married women.

All the foregoing cases reveal the existence of possibilities for the protection of socio-economic rights through the use of other overarching rights or through an expansive interpretation of some civil and political rights. As a result, this kind of justiciability is referred to as indirect justiciability of socio-economic rights.

The main theme of this research, as indicated in the first chapter, is assessing the direct justiciability of socio-economic rights in Ethiopia. Consequently, the indirect approach under the Ethiopian legal system will not be dealt in much detail. However, as it is

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<sup>285</sup> *Maria Eugenia Morales De Sierra v. Guatemala*, Judgment on Merits (Case 11.625, Inter-American Commission, January 19, 2001), para 39, Report No. 4/01, Available at [http://www.escri-net.org/usr\\_doc/IA\\_Commission\\_Report\\_on\\_Merits\\_01-19-01.txt](http://www.escri-net.org/usr_doc/IA_Commission_Report_on_Merits_01-19-01.txt) last visited on 25 October 2010.

<sup>286</sup> *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, Human Rights Committee, 9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987) available at [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401066](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401066) last visited on October 25 2010.

important in enhancing the direct justiciability of socio-economic rights, its role will be addressed in section 4.7 of this chapter.

#### **4.2.2. Direct Justiciability of Socio-Economic Rights**

It is the direct application of socio-economic rights before court of law. Due to different reasons, socio-economic rights are not considered as capable of being invoked in court of law and applied by judges, and hence are not justiciable.<sup>287</sup> This argument is now, however, disregarded at the international level and in some jurisdictions like South Africa<sup>288</sup>, and consequently socio-economic rights are considered as rights that can be invoked before the judiciary.

At the domestic level, unlike indirect justiciability, this kind of justiciability is always applicable in a country that has explicitly incorporated socio-economic rights in the substantive part of its Constitution like that of the civil and political rights and has subjected these rights to judicial enforcement. The South African Constitution provides a clear example of the direct protection of socio-economic rights, by containing a detailed catalogue of these entitlements in its Bill of Rights. In such cases, socio-economic rights are provided equal constitutional protection with that of the civil and political rights counterparts. As a result, the socio-economic rights provisions of the Constitution are enforceable before court of law and are capable of being used as a base for legal action. That is, such an entrenchment of socio-economic rights allows individuals and groups whose rights have been violated to seek redress from the courts. An individual who thinks that his/her right has been violated or threatened to be violated can thus instigate a court action against the violator on the basis of constitutional socio-economic rights provisions.

This direct application of socio-economic rights by the judiciary is successfully proved in the numerous cases presented before the Constitutional Court of South Africa. In the case

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<sup>287</sup> Martin Schenin, (note 188 above).

<sup>288</sup> In the final certification of the South African Constitution and subsequent decisions the constitutional court affirmed the justiciability of socio-economic rights. See Diane A. Desierto, *Justiciability of Socio-Economic Rights: Comparative Powers, Roles and Practices in the Philippines and South Africa*, (2009), pp. 35-41 available at [http://www.hawaii.edu/aplpj/articles/APLPJ\\_11.1\\_desierto.pdf](http://www.hawaii.edu/aplpj/articles/APLPJ_11.1_desierto.pdf) last visited on February 5, 2010.

of *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>289</sup>, at issue was whether the measures taken by the State to realize the right to access adequate housing were reasonable. In addressing this issue the Constitutional Court considered Article 2 and 11 of the ICESCR together with Section 26 of the Constitution. It noted that Section 26 imposed a negative obligation on the State to desist from preventing access to adequate housing, but also a positive obligation to create conditions for access, through planning laws and access to finance. There had to be a coherent public housing programme directed towards realization of the right, the precise detail of which was a matter for the legislature and the executive and which did not need to go beyond what was achievable by the State within its available resources. The State's various legislative schemes made no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads or are living in crisis as a result of natural disaster or threat of demolition. The nationwide housing programme therefore fall short of the State's obligations under Section 26 by focusing on medium and long term objectives to the exclusion of those in desperate need. Thus, the court ruled that 'the programme is inconsistent with Section 26 of the Constitution since it failed to provide relief for the people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.'<sup>290</sup>

Another decision that specifically addresses issues of socio-economic rights was held in *Thiagrai Soobramoney v Minister of Health, Kwazulu-Natal*<sup>291</sup>. In this case, the South African Constitutional Court explicitly recognized the direct justiciability of socio-economic rights. Mr. Soobramoney, who was terminally ill, sued the hospital that refused his claim to obtain dialysis treatment to prolong his life. The court ruled that there is no violation of socio-economic right as the court has a view that the right to emergency medical treatment could not extend to life-prolonging treatment to terminally ill patients.

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<sup>289</sup> *Government of the Republic of South Africa and Others v Grootboom and Others*, (Case CCT 11/00, Constitutional Court of South Africa, 4 October 2000).

<sup>290</sup> *Id.*, paras. 69 and 99 (2).

<sup>291</sup> *Thiagrai Soobramoney v Minister of Health (Kwazulu-Natal)*, (Case CCT 32/97, Constitutional Court of South Africa, 27 November 1997). For further analysis of the direct application of socio-economic rights by the Constitutional Court of South Africa see also *Treatment Action Campaign v Minister of Health*, (Case CCT 8/02, Constitutional Court of South Africa, 5 July 2002) (on the right to health). See also Mariette Brennan, (note 39 above), pp. 76-83.

Though this decision did not find a violation of a socio-economic right, it clearly shows the possibility for the direct protection of socio-economic rights through judicial enforcement.

This direct application of socio-economic rights have similarly boosted in cases presented before the African Commission. For instance, in the *SERAC case*<sup>292</sup> the African Commission directly entertain socio-economic rights that have not even got explicit protection in the ACHPR. Accordingly, the Commission finds that the Nigerian Government is in violation of the right to health, shelter and food of the Ogoni people.

Similarly, in the *Purohit case*<sup>293</sup>, the African Commission clearly demonstrates the direct enforceability of socio-economic rights. This case was brought in regard to the legal and material conditions of detention in a Gambian mental health institution. The complaints (mental health advocates), among others, alleged that the Scheme and operation of the Lunatics Detention Act (the principle instrument governing mental health in Gambia) violates the right to health provided in Article 16 and 18 (4) of the ACHPR. In the instant case, the Commission after exploring the meaning of the right to health, as provided for under the ACHPR finds the Republic of Gambia in violation of the right to health of patients detained in Campama and accordingly urge the Gambian government to repeal the Lunatics Detention Act, among others.

Therefore, all the foregoing cases reveal the possibilities for the direct protection of socio-economic rights. As a result, this kind of justiciability is referred to as direct justiciability of socio-economic rights. Since the main objective of this research is to examine the direct justiciability of socio-economic rights in Ethiopia, the following sections are therefore arranged to discuss its applicability in Ethiopia.

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<sup>292</sup> *SERAC and Others v Nigeria* (African Commission, 2001), in African Human Rights Law Reports, 2001, p. 60 as compiled in Christof Heyns and Magnus Killander, (note 245 above), pp. 251-261.

<sup>293</sup> *Purohit and Others v The Gambia* (African Commission, 2003), in African Human Rights Law Reports, 2003, p. 96 as compiled in Christof Heyns and Magnus Killander, ( note 245 above), pp. 243-250.

### 4.3. Elements of Justiciability of Socio-Economic Rights

As clearly outlined in chapter two, justiciability means that people who claim to be victims of violations of rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation have been found to have occurred or to be likely to occur, and to have any remedy to be enforced.<sup>294</sup> This connotes that in order to consider a certain legal system has guaranteed justiciable socio-economic rights, there is a need for the fulfillment of three normative preconditions. In other words, justiciability rests on three normative preconditions consisting of:<sup>295</sup>

- ✓ The existence of legally protected rights (claim);
- ✓ The existence of an institution having judicial or quasi-judicial power to adjudicate socio-economic rights (setting); and
- ✓ The availability of remedies (the consequence of the claim)

The following sub-sections will thus discuss these pre-conditions in that particular order.

#### 4.3.1. The Claim Element of Justiciability

The claim element of justiciability is the existence of protected socio-economic rights that could be used as a base for legal action in case when violations are occurred or are likely to occur.<sup>296</sup> Socio-economic rights, like that of civil and political rights, may obtain legal protection in domestic legal systems through the entrenchment of them in constitutional provisions (either in the substantive part or DPSP or both parts of the Constitution), ordinary legislations and/or through integration of international human rights norms into domestic law. Nevertheless, the constitutional entrenchment of these rights represents the highest ranking norms within the domestic legal order as the Constitution of a country is generally considered to be its supreme law.<sup>297</sup> However, by whatever means the rights are protected, in order to fulfil this requirement of justiciability, one of the rights protected should be violated or there should be a

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<sup>294</sup> ICJ, (note 13 above), p. 1.

<sup>295</sup> On this point see also Frans Viljoen, (note 272 above); Takele Soboka, (note 275 above), p. 2.

<sup>296</sup> Frans Viljoen, *International Human Rights Law in Africa*, (2007), p. 8; Takele Soboka, (note 275 above), p. 2.

<sup>297</sup> Sandra Liebenberg, “*The Protection of Economic and Social Rights in Domestic Legal Systems*,” in Asbjorn Eide et al (eds.), *Economic, Social and Cultural Rights* (2<sup>nd</sup> ed, 2001), pp. 56-57.

possibility for its violation within the existing situation and in the absence of pre-emptive measures<sup>298</sup>. That is, the existence of protected right is not sufficient in the absence of violation or possibility of violation of that right. The fulfillment these two conditions thus provide individuals to invoke it before the court for obtaining remedy. To express otherwise, individuals could have legal standing to enforce their rights in the court of law.

#### **4.3.2. The Setting Element of Justiciability**

It is the existence of an institution having a judicial or quasi-judicial power with a jurisdiction to entertain cases of protected socio-economic rights.<sup>299</sup> The setting element of justiciability ensures the right to have one's case heard before a court of appropriate jurisdiction which is a central aspiration of all human rights instruments both at the domestic and international level and is central in the building of public confidence on the judiciary via the respect of rule of law.<sup>300</sup>

The right to have one's case heard before a court of law invariably applies to cases of socio-economic rights. However, in some domestic legal systems accessing the court for the lodging of socio-economic rights violations is curtailed by placing the claim within non-justiciable provisions under the domestic laws such as by forming part of DPSP or through jurisdictional ouster clauses.<sup>301</sup> In this case, since the claim is not under the subject matter jurisdiction of the court, the setting element is failed to met and resulted in the characterization of the rights as non-justiciable. Therefore, in order to say that the setting element of justiciability is met in a particular case, the claim alleged in the case should be under the subject matter jurisdiction of the judicial or quasi-judicial body before which the case was brought.

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<sup>298</sup> By 'pre-emptive measure' mean any action that has been taken in advance to avoid potential damage.

<sup>299</sup> E. W. Vierdag, (note 19 above), pp. 69, 78 as cited in Frans Viljoen, (note 296 above); Takele Soboka, (note 275 above), p. 2.

<sup>300</sup> Nsongurua J Udombana, "The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa," *African Human Rights Law Journal*, Vol. 6 (2006), p. 311 as cited by Takele Soboka, (note 275 above), p. 29.

<sup>301</sup> Takele Soboka, (note 275 above), p. 29-30. According to Takele Soboka accessing the concerned bodies (judicial or quasi-judicial bodies) may also be curtailed due to cost implications of the judicial process. Though this assertion is true as it could make judicial procedure beyond the reach of the poor and the marginalized, it is irrelevant in the determination of justiciability of rights. This is due to the fact that availability of a body having judicial or quasi-judicial power to adjudicate cases of socio-economic rights, not accessibility, is a requirement for justiciability.

#### 4.3.3. The Consequence of the Claim Element of Justiciability

The final prerequisite for the ascertainment of direct justiciability of socio-economic rights is the availability of remedies for their violations. The crucial importance of the right to accessing a tribunal with a power to investigate into and judicially appraise arbitrary violations of socio-economic rights lies in the fact that it leads to the award of remedies.<sup>302</sup> Thus, if the court finds a violation, it must be able to provide remedy.<sup>303</sup>

The inability of the court to grant remedies for violation of socio-economic rights could not only hinder the justiciability of these rights but also has other negative consequences. Firstly, the accessibility and efficacy of the protected rights could be in jeopardy and are highly questionable.<sup>304</sup> Secondly, the public confidence on the judiciary could be eroded since a judgment that fails to encapsulate remedy is meaningless and against rule of law as it is extracting the teeth of the court in the pursuit of the latter's respect. Finally, national remedies, which are accessible, effective and adequate, are the primary means of protecting human rights in general and socio-economic rights in particular. The absence or ineffectiveness and/or inadequacy of national remedies for violations of rights lead to the seizure of jurisdiction of domestic courts to the regional or international treaty monitoring bodies in which the State is a party, because the requirement of exhaustion of local remedies can be met easily. In turn it would result for the loss of the right of the State to take the first opportunity to consider the issue by its own.

The remedy that the court may provide could take the form of injunctions, compensations, restoration of confiscated property, reinstatement in a job or a combination of these or other types of relief.<sup>305</sup>

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<sup>302</sup> E. W. Vierdag, (note 19 above), p. 78 as cited in Frans Viljoen, (note 296 above); Takele Soboka, (note 275 above), p. 30.

<sup>303</sup> Frans Viljoen, (note 272 above); Diane A. Desierto, (note 288 above).

<sup>304</sup> Sandra Liebenberg, (note 297 above), p. 69.

<sup>305</sup> See, generally, Kent Roach, "Crafting Remedies for Violations of Economic, Social and Cultural Rights," in John Squires *et al.* (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005), pp. 111-126; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights," in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008), pp. 46-58.

#### **4.4. Justiciability of Socio-Economic Rights in Ethiopia**

As the writer tried to discuss in chapter three, the FDRE Constitution has explicitly included socio-economic rights both in its substantive part as well as under the NPPO. It has also extended this protection by integrating international agreements ratified by Ethiopia as part and parcel of the law of the land and by allowing the consideration of principles of international instruments adopted by Ethiopia including the UDHR, ICESCR and other instruments in the interpretation of the fundamental rights and freedoms that are recognized in the Constitution. Since the issues raised on the justiciability of socio-economic rights in these normative frameworks are to some extent different, the writer prefers to discuss them separately. Accordingly, the following three sub-sections analysis the justiciability of socio-economic rights found in the substantive part of the FDRE Constitution, in the NPPO of the FDRE Constitution and in international human rights instruments ratified by Ethiopia in that particular order via the evaluation of them in terms of the three preconditions of justiciability discussed in the preceding section.

##### **4.4.1. Justiciability of Socio-Economic Rights in the Substantive Part of FDRE Constitution**

The FDRE Constitution has given protection to socio-economic rights through their entrenchment in its substantive part starting from Article 40 to Article 43 (1). However, the rights that have been included in this part are limited to the right to property (Article 40), and labour rights (Article 42). It has thus omitted to explicitly provide other socio-economic rights including the right to food, social security, water, education and the like. Nevertheless, the absence of an explicit provision relating to these rights does not imply that they are beyond the Constitution ambit of protection as they are indirectly included in it. To begin with, though the Constitution incorporates socio-economic rights under the crudely-formulated provision of Article 41, the usage of general terms and the incorporation of some indicative lists help for the inclusion of unlisted rights. Besides, the cross-referring provision of the Constitution in the interpretation of the fundamental rights and freedoms provides a leeway for their inclusion. That is, the interpretive latitude

provided by Article 13 (2) of the Constitution is of crucial relevance to the implicit socio-economic rights which are within the purview of the Constitution but lack express protection.<sup>306</sup> Thus, what remains to be proved for the fulfillment of the claim element of justiciability of socio-economic rights under the substantive part of the Constitution is the issue of standing.

As far as the issue of standing is concerned, Article 37 of the FDRE Constitution provides that, ‘everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power’.<sup>307</sup> A rough look at of this provision may connote that *actio-popularis* is permitted under the Constitution due to the fact that it allows everyone to bring cases before court of law without the need to show an interest on the matter. However, the deep scrutiny of the second sub-article of the same article proves otherwise. Under sub-article 2 an individual, group of persons or an association has given the right to bring justiciable matters to a judicial or quasi-judicial body. Nonetheless, the same sub-article requires the person to be a member of the affected group or an association representing the individual or collective interest of its members. This indicates that there is a need to show vested interest on the matter in order to have *locus standi*.<sup>308</sup> Thus, it is difficult to argue that *actio-popularis* is allowed in human rights litigation in the Constitution. If it has been allowed, there is no need of having sub-article 2 of Article 37 since the person or group of persons or an association can bring a case without showing an interest on the matter, thus making Article 37 (2) meaningless as there is no room for its application. However,

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<sup>306</sup> The interpretive latitude will also enable the Constitution to grasp international and regional developments in the area of human rights and to be in line with international practices by allowing the Constitution as a living legal document.

<sup>307</sup> FDRE Constitution, (note 9 above), Article 37 (1).

<sup>308</sup> A similar rule is found in the Civil Procedure Code of Ethiopia regarding representations in civil cases. Article 38 for instance provides that,

where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorized by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agree to be so represented.

Civil Procedure Code of Ethiopia, Article 38; see also Article 57-64. For further analysis of this point see Sisay Alemahu, (note 231 above), p. 4.

this does not mean that *actio-popularis* is not applicable in Ethiopia, because there are some laws that allow for public interest litigation.<sup>309</sup>

Although the absence of a procedure of *actio-popularis* under the Constitution may hinder NGOs and other human rights activists their vital role in fighting against violations of human rights via taking cases to national organs with judicial or quasi-judicial power, it does not affect the claim element of justiciability since in the latter case what is required is the existence of standing regardless of its form (whether it is *actio-popularis* or not). Thus, the first requirement is met under the substantive part of the Constitution.

Apropos the second precondition of justiciability, which is the existence of an institution having a judicial or quasi-judicial power to entertain cases of socio-economic rights, Article 13 (1) of the FDRE Constitution has some help. According to this article, any organ of government, both at federal and state level, has the responsibility and duty to respect and enforce the fundamental rights and freedoms included in the substantive part of the Constitution. This provision indicates not only the empowerment of the court to see cases concerning socio-economic rights but also the duty of the court to enforce them. That is, the duty of the judiciary to enforce the fundamental rights and freedoms, which definitely include socio-economic rights, is an expression of their judicial enforceability.

However, some argue that Article 63 cumulative with Article 83 and 84 of the FDRE Constitution, which empower the House of Federation to interpret the Constitution and to decide on all constitutional disputes upon the recommendation of the Council of

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<sup>309</sup> See for instance, The Federal Courts Advocates' Licensing and Registration Proclamation, 2000, Article 10, Proclamation No. 199, Negarit Gazeta, 6<sup>th</sup> Year, No. 27 (provides that any Ethiopian who defends the general interests and rights of society will be issued with a Federal Court Special Advocacy License, provided certain requirements mentioned in the proclamation are fulfilled). See also The Ethiopian Human Rights Commission Establishing Proclamation, 2000, Proclamation No. 210, Negarit Gazeta, 6<sup>th</sup> Year, No. 40 and the Institution of the Ombudsman Establishing Proclamation, 2000, Proclamation No. 211, Negarit Gazeta, 6<sup>th</sup> Year, No. 41 (both proclamations allow *actio-popularis* under their identical Article 22 (1), which provides, 'a compliant may be lodged by a person claiming that his rights are violated or, by his spouse, family member, representative or by a third party'.); the Environmental Pollution Control Proclamation, 2002, Article 11, Proclamation No. 300, Negarit Gazeta, 9<sup>th</sup> Year, No. 12 (stipulates that, any person, without a need to show a vested interest, ca lodge a compliant to the Environmental Authority or the relevant Regional Environmental Agency against any person causing actual or potential damage to the environment. This right is extended up to bringing the case to the relevant court).

Constitutional Inquiry (hereinafter ‘CCI’), exclude courts from enforcing constitutional provisions on fundamental rights and freedoms.<sup>310</sup> These have been also used by some courts and lawyers in the country as grounds for objecting the direct application of constitutional provisions in concrete cases, because they consider these cases as raising constitutional disputes.<sup>311</sup>

In practice, instead of adjudicating cases raising constitutional provisions, Ethiopian courts, most of the time, tend to refer it to the CCI.<sup>312</sup> For instance, in *Coalition for Unity and Democracy (CUD) v Prime Minister Meles Zenawi Asres*<sup>313</sup>, the plaintiff (CUD) has base its case on the provisions of Article 30 (1)<sup>314</sup>, and Article 9 (1) of the FDRE constitution as alternative to the provisions of Article 3 (1)<sup>315</sup> and Article 11<sup>316</sup> of Proclamation No. 3/1991.<sup>317</sup> In this case, instead of adjudicating the case by considering the relevant provisions, the court simply referred the matter to the CCI by framing the issue as whether the directive issued by the Prime Minister was constitutional or not?<sup>318</sup> In doing so the court has based its decision on the provisions of Article 17 and 21 of Proclamation No. 250/2001.<sup>319</sup> Surprisingly, instead of considering the clarity or otherwise of the relevant constitutional provisions for ascertaining whether there is a need

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<sup>310</sup> Sisay Alemahu, (note 231 above), p. 6; Tsegaye Regassa, *State Constitutions in Federal Ethiopia: A Preliminary Observation*, a Summery for the Bellagio Conference, (March 22-27, 2004), p. 3 available at <http://www.camlaw.rutgers.edu/statecon/subpapers/regassa.pdf> last visited on 21 October 2010.

<sup>311</sup> Sisay Alemahu, (note 231 above), p. 6; Tsegaye Regassa, (note 310 above), p. 3.

<sup>312</sup> Sisay Alemahu, (note 231 above), p. 7.

<sup>313</sup> *Coalition for Unity and Democracy (CUD) v Prime Minister Meles Zenawi Asres*, (File 54024, Federal First Instance Court, 3 June 2005). For detail analysis of this case see Sisay Alemahu, (note 231 above), p. 8-10.

<sup>314</sup> Article 30(1) provides that ‘everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition...’

FDRE Constitution, (note 9 above), Article 30 (1).

<sup>315</sup> Article 3(1) provides for the right of any individual to organize and participate in peaceful demonstration and public political meeting.

The Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting, 1991, Article 3 (1), Proclamation No. 3, Negarit Gazeta, 50<sup>th</sup> Year, No. 4.

<sup>316</sup> Article 11 declares that any law, regulation, directive or decision that violates the Proclamation null and void.

Id, Article 11.

<sup>317</sup> Sisay Alemahu, (note 231 above), p. 9.

<sup>318</sup> Id, p. 8.

<sup>319</sup> Ibid; Under Article 17 and 21 of Proclamation No. 250/2001 courts are allowed to refer cases in which the constitutionality of the decision of a government official is disputed and the interpretation of the constitution is needed.

Council of Constitutional Inquiry Proclamation, 6 July 2001, Proclamation 250, Negarit Gazeta, 7<sup>th</sup> Year, No. 40.

for constitutional interpretation, the court in the case at hand has relinquished such power to the CCI by allowing the latter to determine it<sup>320</sup>, which is given to them and any interested party under Article 84 (2) of FDRE Constitution<sup>321</sup>.

However, the above argument and the practice of courts are inconsistent with the relevant laws, the constitution itself and some of their jurisprudences. Firstly, the above argument and the practice of the courts stem from the existence of misunderstanding as to the meaning of the phrase ‘constitutional dispute’ included under Article 83 of the FDRE Constitution.<sup>322</sup> This view is also shared by Ato Agenagn Wudie.<sup>323</sup> According to the provisions of Article 84 of the Constitution and Articles 6, 17 and 21 of Proclamation No. 250/2001, ‘constitutional disputes’ are those in which the constitutionality of laws or decisions is contested and those which make the interpretation of some constitutional provisions necessary.<sup>324</sup> Thus, when constitutional provisions arise in a case already before a court of law, the court is not precluded from deciding the case. It is only when there is a lack of clarity necessitating the interpretation of the Constitution that the court is required to refer the case to the CCI.<sup>325</sup> In this case, the court will only submit a legal

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<sup>320</sup> Sisay Alemahu, (note 231 above), pp. 8-9.

<sup>321</sup> Article 84 (2) states that:

Where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision.

FDRE Constitution, (note 9 above), Article 84 (2).

<sup>322</sup> Sisay Alemahu, (note 231 above), p. 10.

<sup>323</sup> Interview with Agenagn Wudie, Government Advocate of Law and Justice Office of Gulelie Sub-city, from 10:00 A.M – 12:00 A.M of October 28, 2010, (according to him, in addition to the misunderstanding of the phrase ‘constitutional dispute’, the negligence of the judges and their eagerness of avoiding responsibility from their shoulder are also contributed for such practice). This latter view is similarly adhered by Yohannes Giesyas and Aysheshim Meles, Interview with Yohannes Giesyas, Federal High Court Judge, from 1:00 P.M – 2:50 P.M of November 3, 2010, and Interview with Aysheshim Meles, Federal High Court Judge, from 3:00 P.M – 4:00 P.M of November 3, 2010.

<sup>324</sup> Council of Constitutional Inquiry Proclamation, (note 319 above) as cited in Sisay Alemahu, (note 231 above), p. 6.

<sup>325</sup> Sisay Alemahu, (note 231 above), p. 8.

issue to the CCI.<sup>326</sup> If the court believes that the constitutional provision in question is clear, it can apply it without referral to the CCI.<sup>327</sup>

Secondly, Article 83 and 84 of the FDRE Constitution talks about questioning the constitutionality of federal or state laws but not about the implementation of the constitutional provisions. Thus, it does not hinder the court from applying constitutional provisions in the adjudication of cases. As we know, the Constitution is everyday steeple of the judiciary due to the fact that it has applied indirectly the Constitution via the application of ordinary legislations that are consistent with the constitution. Consequently, it is difficult to say that courts cannot adjudicate constitutional issues. This does not however mean that the judiciary is capable of adjudicating constitutional disputes as it is clearly fall under the mandate of the House of Federation. It to mean that the mere existence of constitutional issues do not result for referral; because unless there is more than one way of interpretation, there is no need of referring the issue to the CCI. That is, only when there are two or more constitutionally acceptable or sustainable interpretations before the court that referral is necessary.

In addition, referral is an exception since it depends on the discretionary power of the judiciary, because as we can understand from the provisions of Article 84 (2 and 3/a/) of the FDRE Constitution, it is at the desire of the court to submit the dispute to the CCI or to the House of Federation by appeal as these provisions are not formulated in obligatory terms like ‘the court shall or must submit’. Thus, since referral is an exception, the courts are required to apply it restrictively in limited situations where there is a constitutional dispute.

Moreover, Article 3 (1) of the Federal Courts Proclamation which provides that, ‘federal courts shall have jurisdiction over cases arising under the Constitution, federal laws and

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<sup>326</sup> In some cases courts referred the whole case to the CCI and the latter makes a decision not only on the legal issue but also on the case itself. See for instance the aforementioned case between *CUD v Prime Minister Meles Zenawi Asres*, (note 313 above).

<sup>327</sup> This has been demonstrated in the case of *State v Haile Meles & Another* (File No. 21/90, Supreme Court of Amhara Regional State, 1998), for an analysis of this case see Sisay Alemahu, (note 231 above), p. 8.

international treaties<sup>328</sup>, shows the possibility of applying constitutional provisions in the adjudication of cases.<sup>329</sup>

At last, in recent years, some members of the judiciary have taken steps to invoke and directly apply constitutional provisions though such situations remain exceptions to the general trend of evasion.<sup>330</sup> For instance, in *Miss Tsedale Demissie v Mr Kifle Demissie*<sup>331</sup>, Cassation Division of the Federal Supreme Court directly applied Article 36 (2) of the FDRE Constitution in addition to Article 3 (1) of the CRC in determining the best interest of the child and providing decision on the case. This decision of the Cassation Division of the Federal Supreme Court on this case is imperative as it set a precedent for the future application of constitutional provisions as well as ratified international agreements by courts of law in Ethiopia,<sup>332</sup> because Proclamation No. 454/2005 provides that federal as well as regional courts on all levels are bound by the Cassation Division's interpretation of law.<sup>333</sup>

Therefore, the mandate of the House of Federation and the CCI to interpret the Constitution and resolve constitutional disputes does not exclude courts from enforcing constitutional provisions on fundamental rights and freedoms including the socio-economic rights provisions of the Constitution.<sup>334</sup> Thus, the duty of the judiciary to enforce the rights enshrined in the Constitution under Article 13 (1) of the FDRE

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<sup>328</sup> Federal Courts Proclamation, 15 February 1996, Article 3 (1), Proclamation 25, *Negarit Gazeta*, 2<sup>nd</sup> Year, No. 13.

<sup>329</sup> Sisay Alemahu, (note 231 above), p. 7.

<sup>330</sup> *Id.*, p. 11.

<sup>331</sup> *Miss Tsedale Demissie v Mr Kifle Demissie*, (File No. 23632, Federal Supreme Court Cassation Division, 6 November, 2006). For further analysis of this case see Sisay Alemahu, (note 231 above), pp. 15-16. On the direct application of constitutional provisions see also *Coalition for Unity and Democracy v National Electoral Board*, (Federal High Court, Addis Ababa, Judgment of 10 June 2005) (in this case, the Federal High Court applied Articles 29 and 38 of the Ethiopian Constitution in reversing the decision of the Federal First Instance Court. Though the Federal High Court has underlined first that, the plaintiff has the right to hold an opinion and has freedom of expression without interference, as well as the right to vote and to be elected without any form of discrimination based on these constitutional provisions, the court finally upheld the submission of the Coalition that the Board had violated the Constitution (referred to in general terms) in announcing provisional results for polling stations in relation to which the former has complaints pending before it. For further analysis of this case see Sisay Alemahu, (note 231 above), pp. 11-12.

<sup>332</sup> Sisay Alemahu, (note 231 above), pp. 15-16.

<sup>333</sup> Federal Courts Proclamation, 15 February 1996, Proclamation No. 25, *Negarit Gazeta*, 2<sup>nd</sup> Year, No. 13 as amended, Federal Court (Amendment) Proclamation, 2005, Article 4, Proclamation No. 454, *Id.*, 11<sup>th</sup> Year, No. 42; see also Sisay Alemahu, (note 231 above), p. 16.

<sup>334</sup> Sisay Alemahu, (note 231 above), p. 6.

Constitution definitely extends to applying the provisions in specific cases.<sup>335</sup> As a result, the second element for the direct justiciability of socio-economic rights found in the substantive part of the Constitution is also met. Hence, what remains to be proved is the last precondition, which is the availability of remedy.

The final prerequisite for the ascertainment of direct justiciability of socio-economic rights found in the substantive part of the Constitution is availability of remedies for their violations. Although remedies for the violations of individual rights are found in ordinary legislations, there are also constitutional remedies found in the Constitution itself.<sup>336</sup> For instance, as indicated under Article 9 (1) of the FDRE Constitution “any law, customary practice or a decision of an organ of State or a public official that contravenes the Constitution has no effect.” This provision, which is found in the ‘Fundamental Principles of the Constitutions’, is applicable not only for civil and political rights but also for any provisions of the Constitution including that of the socio-economic rights. Article 40 (8) of the Constitution has also some relevancy for the ascertainment of the existence of constitutional remedies for violations of socio-economic rights. Article 44 (2) of the Constitution also contains constitutional remedy clause, which states that, ‘all persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance’. These provisions of the Constitution prove the existence of constitutional remedies for violations of socio-economic rights. However, the question is, can the court provide such remedy? This can be answered by looking at the provision of Article 13 (1), which imposes an obligation on the court to enforce the fundamental rights and freedoms. The “duty to enforce” in relation to the judiciary includes the duty to provide decision or judgment, which definitely encapsulate the duty to give remedy due to the fact that judgment without remedy is meaningless.

However, the court is not restricted to those constitutional remedies due to the absence of constitutional provision that affect the power of the court to order other appropriate

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<sup>335</sup> Id, p. 7.

<sup>336</sup> Rakeb Messele, (note 12 above), p. 22.

remedies. For instance, despite the qualification, competence, as well as relevant experience, the right person has been denied a given position while a person who has either affinity or consanguinity to public officials is employed. In both instance citizens are denied the enjoyment of the right to work set forth in the Constitution, because violation of the right to work also gets expression in denying equal opportunity to persons who applied for a position in government institutions. In such instance, the court may, for example, order the relevant institution to employ the right person though this remedy is not included in any of the provisions of the Constitution. This indicates the existence of possibilities for the court to make any order other than the aforementioned constitutional remedies for the enforcement of constitutional provisions in general and socio-economic rights in particular. This would pave the way for the development of a number of creative remedies to redress violations of socio-economic rights. For instance, the court may award preventive damages to avoid future violations of the right in question, may order reparations in kind, injunction or even some times order for the provision of appropriate remedial services for the benefit of the victimized class as a whole.

The problem that could be raised here however is the dependency of the execution of the judicial remedies on the executive branch of the government. Nevertheless, this cannot affect the justiciability of socio-economic rights. To start with, the problem of implementation of judicial remedies as a result of its dependency on the executive branch is not solely confined to socio-economic rights as the judicial remedies provided for violation of civil and political rights are also dependent upon the well functioning of the executive branch. Besides, the issue of enforceability of judicial remedies always comes after the issue of justiciability is already addressed. That is, the issue of justiciability precedes the issue of execution of judicial remedies. Thus, it could not have retrospective effect for hindering the capability of the court to adjudicate cases of socio-economic rights. Moreover, as employed in other domestic jurisdictions like South Africa<sup>337</sup>, in

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<sup>337</sup> The South African Constitutional Court, for instance, in the second part of the order on the Grootboom case directs the respondent (the Government of the Republic of South Africa) to present under oath reports to the Court on the implementation of the order within a period of three months from the date of the order. The applicants are also given the opportunity to deliver their commentary on the respondent report. See *Government of the Republic of South Africa and Others v Grootboom and Others*, (note 289 above). For further discussion of this point see Sandra Liebenberg, (note 297 above), pp. 70-71; W. Trengove, "Judicial

some instances the court can undertake ongoing judicial supervision to ensure that its orders are properly implemented. Thus, the last requirement is also met.

Therefore, since the three prerequisites for the determination of justiciability are met, socio-economic rights found in the substantive part of FDRE Constitution are justiciable. As a result, since courts are empowered to provide a decision or judgment on justiciable matters under Article 37 (1) of the FDRE Constitution, the judiciary has power to entertain matters involving socio-economic rights found in the substantive part. For instance, assume that, a person (Mr. A) who has applied to lease State owned houses has been told to wait for ten years and another person (Mr. B) who applied for the same service after the application made by the former person is accepted to conclude a contract immediately. This violates the rights of Mr. A to have equal access to government financed social services, the right to equality of treatment and most of all the right to housing. According to Article 41 (3) of the Constitution, “Every Ethiopian National has the right to equal access to publicly funded social service”. Thus, since Mr. A is denied equal access to publicly funded social services, in this case, the right to housing, he can take the case to court to redress the violation. That is, a person whose right is violated can institute legal action before court of law based on this Constitutional provision. In this case, the claim element is there by the application of Article 41 (3) and Article 37 of the Constitution, the setting element is met by the application of Article 13 (1) of the Constitution. As far as the availability of remedies is concerned Article 9 (1) of the Constitution provides that ‘a decision of an organ of State or a public official which contravenes this Constitution shall be of no effect’. Thus, since the decision denying Mr. A access to publicly funded social services while allowing the same for Mr. B is inconsistent with the provision of Article 41 (3) of the Constitution, it has no legal effect. So, the court is allowed to provide remedy. The remedy may be ordering the concerned body, in the present case the House Lease Agency, to reconsider its decision and permit Mr. A to obtain lease of State owned houses. Thus, a person’s right to housing in the case at hand is justiciable.

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Remedies for Violations of Socio-Economic Rights: Economic and Social Rights in South Africa,” *ESR Review*, Vol. 1, No. 4 (March 1999), pp. 8-11.

#### **4.4.2. Justiciability of Socio-Economic Rights in the NPPO of FDRE Constitution**

As discussed in chapter three, the constitutional protection of socio-economic rights may be extended through their incorporation in the DPSP. The State may do it in addition to their incorporation in the substantive part of its Constitution or in the absence of the latter. In Ethiopia, the socio-economic rights are found in the substantive part as well as in the NPPO of the Constitution. That is, the FDRE Constitution has incorporated various rights that fall under the realm of socio-economic rights in the socio-economic objectives and principles. As we can see from the provisions of Article 89 and Article 90 of the FDRE Constitution health, welfare and living standards, education, clean water, housing, food and social security are among the socio-economic rights that are explicitly included in the NPPO. Thus, the existence of the rights is proved by their incorporation though they are formulated in the form of State obligations. However, it is not sufficient to attain the requirement of the claim element of justiciability as it is also dependent on legal standing.

The socio-economic rights found in the NPPO, have take the form of directives that oblige the State organs to undertake legislative or any other measure for their realization. Consequently, they do not give rise to individual, subjective rights. This might have negative effect on the legal standing of an individual to bring socio-economic rights cases before court of law based on the legal provisions solely found in the NPPO; because as indicated in section 4.4.1, the person or group or an association is required to show vested interest to have *locus standi* and there is no concept of *actio popularis* under the Constitution. Accordingly, an individual whose socio-economic right is violated or susceptible of violation, as a result of the failure of the government to adhere to the provisions of NPPO, is precluded from instituting legal action before court of law based on the dishonored provision due to lack of legal standing. Thus, since one of the cumulative requirements for the direct justiciability of socio-economic rights is failed to met (the claim element of justiciability), there is no need of proving the other two preconditions (the setting and consequence of the claim element of justiciability). Therefore, the socio-economic rights incorporated in the NPPO of the Constitution

cannot be directly enforced before the judiciary. However, this does not mean that they are totally beyond the reach of the court and non-justiciable since there is possibility for the judiciary to consider them in the implementation of the Constitution.

Nevertheless, though their incorporation in the substantive part of the Constitution has give them equal status with that of the civil and political rights and resulted for their direct justiciability, at least normatively, however, the inclusion of them as NPPO create doubt as to their actual legal status and justiciability. Accordingly, some scholars like Rakeb Messele<sup>338</sup> considers them as mere aspirations that only directs the government in the implementation of the Constitution and are not enforceable before court of law. This is also true for the judges that are interviewed. For instance, Ato Yohannes Giesyas says that, ‘the NPPO are guidelines for the functioning of the government in the making of policies, laws as well as in the drawing of programmes. He further says that the court has no power to consider them as they fall out of the realm of its jurisdiction.’<sup>339</sup> The same view is also expressed by Ato Ayisheshim Meles.<sup>340</sup>

According to the view of the writer, the mere fact of the incorporation of socio-economic rights as NPPO does not forbid the court from enforcing them. First, in countries that adopt DPSP as a model for constitutionalizing socio-economic rights, there is a clear constitutional provision ousting the jurisdiction of the court with regard to the provisions found in the DPSP of their Constitution.<sup>341</sup> There is no similar provision in the FDRE Constitution that affects the jurisdiction of the court in relation to the NPPO. Second, the Constitution itself imposes an obligation on the court to consider the principles and objectives while implementing the Constitution.<sup>342</sup>

So, the problem is not their place in the Constitution rather the attitude of the judiciary as well as the approaches followed by the claimants. If both of them are followed creative approach, the NPPO are not out of the ambit of the judiciary. For instance, if an

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<sup>338</sup> Rakeb Messele, (note 12 above), p. 29.

<sup>339</sup> Interview with Yohannes Giesyas, (note 323 above).

<sup>340</sup> Interview with Ayisheshim Meles, (note 323 above).

<sup>341</sup> For instance see the Constitution of India, (note 278 above), Article 37; Namibian Constitution, (note 278 above), Article 101 and Nigerian Constitution, (note 278 above), Section 6 (6/c/).

<sup>342</sup> FDRE Constitution, (note 9 above), Article 85 (1) contains a phrase ‘any organ of government’ which definitely includes the judiciary.

individual thinks that the policy issued by the government is discriminatory, he/she can bring legal action against the government based on the provisions found in the substantive part like Article 25.<sup>343</sup> In such cases, the court can consider the case since there is no controversy as to the justiciability of the equality guarantee under Article 25 and should consider the relevant provision of the Constitution found in the NPPO as per Article 85 (1). Thus, though the NPPO do not create any subjective rights, they can be indirectly enforced by the court through the application of them cumulative with the fundamental rights and freedoms. Therefore, though the NPPO of the Constitution are not directly justiciable they are indirectly justiciable.

#### **4.4.3. Justiciability of Socio-Economic Rights in Ratified Human Rights Instruments**

Ethiopia has ratified different international and regional human rights instruments that provide protection to socio-economic rights. ICESCR, CEDAW, CRC, ACHPR, and ACRWC are among the instruments. While the ICESCR is wholly devoted to socio-economic rights, the other instruments give protection to socio-economic rights with other groups of rights, which in effect acknowledge the indivisibility, interdependence and interrelatedness of all human rights. The following few pages thus analysis the justiciability of socio-economic rights encapsulated in those instruments before the judiciary in Ethiopia.

As far as the claim element is concerned, the human rights instruments mentioned above have comprehensive provisions on socio-economic rights. They entrench protection to all areas of socio-economic rights including, among others, the right to education, housing, food, water, social security, health and labour related rights. Even if some of the human rights instruments like the ACHPR allow *actio-popularis* for lodging complaint before the respective treaty monitoring bodies<sup>344</sup>, it is not applicable to domestic courts because

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<sup>343</sup> Sisay Alemahu, (note 231 above), p. 5.

<sup>344</sup> For instance the ACHPR permits any one to lodge a complaint before the African Human Rights Commission for the violations of the rights included in the Charter even if their interest is not affected. ACHPR, Article 60. on this point see also the African Commission view in the SERAC Case, (note 245 above), para. 49.

of the sovereignty of the domestic legal systems in determining the jurisdiction of their courts.

In Ethiopia, as discussed in section 4.4.1, *actio-popularis* is not allowed in human rights litigation though it is permitted in exceptional situations under some domestic legislation like the Environmental Pollution Control Proclamation 200/2002. Hence, in the absence of an explicit incorporation, it is difficult for lodging legal action before the court by public interest litigants. However, since the absence of procedure of public interest litigation is not relevant though it is useful for the justiciability of socio-economic rights found in ratified treaties, the first precondition is met due to the existence of *locus standi* on individual, group or collective interest bases as per Article 37 of the FDRE Constitution.

It is believed that the Constitution of a country has the potential to be a powerful vehicle for giving domestic legal effect to international standards on socio-economic rights.<sup>345</sup> Accordingly, in some countries like South Africa<sup>346</sup>, international instruments are considered as source of interpretation for relevant constitutional norms.<sup>347</sup> This has been also the case in Ethiopia, because the FDRE Constitution expressly provides that, “the fundamental rights and freedoms specified in Chapter Three shall be interpreted in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and International instruments adopted by Ethiopia”.<sup>348</sup> The phrase ‘shall consider’ employed in this provision implies that the body having judicial or quasi-judicial power is enjoined to have recourse to the principles of international instruments while enforcing the provisions of the Constitution dealing with fundamental rights and freedoms. Nevertheless, since this article does not deal with the direct application of international human rights instruments by the judiciary, it is not relevant for the determination of the setting element of justiciability.

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<sup>345</sup> Sandra Liebenberg, (note 297 above), p. 76.

<sup>346</sup> Section 39 (1b) of the South African Constitution for instance expressly requires the Court, Tribunal or Forum to consider international law when interpreting the Bill of Rights. South African Constitution, (note 241 above), Section 39 (1b).

<sup>347</sup> Sandra Liebenberg, (note 297 above), p. 76.

<sup>348</sup> FDRE Constitution, (note 9 above), Article 13 (2).

The direct application of international instruments by domestic courts is also usually stipulated in the Constitution of the State.<sup>349</sup> It may stipulate that international treaties ratified by the State concerned require incorporation by national legislation to have domestic legal effect or they may be automatically adopted into domestic law.<sup>350</sup> While the former is applicable in States following the dualist system, the latter is employed in States following monist system.<sup>351</sup>

In Ethiopia, Article 9 (4) of the Constitution provides that, “all international agreements ratified by Ethiopia are an integral part of the law of the land”. Pursuant to the provision of this article, the relevant provisions of international instruments ratified by Ethiopia are part of its domestic law. There is no other precondition stipulated in the text of the Constitution for giving domestic legal effect to ratified international instruments. So, it can be argued that, Ethiopia has followed the monist system as separate legislation is not required in order for the provisions of ratified international instruments to be implemented at the domestic level by the judiciary.

However, despite the explicit nature of Article 9 (4), in practice litigants as well as courts avoid referring to international human rights instruments ratified by Ethiopia even in cases where they are directly relevant, save some exceptional cases in which provisions of such instruments are applied.<sup>352</sup> Different arguments are raised for the non-applicability of ratified treaty provisions, which are discussed hereunder.

Some argue that, since most of the provisions of international instruments are incorporated in domestic laws, especially in the Constitution, there is no need for the

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<sup>349</sup> Sandra Liebenberg, (note 297 above), p. 77.

<sup>350</sup> Ibid.

<sup>351</sup> In dualist system, ratified treaties have no direct validity in domestic law until they are incorporated or transformed into domestic legal system. In the case of incorporation, the treaty as a whole becomes part of domestic law through a specific legislation or statute. A treaty is transformed into domestic law by amending or supplementing legislation without any specific reference to the treaty provisions. On the other hand, in monist system, international law has direct validity in domestic law immediately after its ratification by the State. There is no need of legislation for their incorporation or transformation into domestic law. For further analysis see Sandra Liebenberg, (note 289 above), p. 81; Rakeb Messele, (note 12 above), p. 13; Yuval Shany, “How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts,” *Brook Journal of International Law*, Vol. 32, No. 2 (2006).

<sup>352</sup> Sisay Alemahu, (note 231 above), p. 14.

direct application of ratified treaty provisions.<sup>353</sup> This argument lacks persuasiveness. First, the provisions of the Constitution as well as domestic laws are not the substitution of the provisions of international ratified treaties.<sup>354</sup> It is also difficult to assume that the Constitution as well as domestic laws has incorporated each and every right, especially socio-economic rights, that have been included in ratified international treaties.<sup>355</sup> Moreover, the provisions of the Constitution that deals with fundamental rights and freedoms in general and socio-economic rights in particular, are formulated in general and vague terms than the ratified international treaty provisions.<sup>356</sup> That is why the Constitution itself makes cross-referring provision that allow to have recourse to the principles of international instruments while enforcing the provisions of the Constitution under article 13 (2) of FDRE Constitution. So, it is difficult to sustain the above argument with credibility.

The most commonly held view among members of the judiciary, litigants and some academicians regarding the non-applicability of treaty provisions is related to ‘requirement of publication in the Federal Negarit Gazeta (hereinafter the ‘Gazeta’)<sup>357</sup>, for incorporating ratified treaties into domestic law’. That is, the main debate regarding incorporation of international human rights instruments into Ethiopian law is whether ratification alone suffices for domestication or whether publication in the Gazeta is required. Accordingly, some argue that, unless ratified treaties are published in the Gazeta, the court is precluded from adjudicating cases on the basis of treaty provisions.<sup>358</sup> The proponents of this view basis their argument by citing the provision of Article 2 (2&3) of Proclamation No. 3/1995.<sup>359</sup> While Article 2 (2) of this proclamation requires

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<sup>353</sup> Rakeb Messele, (note 12 above), p. 15.

<sup>354</sup> Sisay Alemahu (note 231 above), p. 15.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> ‘Federal Negarit Gazeta’ is the official law gazette of the federal government, by which federal laws are published.

<sup>358</sup> People in Need Ethiopia, *A Study on the Situation of Child Labour in Ethiopia: Review of Existing Studies and Brief Assessment*, (2009), p. 8

Available at [http://www.rozvojovka.cz/download/pdf/pdfs\\_194.pdf](http://www.rozvojovka.cz/download/pdf/pdfs_194.pdf) last visited on 8 October, 2010; Rakeb Messele, (note 12 above), p. 15; Chi Mgbako et al., “Silencing the Ethiopian Courts: Non-judicial Constitutional Review and Its Impact on Human Rights (Report),” *Fordham International Law Journal*, Vol. 32 (2008), p. 270.

<sup>359</sup> Federal Negarit Gazeta Establishment Proclamation, 1995, Proclamation No. 3, Negarit Gazeta, 1st Year, No. 3.

for the publication of all laws of the federal government in the Gazeta, Article 2 (3) of the same proclamation obliges all State organs both at the federal or regional level as well as any natural or juridical person to take judicial notice of laws published in the Gazeta. Thus, on the basis of these provisions, it has been argued that ratified international instruments are required to be published in the Gazeta for their provision to be implemented at the domestic level.<sup>360</sup> This argument too lacks persuasiveness for the reasons discussed hereunder.

To start with, the provisions of Article 2 (2&3) of Proclamation No. 3/1995 only talks about laws of the federal government rather than ratified treaties.<sup>361</sup> In addition, Article 3 (1) of Proclamation No. 25/1996 states that federal courts shall have jurisdiction over cases arising under the Constitution, federal laws and international treaties. Article 6 (1/a/) of the latter proclamation also empowers Federal Courts to settle cases or disputes, submitted to them within their jurisdiction on the basis of Federal laws and international treaties. In these latter two Articles of Proclamation No. 25/1996 international treaties are stated as a different set of laws than the federal laws.<sup>362</sup> Hence, ratified treaties are not part of the federal laws that must be published in the Gazeta pursuant to Article 2 (2) of Proclamation No. 3/1995.<sup>363</sup>

Besides, the provision of Article 2 (3) of Proclamation No. 3/1995 requires only that judicial notice be taken of laws published in the Gazeta. It does not necessary imply that the laws that courts may take judicial notice of and apply are only those of which the texts are published in the Gazeta.<sup>364</sup> Thus, the court can also take judicial notice of laws that are not published in the Gazeta and apply them in the making of decisions.

As discussed above, Proclamation No. 25/1996 has empowered federal courts to settle cases or disputes submitted to them on the basis of the Constitution, federal laws and international treaties.<sup>365</sup> Hence, the treaty provisions can be applied by courts as per the

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<sup>360</sup> Rakeb Messele, (note 12 above), p. 15; Interview with Ayisheshim Meles, (note 323 above).

<sup>361</sup> Sisay Alemahu, (note 231 above), p. 17.

<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

<sup>364</sup> Id, pp. 17-18.

<sup>365</sup> Federal Courts Proclamation, (note 328 above), Article 3 (1) and Article 6 (1/a/).

provisions of Article 3 (1) and Article 6 (1/a/) of Proclamation No. 25/1996 even if they are not published in the Gazeta.<sup>366</sup>

Moreover, there is no provision in any of the proclamations or the articles of the FDRE Constitution that indicate publication as a precondition requirement for the incorporation of ratified treaties into domestic law. Thus, the issue of publication in the Gazeta is one of practicality, not legality, because publication of the entire text of any international human rights covenant or treaty as an official Amharic translation subsequent to ratification followed by the implementation of national legislation is ideal, but it is not an express requirement of the Constitution or the proclamation.<sup>367</sup> However, publication of human rights treaties in the Gazeta would improve access to and comprehension of these instruments and empower the courts to invoke them.<sup>368</sup>

Furthermore, there are some cases in which provisions of international instruments are applied to decide on the case. For instance, in the judgment of the Cassation Division of the Federal Supreme Court on the case between *Miss Tsedale Demissie v Mr Kifle Demissie*, discussed above<sup>369</sup>, the Court in affirming the argument of the appellant cited Article 3 (1) of the CRC in addition to Article 36 (2) of the FDRE Constitution while determining the best interest of the child. In the case of *Special Prosecutor v Shambel Legesse Asfaw and others*<sup>370</sup>, the Federal High Court has also applied the provisions of the Four Geneva Conventions, which has been ratified by Ethiopia on 2 October 1969, but has not been reproduced in the Gazeta. Surprisingly, the Court has also applied the Second Additional Protocol of 1977<sup>371</sup>, which was not ratified by Ethiopia at the time when the alleged crime was committed.

Based on the aforementioned reasons, though the practical significance that may accrue from their publication is acceptable, international human rights instruments ratified by Ethiopia can be applied by courts irrespective of their publication in the Gazeta. Thus,

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<sup>366</sup> Sisay Alemahu, (note 231 above), p. 17.

<sup>367</sup> Chi Mgbako et al., (note 358 above).

<sup>368</sup> Ibid; see also Sisay Alemahu, (note 231 above), p. 18.

<sup>369</sup> *Miss Tsedale Demissie v Mr Kifle Demissie*, (note 331 above).

<sup>370</sup> *Special Prosecutor v Shambel Legesse Asfaw and others*, (File No. 03116, Federal High Court, Addis Ababa, Judgment of March 26/2000 E.C).

<sup>371</sup> Ethiopia has ratified this protocol on 8 April 1994.

since the ratified treaties are became part of the corpus of law of Ethiopia on the date they entered into force for Ethiopia as per Article 9 (4), it presupposes that the provisos and entitlements of the relevant instrument have direct and immediate application within the Ethiopian legal system, thereby enabling individuals to seek enforcement of their internationally recognized socio-economic rights in Ethiopian courts. Article 9 (4), thus potentially opens the door for Ethiopian citizens to appreciate the importance of the world beyond their own country in the definition and enforcement of human rights. Therefore, the second element of justiciability is also met.

The final prerequisite for the ascertainment of the direct justiciability of socio-economic rights found in the ratified treaties is the availability of remedies for their violations. As we know, international human rights instruments does not contain specific remedies for violations of the rights entrenched in them, which are not actually required to do so since their application is based on domestic laws. However, this does not mean that there is no remedy for violations of rights found in ratified treaties. Firstly, the right to have ones cases heard, or the right to accessing a court of appropriate jurisdiction is a central aspiration of all human rights instruments.<sup>372</sup> For instance, Article 7 of the ACHPR provides for the right to have one's case heard. The crucial importance of this right lies in the fact that it leads to the award of an adequate and effective remedy.<sup>373</sup> Second, most international human rights instruments contain an effective remedy clause that requires State Parties to ensure that any person whose rights are violated shall have an effective remedy.<sup>374</sup> Thus, absence of specific remedies in international instrument, the recognition of the right to have one's case heard and the obligation of the State to provide effective remedies in case of violations indicates the autonomy of the domestic courts in the determination of specific substantive remedies. Accordingly, there is legal possibility for Ethiopian courts to make any order that they thinks proper for the enforcement of socio-economic rights found in the ratified human rights instruments though there is no such jurisprudence in Ethiopia.

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<sup>372</sup> Nsongurua J Udombana (note 300 above).

<sup>373</sup> Takele Soboka, (note 275 above), p. 30.

<sup>374</sup> Philip Alston and Gerard Quinn, (note 46 above), p. 169; Yuval Shany, (note 351 above), pp. 350-352.

Thus, since the three-pronged test of justiciability has been cumulatively met, the socio-economic rights found in the ratified human rights instruments are also justiciable.

#### **4.5. Benefits of Justiciable Constitutional Guarantee of Socio-Economic Rights**

The existence of justiciable constitutional guarantee of socio-economic rights would have different benefits both to the beneficiaries of these rights (most importantly the marginalized segment of the society) as well as to the State itself. To begin with, justiciable constitutional guarantee of socio-economic rights would alleviate the gratuitous abuses of these rights and would also combat the perpetuation of corruption.<sup>375</sup> This is due to the fact that it would be used as a means of ensuring State accountability and developing the culture of justification.<sup>376</sup> As noted, in many parts of Africa, the impoverished state of the lives of millions of Africans is primarily due to the misguided state of State policies and rife corruption.<sup>377</sup> While it has to go hand in hand with the rule of law, independent, impartial and competently functioning judiciary and availability of resources, justiciability contributes towards ensuring State accountability. Justiciability thus subjects State policies, decisions and budgetary and other resource allocations to an impartial judicial and quasi-judicial scrutiny.<sup>378</sup> It is thus seen as a very strong means of ensuring State accountability.<sup>379</sup> However, lack of such guarantee would not only worsen the socio-economic conditions of the marginalized part of the society, but would also contribute for the intensification of institutionalized corruption, and the anticipation of

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<sup>375</sup> Idowu Mopelola Ajibade, (note 69 above), p. 41.

<sup>376</sup> Takele Soboka, (note 275 above), p. 9.

<sup>377</sup> Nana K.A. Busia, Jr. and Bibiane G. Mbaye, "Filing Communications on Economic and Social Rights under the African Human and Peoples' Rights Charter (The Banjul Charter)," *East African Journal of Peace and Human Rights*, Vol. 3(2) (1996), p. 195 as cited by Takele Soboka, (note 275 above), p. 9.

<sup>378</sup> Martin Scheinin, "Economic, Social and Cultural Rights: Modes of Enforcement" (IHRC Conference, Dublin, 2005), (unpublished), p. 17 as cited by Takele Soboka, (note 275 above), p. 10.

<sup>379</sup> Frans Viljoen, *International Human Rights Law in Africa* (2007), pp. 568-570; Margit Tveiten, "Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience," in Wenche Barth Eide and Uwe Kracht (ed), *Food and Human Rights in Development-Volume I: Legal and Institutional Dimensions and Selected Topics* (2005) 163, pp. 164-165 as cited by Takele Soboka, (note 275 above), p. 10.

gross mismanagement of public resources<sup>380</sup>, which in effect negatively affect the development of the country.

In addition, justiciable constitutional guarantee of socio-economic rights provides an opportunity for the courts to see cases involving these rights, which enable them to demand the other branches to comply with their constitutional obligations.<sup>381</sup> It thus adds to the level of understanding about socio-economic rights as legal rights enjoying the characteristic of validity.<sup>382</sup> That is, judicial invocations of socio-economic rights could further a more general understanding that these rights have relevance as a matter of law and cannot be relegated into mere moral or political aspirations.<sup>383</sup> Hence, it can help focus the attention of the executive and legislature on how to better protect and fulfill socio-economic rights and at the same time helping to ensure that the State becomes more responsive to its human rights obligations.

Besides, justiciable constitutional guarantee of socio-economic rights is a means for reclaiming equality for the marginalized and impoverished group of people who have no other viable avenue or financial resource to influence political decision making processes.<sup>384</sup> It is perhaps the most viable means through which they can voice their grievances and oppose systemic exclusions that they face. To this effect, Agbakwa suggests that socio-economic rights in Africa are the main means of reclaiming humanity (as protective of the poor and the marginalized sections of societies).<sup>385</sup> In a similar vein, Kunemman concurs in that socio-economic rights' are the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the

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<sup>380</sup> Idowu Mopelola Ajibade, (note 69 above), p. 41.

<sup>381</sup> Ibid.

<sup>382</sup> Martin Scheinin, (note 378 above), p. 6.

<sup>383</sup> Idowu Mopelola Ajibade, (note 69 above), p. 16.

<sup>384</sup> Takele Soboka, (note 275 above), p.11.

<sup>385</sup> Shedrack C Agbakwa, "Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights," *Yale Human Rights and Development Law Journal*, Vol. 5 (2002), 179 as cited by Takele Soboka, (note 275 above), p.11.

world.’<sup>386</sup> Justiciability of socio-economic rights is, therefore, a means of ‘claiming adjudicative space’ for the poor and the weak.<sup>387</sup>

Moreover, for any meaningful realization to occur in the realm of socio-economic rights there has to be a viable mechanism for demanding accountability, transparency, and responsibility from the government.<sup>388</sup> Justiciable guarantee of socio-economic rights has such avenue since it gives teeth to the enforcement of socio-economic rights before the judiciary. However, a lack of justiciable constitutional guarantee of these rights would result for the lack of such mechanism, which is not only tantamount to denying individuals or groups the opportunity to make constitutional claims against the State with respect to these rights, but also excludes those interests from the process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustice. An exclusion of socio-economic rights from constitutional discourse is bound to affect the breadth and depth of the discourse, with the effect that the parameters of debate and dialogue will be unnecessarily curtailed.<sup>389</sup>

Furthermore, as we know, international recourse mechanisms are often inaccessible to disadvantaged groups and their organizations operating at the local level. These groups will generally be forced to rely exclusively on the legal remedies and institutions existing within their country in order to defend their rights. That is why it is said that accessible and effective national remedies are the primary means of protecting human rights in general and socio-economic rights in particular.<sup>390</sup> Thus, justiciability constitutional guarantee of socio-economic rights ensures this avenue possible at least normatively.

Therefore, justiciable constitutional guarantee of socio-economic rights can help to address agitations over marginalization and underdevelopment. It can allow the judiciary

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<sup>386</sup> Rolf Kunnemann, “A Coherent Approach to Human Rights,” *Human Rights Quarterly*, Vol. 17, (1995), p. 332 as cited by Takele Soboka, (note 275 above), p.11.

<sup>387</sup> Narrated by Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality and Citizenship,” (unpublished), (2006), p. 1 as cited by Takele Soboka, (note 275 above), p.11.

<sup>388</sup> Idowu Mopelola Ajibade, (note 69 above), p. 41.

<sup>389</sup> Craig Scott & Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,” *University of Pennsylvania Law Review*, Vol. 141, No. 1 (November, 1992), p. 9.

<sup>390</sup> Sandra Liebenberg, (note 297 above), p. 55.

to develop jurisprudence that will ultimately ensure good governance and welfare of the people.

#### **4.6. Jurisprudence of Justiciability of Socio-Economic Rights in Ethiopia**

As discussed in chapter three and the preceding sections of this chapter, socio-economic rights are entrenched in the FDRE Constitution and ratified international agreements, and they are normatively proved as directly justiciable. However, around fifteen years after the coming into force of the FDRE Constitution, the Ethiopian courts are mainly involved in the adjudication of labour related rights and eviction cases. Even in those cases, the jurisdiction of the court is somehow restricted to entertaining the complaints made in relation to decisions passed on the amount of appropriate compensation. Their jurisdiction to see the factual as well as legal errors made by the concerned administrative agencies is ousted via legislations enacted by the parliament and the Council of Ministers.<sup>391</sup> Consequently, almost all the cases that have been presented before the courts and decided by the same since the coming into force of the FDRE Constitution are mainly involving issues of civil and political rights. Thus, it can be said that, the civil and political rights to date constitutes the daily steeple of the Ethiopian courts. This indicates that the socio-economic rights in Ethiopia have got scant attention and hence being marginalized. Therefore, it can be said that the justiciability jurisprudence of socio-economic rights in Ethiopia is under-developed.

Many reasons can be surmised for the under-development of their jurisprudence of justiciability, some of which are discussed hereunder as mentioned by the participants of this research as well as the writer's own scrutiny.

The first reason that has been propagated by the interviewed judges relates to the nature of socio-economic rights themselves. According to them, since the realization of socio-economic rights is dependent upon the availability of State resources, they are positive

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<sup>391</sup> See for instance, Re-Enactment of Urban Lands Lease Holding Proclamation, 14<sup>th</sup> May 2002, Article 18 (3&4), Proclamation No. 272, 8<sup>th</sup> Year, No. 19 and Ethiopia Custom and Revenue Authority Employee Regulation, 15<sup>th</sup> June 2008, Article 37, Council of Ministers Regulation No. 155.

and progressively realizable rights. Thus, it is difficult to hold the government responsible for their violations in the absence of State resources. As a result they are not claimable rights.<sup>392</sup> As the writer has tried to discuss in the second chapter, though socio-economic rights are more resource demanding, positive and progressively realizable rights than civil and political rights, the latter are also to some extent resource demanding, positive and progressively realizable rights. So, their difference vests in terms of degree than nature. Consequently, the problem surrounding the nature of socio-economic rights owes its cause from the lack of understanding about the realities in the enforcement of rights. Accordingly, it is not reasonable to raise it as justification for the failure of adjudicating cases involving socio-economic rights, though it would require the court to give at most caution in the determination of their violations.

The vagueness of the wording of the provisions concerning socio-economic rights in the Constitution is also raised as a reason for the under-development of their jurisprudence of justiciability in the country.<sup>393</sup> It is true that the relatively obscure normative content of the rights could hinder their direct justiciability as it would make significantly more difficult for courts and litigants to spot the breaches with ease and specificity.<sup>394</sup> However, this could not also be used as a justification for making socio-economic rights beyond the reach of the court. First, there are legal possibilities for the application of international human rights instrument ratified by Ethiopia, which contains more clear and precise normative content than the provisions of the Constitution. Second, the normative content of rights is usually elaborated through time via interpretation in the adjudication of cases. So, the reason for the under-development of justiciability jurisprudence of socio-economic rights is not attributable to the vagueness of the rules governing these rights rather the absence of normative development of the relevant rights; because given the relatively absence of litigation on the categories of rights under consideration, there has been no cases which shades light on the normative content of each of the socio-economic rights explicitly or implicitly guaranteed under the Constitution.

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<sup>392</sup> Interview with Ayisheshim Meles, (note 323 above); Interview with Yohannes Giesyas, (note 323 above); Interview with Agenagn Wudie, (note 323 above).

<sup>393</sup> Interview with Agenagn Wudie, (note 323 above).

<sup>394</sup> Takele Soboka, (note 275 above), p. 4.

The enforcement problem of the decision of the court concerning cases of socio-economic rights is also mentioned as a justification for the under-development of their jurisprudence. According to Ato Yohannes Gesiyas, ‘even if we consider these rights as justiciable and provide remedy for their violation, the government may not enforce it since it may not have enough resource’.<sup>395</sup> According to the view of the writer, this too lacks persuasiveness. Firstly, enforcement problem is not solely attributable to cases of socio-economic rights. Decisions of the court regarding civil and political rights may also face the same problem as it is dependent on the well functioning of the other branch of government (executive organ) unless necessary follow up is made by the judiciary. In addition, the court is required to provide remedies that are enforceable having regard to the circumstances and situations of the litigants. Moreover, execution of the decision of the court always comes after the adjudication of the case, which is thus irrelevant for the determination of the justiciability of rights. Hence, it is not reasonable to give the former to have retrospective effect for negating the latter.

The aforementioned reasons expressed by the participants of the research may have some contribution for the under-development of the justiciability jurisprudence of socio-economic rights in Ethiopia, though their effect is minimal. However, there are also other problems that the writer considers as contributors for the under-development of their justiciability and that would also contribute for the future marginalization of these rights in the country, which are discussed in the following few paragraphs.

The first problem is related to the issue of standing. As expressed in section 4.4.1, *actio-popularis* is not permitted in Ethiopia save with certain exceptions expressly provided in some legislations. This will play its part in the perpetuation of marginalization of socio-economic rights in the country. As we know, most of the time, individuals that have been vulnerable for violations of socio-economic rights are the poorest section of the society, who is not only marginalized in their economic capacity but also in their awareness of their rights. Thus, the low economic capacity of the vulnerable section of the society coupled with their lack of awareness of their rights makes the accessibility of the judiciary a nightmare for them, which inevitably contribute for the perpetuation of the

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<sup>395</sup> Interview with Yohannes Gesiyas, (note 323 above).

under-development of justiciability jurisprudence of these rights. Therefore, it is better if the government has taken measures for allowing legal standing to public interest litigants without a need to show vested interest in human rights cases.

As indicated at the outset of this section, different legislations containing an ouster clause that deny the jurisdiction of the court in the adjudication of some aspects of socio-economic rights were enacted by the parliament and Council of Ministers. For instance, the proclamation enacted for the Re-Enactment of Urban Lands Lease Holding Proclamation (Proclamation No. 272/2002) contains an explicit provision ousting the jurisdiction of the judiciary on points of law and fact regarding cases of eviction, because, Article 18 of Proclamation No. 272/2002 provides that, ‘the decisions which the commission delivers upon disputes of points of law and fact shall be final, save on disputes as to the issue of compensation’.<sup>396</sup> The same article further stipulates that, ‘a person’s right to appeal before the relevant court is limited only to the dissatisfactions held on the decision of the commission on the issues of compensation’.<sup>397</sup> A similar provision regarding the jurisdiction of the court is also found in the Council of Ministers Regulation No. 155/2008.<sup>398</sup> Article 37 of this regulation provides that, an employee who has been dismissed by the director cannot be reinstated into his/her job by the decision of the court. That is, the decision of the director concerning the dismissal of employees of the authority is final as to the point of law and fact. Thus, the only leeway by which an employee could approach the court regarding his/her dismissal is on disputes concerning the amount of employment termination benefit. The existence of such kind of legislations inevitably will contribute its part in the future continuity of the under-development justiciability jurisprudence of socio-economic rights. They would also have the effect of relinquishing the power of the State to take the first opportunity to see cases by itself. This is because the requirement of exhaustion of local remedies found in different treaties could be satisfied easily due to the absence of domestic remedies as a consequence of ousting the jurisdiction of domestic courts. In such cases, the treaty monitoring bodies will have first instance jurisdiction on the matter.

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<sup>396</sup> Re-Enactment of Urban Lands Lease Holding Proclamation, (note 391 above), Article 18 (3).

<sup>397</sup> *Id.*, Article 18 (4).

<sup>398</sup> Ethiopia Custom and Revenue Authority Employee Regulation, (note 691 above), Article 37.

Last but not least, the reluctance or inaction of the judiciary as well as the lack of awareness among them and other concerned bodies regarding socio-economic rights is also a problem surrounding their justiciability in the country. However, it is not reasonable to shift the whole blame on to the court for the lack of justiciability jurisprudence of socio-economic rights. The court is a body who decides only when there is a case before it to start with. Only if complaints are lodged can the court decide. Thus, the beneficiaries of socio-economic rights who have been the deriving force of the complaints have equally been unable or reluctant to litigate in the area of socio-economic rights violations<sup>399</sup> or unaware of their socio-economic rights as capable of being enforced before the judiciary. Therefore, they are also equally blamable.

#### **4.7. Role of Indirect Justiciability in Enhancing Direct Justiciability of Socio-Economic Rights in Ethiopia**

Despite the direct justiciability of socio-economic rights that has been made normatively possible under the FDRE Constitution and ratified international agreements, their jurisprudence, as discussed in the preceding section, is under-developed in Ethiopia. Hence, in order to establish the much needed jurisprudence regarding the justiciability of these rights, it is important for courts as well as beneficiaries of these rights to use an innovative approach, as applied in other jurisdictions and international human rights system, for enhancing their direct justiciability.

In regional and international human rights system as well as in some domestic legal systems, the indirect approach has proven to be capable of playing this role as it contributes in norm clarification and consequently pave the way for the gradual emergence of a nuanced jurisprudence for the complaints to rely on in order to establish specific socio-economic rights violations before the court.<sup>400</sup>

There are different reasons for considering the indirect approach as a means for enhancing the direct justiciability of socio-economic rights. To begin with, it allows for

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<sup>399</sup> Takele Soboka, (note 275 above), p. 20.

<sup>400</sup> Id, p. 21.

the use of other overarching rights like the rights to equality and due process of law, whose broad application is usually uncontested, as a means of providing remedy for violations of socio-economic rights<sup>401</sup>, because a remedy to these overarching rights could also remedy to violations of socio-economic rights as violation of the latter is usually leads to, results from or is accompanied by the violation of one or a combination of the former rights.<sup>402</sup>

Besides, the indirect approach is a means of operationalising the indivisibility, interdependence, and interrelatedness of all human rights.<sup>403</sup> This is due to its ability to enhance the elaboration of the civil and political dimensions of the socio-economic rights. It thus helps to understand a given right in its fullest sense.<sup>404</sup> Therefore, approaching socio-economic rights from their civil and political dimensions will help clarifying the scope of protection and clarity of the socio-economic rights in question.<sup>405</sup>

Moreover, the indirect approach is useful in discovering the hidden aspects of rights that are not expressly guaranteed in the given instrument but falls within its realm of protection.<sup>406</sup> This will make the complete account of socio-economic rights guaranteed in the FDRE Constitution and ratified treaties to be a combination of explicit norms and implicit guarantees that have yet to be explicated by the court within the context of progressive development of the domestic human rights system.

As discussed in chapter three, this kind of approach can be applied even in a country that has included socio-economic rights in the substantive part of its Constitution but lack the necessary jurisprudence concerning their enforcement before court of law since it is important to clarify the normative contents of the recognized socio-economic rights and in effect developing their jurisprudence. Therefore, since the cross-cutting rights like the right to equality and due process of law are built-in the Constitution as well as ratified treaties and their applicability by the judiciary are not exposed to objection, the indirect

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<sup>401</sup> Id, p. 4.

<sup>402</sup> Id, p. 5.

<sup>403</sup> Ibid.

<sup>404</sup> Id, p. 17.

<sup>405</sup> Ibid.

<sup>406</sup> Id, pp. 4 & 18.

justiciability can be applied by the Ethiopian courts due to the importance it would provide in the enhancement of direct justiciability by clarifying the normative contents of protected socio-economic rights.

However, it is not arguing towards supplanting the direct justiciability of socio-economic rights with the indirect approach. The interplay of the direct and the indirect approaches to socio-economic rights justiciability is such that the former, which is the end, can be enhanced through the use of the latter as a viable instrument. However, in order to enhance the direct justiciability of the socio-economic rights, there is a need to establish more normative clarity about the rights guaranteed in the FDRE Constitution as well as ratified treaties and correlative State obligations. By doing so, the Ethiopian court can bridge the gap between the legal possibility and the prevailing poorness of direct justiciability of socio-economic rights in the country.

#### **4.8. Conclusion**

The judicial protection of socio-economic rights in a domestic legal system, as in international human rights system, may be extended either in indirect way through the application of other overarching rights like the right to equality and due process of law and an expansive interpretation of some civil and political rights like the right to dignity and the right to life or in a direct way through the direct application of legal provisions dealing with socio-economic rights in the adjudication of cases.

The determination of the direct justiciability of socio-economic rights depends on the fulfillment of three cumulative conditions including the claim, setting and consequence of the claim element of justiciability. The cumulative presence of these three preconditions of justiciability in a certain legal system proves the existence of justiciable guaranteed socio-economic rights.

As far as the issue of justiciability of socio-economic rights in Ethiopia is concerned, both direct and indirect justiciability are normatively applicable. While the direct way would be grounded on the provisions of substantive part of the Constitution and ratified treaties because of the cumulative fulfillment of the three-pronged test of justiciability in

both legal frameworks, the indirect way would be grounded on the provisions found in the NPPO due to the absence of one of the cumulative requirements for the direct justiciability of socio-economic rights (the claim element of justiciability).

The existence of such justiciable guarantee of socio-economic rights has the benefit of ensuring accountability, transparency, and responsibility from the government, reclaiming equality for the marginalized section of the society, creating understanding of these rights as legal rights, alleviating the gratuitous abuses of these rights, combating the perpetuation of corruption, and maintaining the sovereignty of the State in the adjudication of cases.

Though socio-economic rights are *sine qua non* for improving people's lives and standard of living, and human rights jurisprudence from other jurisdictions shows that these rights can and should play a greater role in improving people's opportunities in life, the justiciability jurisprudence of socio-economic rights in Ethiopia is under-developed despite the normative possibility. This may be because of a number of factors including the scant entrenchment of these rights in the Constitution, the way these rights have been formulated in the Constitution, the dominant perception that these rights are not enforceable by the judiciary, the absence of legal standing on the basis of *actio-popularis* in human rights litigation, and the existence of legislations ousting the jurisdiction of the court. Thus, since the direct justiciability of socio-economic rights in Ethiopia is under-developed in our country, the application of indirect justiciability through the use of equality clause, and due process of law is important for clarifying the normative content of the recognized socio-economic rights and consequently to enhance their direct justiciability.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1. Conclusions**

Socio-economic rights are considered as rights imposing positive obligations on the State, have vague normative content, dependent on resources and progressively realizable, and thus inherently different from civil and political rights. It has been said that the adjudication of socio-economic rights cases by the judiciary is both democratically and politically illegitimate, and also considered as beyond the institutional competency of courts. Accordingly, it has been argued and traditionally accepted that these rights are non-justiciable. However, as discussed in this research, this is not the case. Firstly, civil and political rights are also to some extent positive, have vague normative content, resource demanding and progressively realizable. Secondly, adjudication of socio-economic rights by the judiciary strengthens true democracy by providing protection to fundamental rights including socio-economic rights, providing protection to minority groups, and ensuring the application of checks and balances, which are also the attributes of true democracy besides the principle of separation of power. Thirdly, there are some civil and political rights requiring resource for their realization. For instance, the realization of accused persons right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense, obviously requires resource. However, the justiciability of this right is not contested. Thus, the existence of such kind of civil and political rights requiring resources for their enjoyment also shows the legitimacy of the judiciary in adjudicating matters involving resource implications like socio-economic rights. Fourthly, it is worth noting that the approach, which classifies civil and political rights as justiciable and socio-economic rights as non-justiciable, disregards individual rights to enjoy freedom not only from fear but also from want. Lastly, the existence of competency issue in the adjudication of some civil and political rights but still the courts' power and ability of adjudicating them, through for example the use of expert testimony, can analogously be applied to socio-economic matters. Thus,

there is no reason for ousting the jurisdiction of the court from adjudicating socio-economic rights.

In Ethiopia, socio-economic rights have got protection in the FDRE constitution (both in the substantive part dealing with ‘Fundamental Rights and Freedoms’ as well as in the NPPO) and in the ratified international agreements. There are also ordinary legislations that deal with socio-economic rights. Thus, the normative framework for socio-economic rights in Ethiopia drives from the text of the Constitution, international human rights instruments ratified by Ethiopia and ordinary legislations. The legislature, the executive and the judiciary are the main duty bearers for the realization of these rights. The EHRC and the Institute of the Ombudsman have also decisive roles in the implementation of human rights in general and socio-economic rights in particular. The roles of NGOs in nurturing the human rights culture through their promotional function are not also overlooked.

This research has tried to examine the justiciability of socio-economic rights in Ethiopia from the perspective of the three pronged test of justiciability. In doing so, it has made a separate analysis of the justiciability of socio-economic rights found in the substantive part of the FDRE Constitution, in the NPPO of the FDRE Constitution, and in the ratified international agreements due to the fact that the issues in each of these normative frameworks are not always the same.

The FDRE Constitution has given both an express and implied protection to socio-economic rights in its substantive part, which deals with ‘fundamental rights and freedoms’. The express protection of socio-economic rights in this part is provided to the right to property under Article 40 and labour related rights under Article 42. The other areas of socio-economic rights that fall under the purview of protection of the Constitution are provided an implied protection under Article 41 and 43 (1) through the usage of general terms and incorporation of some indicative lists, and the inclusion of cross-referring provision under Article 13 (2) in the interpretation of the fundamental rights and freedoms. That is, the usage of general terms and the existence of some indicative lists coupled with the interpretive latitude provided by Article 13 (2) of the

Constitution helps for the inclusion of unlisted rights that fall under the Constitutional ambit of protection. Thus, the claim element of justiciability is met since violations of these protected rights give legal standing as per Article 37 of the FDRE Constitution.

Regarding the existence of an institution having a judicial or quasi-judicial power to adjudicate cases of socio-economic rights, Article 13 (1) of the FDRE Constitution imposes an obligation on the judiciary to enforce the fundamental rights and freedoms provided for in the Constitution. This duty to enforce is an indication of the power of the court to adjudicate socio-economic rights found in the substantive part of the Constitution. However, some argue that the mandate of the House of Federation to interpret the Constitution and resolve constitutional disputes excludes the court from enforcing constitutional provisions on fundamental rights and freedoms. Nevertheless, this argument is not in line with the relevant laws that allow the application of constitutional provisions by the judiciary like Article 3 (1) of Proclamation No. 25/1996 and the Constitution itself as the provisions that give power to the House of Federation do not preclude courts from applying constitutional provisions in the adjudication of cases. It is also inconsistent with recent developments at the judiciary as there are some members of the judiciary that invoke and directly apply constitutional provisions in some cases. Thus, the duty of the judiciary to enforce the rights enshrined in the Constitution under Article 13 (1) extends to applying the constitutional provisions in concrete cases, and consequently, the second element of justiciability is also met.

The existence of constitutional remedies under Article 9 (1), Article 40 (8) and Article 44 (2) of the FDRE Constitution, and the nonexistence of constitutional provisions barring the court from granting other appropriate remedies result in the fulfillment of the third element of justiciability, which is the existence of remedies for violations of protected socio-economic rights.

Consequently, as far as the socio-economic rights found in the substantive part of the FDRE Constitution is concerned, the writer reaches at the conclusion that they are directly justiciable due to the cumulative existence of the three normative preconditions of justiciability. Thus, since the court is empowered to provide a decision or judgment on

justiciable matters under Article 37 (1) of the FDRE Constitution, the judiciary has power to entertain matters involving socio-economic rights included in the substantive part.

The constitutional protection of socio-economic rights in Ethiopia is not limited only to the provisions of the substantive part of the Constitution but also extends to the provisions of the NPPO of the Constitution. However, unlike the socio-economic rights found in the substantive part, the socio-economic rights found in the NPPO have taken the form of directives that oblige State organs to undertake legislative or any other measures for their realization. That is, they do not give rise to individual claims. This would affect the legal standing of an individual whose right is violated as a result of disregarding the provisions of the NPPO, taking into account the absence of procedure of *actio-popularis* in human rights litigations under the Constitution. The absence of legal standing thus might result in the loss of the claim element of justiciability. Consequently, the socio-economic rights contained in the NPPO of the Constitution are not directly justiciable by themselves. Yet, this does not mean that they are totally beyond the reach of the judiciary given that the Constitution itself under Article 85 (1) imposes an obligation on the court to consider the principles and objectives while implementing the Constitution. Thus, if an individual thinks that the policy issued by the government is discriminatory, he/she can bring legal action against the government based on the provisions found in the substantive part like Article 25. In such cases, the court can consider the case since there is no controversy as to the justiciability of the equality guarantee under Article 25 and should consider the relevant provision of the Constitution found in the NPPO as per Article 85 (1). So, apropos the justiciability of socio-economic rights entrenched in the NPPO of the FDRE Constitution, the writer concludes that they are indirectly justiciable. This is due to the existence of possibility for the court to enforce socio-economic rights provided for in the NPPO of the Constitution indirectly through the application of them cumulative with the fundamental rights and freedoms found in chapter three of the Constitution.

The final issue that has been addressed in this research regarding the justiciability of socio-economic rights in Ethiopia relates to ratified international agreements, which are expressly recognized in the Constitution. The human rights instruments that Ethiopia has

ratified like the ICESCR, CEDAW, CRC, ACHPR, and ACRWC contain a comprehensive list of provisions that extend protection to all areas of socio-economic rights. In addition, the existence of *locus standi* before domestic courts is determined by the laws of the domestic legal system. Hence, Article 37 of the FDRE Constitution allows *locus standi* on individual, group or collective interest bases in human rights litigation under the Ethiopian legal system. The existence of protected rights together with the existence of *locus standi* on the basis of Article 37 of the FDRE Constitution proves the fulfillment of the claim element of justiciability.

To prove the existence of the setting element of justiciability, it is crucial first to ascertain the direct applicability of ratified treaties in the domestic legal system. In Ethiopia, ratified agreements are considered as part of domestic law as per Article 9 (4) of the FDRE Constitution. There is no other precondition required to be fulfilled for giving domestic legal effect to ratified international agreements. Ethiopia has thus followed the monist system with regard to the giving effect of international agreements at the domestic level.

However, though the provision of Article 9 (4) of the Constitution is clear, some argue that ratification alone is not sufficient for domestication of international agreements. According to them, on the basis of the provisions of Article 2 (2&3) of Proclamation No. 3/1995, international agreements should be published in the Gazeta after ratification in order for their provisions to be enforced at the domestic level. In the absence of publication, they said, the court is precluded from adjudicating cases on the basis of treaty provisions.

This argument, however, is inconsistent with the relevant laws, the provision of the Constitution as well as some of the jurisprudence from courts. To begin with, Article 2 (2&3) of Proclamation No. 3/1995 requires for the publication of only federal laws in the Gazeta rather than international agreements and it does not also exclude courts from taking judicial notice of laws unpublished in the Gazeta. Besides, there is no provision in any of the proclamations or the text of the Constitution claiming publication as a precondition for incorporation of ratified treaties into domestic law. Moreover, Article 3

(1) and Article 6 (1/a/) of Proclamation No. 25/1996 explicitly allow the court to apply the provisions of international agreements without any indication as to the requirement of publication for giving domestic legal effect to ratified treaties. Furthermore, the jurisprudence of the judiciary in some cases also proves the possibility for the direct application of international agreements in concrete cases. As a result, since the courts are given power to directly apply international agreements as per Article 9 (4) of the Constitution and Article 3 (1) and Article 6 (1/a/) of Proclamation No. 25/1996, the setting element of justiciability is met.

Concerning the availability of remedies, international human rights instruments does not contain specific remedies for the violations of the rights entrenched in them. However, this does not mean that there is no remedy for violations of rights found in ratified treaties. This is due to the fact that most international human rights instruments give the domestic legal system autonomy to determine specific remedies for violations of recognized rights. This can be inferred from different international human rights instruments that contain an effective remedy clause. This effective remedy clause requires State Parties to ensure that any person whose rights are violated shall have an effective remedy. Thus, Ethiopian courts are given the autonomy to determine the appropriate remedies for the enforcement of socio-economic rights found in the ratified human rights instruments. Consequently, the final element of justiciability is also satisfied. As a result, since the three-pronged test of justiciability has been cumulatively met, the socio-economic rights found in the ratified human rights instruments are directly justiciable in Ethiopia.

Therefore, both direct and indirect justiciability are normatively applicable for the justiciability of socio-economic rights in Ethiopia. While the direct way would be grounded on the provisions of substantive part of the Constitution and ratified treaties because of the cumulative fulfillment of the three pre-conditions of justiciability in both the provisions of substantive part of the Constitution and ratified treaties, the indirect way would be grounded on the provisions found in the NPPO due to the absence of one of the cumulative requirements for the direct justiciability of socio-economic rights (the claim element of justiciability). The existence of such justiciable guarantee of socio-economic

rights has the benefit of ensuring accountability, transparency, and responsibility of the government, reclaiming equality for the marginalized section of the society, creating understanding of these rights as legal rights, alleviating the unjustified abuses of these rights, combating the perpetuation of corruption, and maintaining the sovereignty of the State in the adjudication of cases.

## **5.2. Recommendations**

Despite the normative possibility for justiciability of socio-economic rights in Ethiopia, the justiciability jurisprudence of these rights is under-developed. Thus, there is a gap between the legal possibility and the practice on the justiciability of socio-economic rights in the country. So, in order to bridge such gap and enhance the justiciability of socio-economic rights in Ethiopia, the writer, based on the discussions so far, recommends the following measures by the government, courts, litigants as well as other human rights activists. The taking of these measures hopefully ensures the better protection of socio-economic rights by the judiciary in Ethiopia.

### **5.2.1. Promotional Measures**

The dominant perception among members of the judiciary as well as the beneficiaries of socio-economic rights that these rights are not judicially enforceable has contributed for the under-development of their justiciability jurisprudence in the country. As the interviews made with the participants of this research indicated, this perception emanates from the understanding of these rights as resource demanding, positive and progressively realizable. This shows the existence of lack of knowledge about the realities in the enforcement of rights whether civil/political or socio-economic. This is because, to some extent civil and political rights themselves are also resource demanding, positive and progressively realizable. Therefore, the writer recommends the government to provide training to members of the judiciary concerning the judicial enforceability of socio-economic rights and consequently boost their awareness of these rights. This awareness creation regarding socio-economic rights should also be extended to the beneficiaries of these rights as they are the deriving force of complaints on which the court is required to decide.

Although the absence of a procedure of *actio-popularis* under the Constitution may hinder NGOs and other human rights activists their vital role in fighting against violations of human rights via taking cases to national organs with judicial or quasi-judicial power, it does not affect their promotional role. Thus, they should also work in the awareness creation regarding socio-economic rights among members of the judiciary as well as the beneficiaries of these rights.

### **5.2.2. Take Measures to Allow Procedure of *Actio-Popularis* in Human Rights Litigation**

The absence of a procedure of *actio-popularis* in human rights litigation in Ethiopia under the Constitution contributes for the under-development of justiciability jurisprudence of socio-economic rights in the country. This is due to, most of the time, individuals that have been exposed to violations of socio-economic rights are the poorest section of the society, who are marginalized both in their economic capacity as well as their human rights awareness. Consequently, they may not be in a position to access the court due to cost implications of the judicial process or their lack of awareness about their socio-economic rights. Thus, the government in order to ensure the judicial enforceability of these rights should allow legal standing to public interest litigants without a need to show vested interest in human rights cases. This will enable NGOs and other human rights activists to fight violations of human rights in general and socio-economic rights in particular via taking cases to courts.

### **5.2.3. Legislative Measures**

There are some legislations in Ethiopia that contain provisions ousting the jurisdiction of courts with regard to some aspects of socio-economic rights. For instance, Article 18 of Proclamation No. 272/2002 contains an explicit provision ousting the jurisdiction of the judiciary on points of law and fact regarding cases of eviction. A similar provision regarding the jurisdiction of the court is also found in Article 37 of the Council of Ministers Regulation No. 155/2008, because the decision of the director concerning the dismissal of employees of the authority is final as to the point of law and fact. In both instruments, the court is only allowed to see disputes concerning the amount of

compensation. The existence of such kind of legislations inevitably will contribute its part in the future continuity of the under-development of justiciability jurisprudence of socio-economic rights. They would also have the effect of relinquishing the power of the State to take the first opportunity to see cases by itself. This is because the requirement of exhaustion of local remedies found in different treaties can be fulfilled easily due to the absence of domestic remedies as a consequence of ousting the jurisdiction of domestic courts. In such cases, the treaty monitoring bodies will have first instance jurisdiction on the matter. Therefore, the Parliament and the Council of Ministers should enact legislations that repeal the provisions of Article 18 of Proclamation No. 272/2002 and Article 37 of Council of Ministers Regulation No. 155/2008, respectively, for making them in line with the Constitution and for boosting the justiciability of socio-economic rights.

#### **5.2.4. Enhancing Direct Justiciability of Socio-Economic Rights through Indirect Approach**

For different reasons discussed in this research, the justiciability jurisprudence of socio-economic rights is under-development in Ethiopia. One of the reasons as it can be understood from the interviews made with the participants of this research, is the understanding of the judiciary of these rights as administrative matters. So, the beneficiaries of these rights should follow an innovative approach in order to secure the judicial enforcement of these rights. In regional and international human rights system as well as in some domestic legal systems, the indirect approach has proven to be capable in securing their enforcement of socio-economic rights and consequently paved the way for the gradual emergence of nuanced justiciability jurisprudence before courts. In Ethiopia, cross-cutting rights like the right to equality and due process of law are built-in the Constitution as well as ratified treaties and their applicability by the judiciary are not exposed to objection. Thus, there is possibility for the application of indirect justiciability. Hence, in order to enhance the direct justiciability of socio-economic rights in Ethiopia, as applied in other jurisdictions, the Ethiopian courts should apply the indirect form of justiciability. This will have help in changing the attitude of the judiciary towards socio-economic rights and consequently enhance their direct justiciability.

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