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**ADDIS ABABA UNIVERSITY  
SCHOOL OF GRADUATE STUDIES**

**DO THE POLICY OBJECTIVES PROVISIONS OF THE FDRE  
CONSTITUTION HINDER JUSTICIABILITY OF SOCIO  
ECONOMIC RIGHTS IN THE CONSTITUTION?**

**BY  
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Addis Ababa, Ethiopia**

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**A Thesis Submitted to the School of Graduate Studies of Addis  
Ababa University in Partial Fulfillment of the Requirements for the  
Masters of Law (LL.M) in Human Rights Law Stream**

## Approval Sheet by the Board of Examiners

**Do The Policy Objectives Provisions Of The FDRE Constitution Hinder  
Justiciability of Socio Economic Rights In The Constitution?**

Approved by Board of Examiners

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## **DECLARATION**

I, **Ashenafi Eticha**, 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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## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on Right and Welfare of the Child
Art.	Article
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CERD	Convention on Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Child Right Convention
CP rights	Civil and political rights
Ed.	Editor
Edn.	Edition
DPSP	Directive principles of state policy
ESC Rights	Economic social and cultural rights
FDRE	Federal Democratic Republic of Ethiopia
HOF	House of federation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGOs	Non-Governmental Organizations
NPPO	National Policy Principles and Objectives
OHCHR	Office of the High Commissioner for Human Rights
SERAC	Social and Economic Rights Action Center

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United nation general assembly
USA	United state of America
USSR	Union of Soviet Socialist Republics

# CHAPTER ONE

## 1.1. Introduction

Implementation of international human rights in general and economic social and cultural rights (hereinafter ESC rights) in particular lag far behind their articulation.<sup>1</sup> Though states have signed binding international human rights treaties their implementation by and large depends on willingness of state parties than international supervisory mechanisms under these treaties.<sup>2</sup> Whether people or individuals can demand remedy for violation of these human rights standards also depends on willingness of states which is manifested in domestic laws and practice of respective states. Hence, whether there is a remedy for violation of ESC rights at domestic level depends on whether they are provided as justiciable rights or non-justiciable directive principles of state policy (DPSP).<sup>3</sup>

Furthermore, there is principled objection on justiciability of ESC rights in human rights jurisprudences which is usually attributed to nature of these rights.<sup>4</sup> ESC rights are claimed to be vague, resource demanding and programmatic which is claimed to make them unqualified for adjudication by court of laws.<sup>5</sup> They are rather provided as DPSP in many jurisdictions like; India, Nigeria and Ghana.<sup>6</sup> Hence, in countries where ESC rights are provided only as DPSP, it has been very difficult for litigants to take related violations to the judiciary and for the latter to adjudicate. Despite this, Courts even in jurisdictions where ESC rights are provided as DPSP,

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<sup>1</sup>The Office of The High Commissioner for Human Rights (OHCHR) Plan of Action: Protection and Empowerment, The UN High Commissioner for Human Rights, Geneva (2005) P. 5, Available at: <http://www2.ohchr.org/english/planaction.pdf>, see also Rebecca Young, *Justiciable Socio-Economic Rights? South African Insights Into Australia's Debate*, P. 2, Available at: <http://www.austlii.edu.au/au/journals/AUIntLawJl/2008/9.pdf>.

<sup>2</sup>Douglas Donoho, *Human Rights Enforcement In The Twenty-First Century*, Georgia Journal of International and Comparative Law, Volume 35, No. 1, (2006), P. 12, Available at: <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1158&context>.

<sup>3</sup>DPSPs are considered only as guidelines by which organs of the state have to perform their function and are not legally enforceable before the judiciary.

<sup>4</sup>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): 135-154, at 151

<sup>5</sup>Michael K Addo, *Justiciability Re-Examined, Economic, Social and Cultural Rights: Progress and Achievement: A Text book*, Beddard Ralph and Dilys M Hill (eds.), Macmillan, (1992) p.p. 93 – 117, P. 93

<sup>6</sup>See the Constitution of India article 37, the Constitution of Nigeria (1999), section 6(6) (c) and the Constitution of Ghana (1992), Chapter 6.

have crafted a way out to adjudicate their violations. India is a best example in this regard.<sup>7</sup> Their experience confirms that innovative and harmonized interpretation of fundamental rights and DPSP have resulted in enforcement of ESC rights.<sup>8</sup> The Supreme Court of India for instance has expansively interpreted the right to life to include the right to food.<sup>9</sup> The FDRE constitution provides for ESC rights both under Chapter three dealing with Fundamental Rights and Freedoms<sup>10</sup> and Chapter ten providing for National Policy Principles and Objectives (herein after NPPO).<sup>11</sup> The latter is usually equated with DPSP by scholars like Rakeb and Sisay.<sup>12</sup> This attribution of ESC rights to policy matter has unduly created a doubt on justiciability of these rights elsewhere.<sup>13</sup> It has also resulted in little adjudication of violation of these rights by court of laws in the country.<sup>14</sup> The research therefore, aims to explore if NPPO provisions of the FDRE Constitution can render ESC rights in the country non-justiciable at all.

## 1.2. Background of the study

ESC rights are clearly provided as non-justiciable or programmatic rights in some states and some others provide them vaguely if they are justiciable or not in their domestic laws, usually the constitution.<sup>15</sup> In many African Constitutions, they are either, placed under DPSP and hence non-

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<sup>7</sup>Sandra Liebenberg, *The Protection of Economic, Social and Cultural right in domestic legal system*, in Economic Social and Cultural Rights: A text book. Second Rev.edn. A. Eide et al (ed.s), Martinus Nijhoff Publishers (2001), P.73.

<sup>8</sup>Berihun Adugna Gebeye, *The Potential of Directive Principles of State Policy For Judicial Enforcement of Socio-Economic Rights: A Comparative Study of Ethiopia and India*, P. 4, Available at: [file:///C:/Users/USER/Downloads/gebeye\\_berihun.pdf](file:///C:/Users/USER/Downloads/gebeye_berihun.pdf).

<sup>9</sup>See Supreme Court of India, *People's Union for Civil Liberties V. Union of India and others*, writ petition No. 196 (2003)

<sup>10</sup> The FDRE Constitution, 1<sup>st</sup> year No. 1, 1995, Article, 40-43.

<sup>11</sup> Id, Article, 89-91

<sup>12</sup> See Rakeb Messele, *Enforcement of Human rights in Ethiopia*, Research Sub-contracted by Action Professionals' Association For The People (APAP) (2002), P. 29, Available at:

<http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf> and 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): 135-154, at 141.

<sup>13</sup> Michael K. Addo, (at note 5), P. 1

<sup>14</sup> Amare Tesfaye, *Justiciability of Socio-Economic Rights In The Federal Democratic Republic of Ethiopia*, (2010) P.11, Available at: <https://chilot.me/llm-thesis-papers-ii>.

<sup>15</sup> For instance the Indian Constitution states that the provisions contained in Part of the Constitution dealing with directive principle and state policy shall not be enforceable by any court. See Article 37 of the Indian Constitution. The Nigerian Constitution also stipulates that judicial power shall not extend to any question as to whether any act of omission by any authority or person or as to whether any law or judicial decision is in conformity with the provisions of directive principles in the Constitution. See, section 6(6) (c) of the 1999 Nigerian Constitution, the constitutions of Namibia and Sierra Leone also oust the judiciary from adjudicating ESC rights violations. The Ghanaian Constitution of 1992 on the other hand is silent on whether provisions of its directive principles are enforceable by courts or not.

justiciable *per se*, or they are not provided for altogether.<sup>16</sup> On the other hand, the FDRE Constitution has no clear provision to provide for justiciability of ESC rights. But at least for ESC rights provided under fundamental rights part of the Constitution one can confidently argue they are equally justiciable as CP rights under the same part. Furthermore, a provision ousting courts from adjudicating ESC rights, even those under NPPO is absent in the FDRE constitution.

Yet court cases invoking ESC rights in the Constitution are rare if not absent in Ethiopia.<sup>17</sup> Even these existing Court cases are related only to certain category of right like the labour and property rights.<sup>18</sup> This is because of the claimed DPSP nature of ESC rights in Ethiopia and failure to understand contents of these rights both by the judiciary and the right holders.<sup>19</sup> Besides, the Ethiopian government emphasis programmatic nature of ESC rights and also claims non-justiciability of violations of these rights.<sup>20</sup> At the forefront of all the reasons to claim non-justiciability of ESC rights in Ethiopia is the fact that these rights are provided as NPPO under the Constitution<sup>21</sup> provisions of the Constitution taken to be equivalent with what is called DPSP, which are only meant to guide government activities rather than providing justiciable rights.<sup>22</sup> Sisay and Rakeb for instance argue NPPO provisions of the FDRE constitution are similar with DPSP and are devoid of direct enforceability before courts.<sup>23</sup> Abdi also stated that, the FDRE Constitution did not make reference about enforceability of ESC rights under its NPPO and no case concerning their justiciability is yet brought before Courts or quasi-judicial bodies.<sup>24</sup>

On the other side of the spectrum there is internationally accepted principle of indivisibility, interdependence and interrelatedness of human rights,<sup>25</sup> which is common sense today. Also, the

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<sup>16</sup>Takele Soboka Bulto, *The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights*, University of Tasmania Law Review, Vol. 29, No. 1, 2011, P. 20, Available at: [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1070002](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1070002).

<sup>17</sup>Sisay Alemahu, (at note 4), P. 144

<sup>18</sup>Yitay BA, *The Critical Analysis of the Judicial Enforceability of Socio Economic Rights in Ethiopia*, University of Limpopo, 2011, P. 47

<sup>19</sup> Amare Tesfaye, (at note 14) P. 12

<sup>20</sup> See for instance Para. 16 and 18, Committee on Economic, Social and Cultural rights, Combined Initial, Second and Third Periodic Reports Submitted By Ethiopia, E/C.12/ETH/1-3, (2009), Available at: <http://ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>.

<sup>21</sup>See FDRE Constitution (at note 9), Chapter ten.

<sup>22</sup> Takele Soboka Bulto, *Exception As Norm: The Local Remedies Rule In The Context of Socio-Economic Rights In The African Human Rights System*, The International Journal of Human Rights, Vol. 16, No. 4, (2012), P. 565

<sup>23</sup> Sisay Alemahu (at note 4), P. 142, See also Rakeb Messele (at note 12).

<sup>24</sup> Abdi Jibril Ali and Kwadwo Appiagyei-Atua, *Justiciability of Directive Principles of State Policy In Africa: The Experiences of Ethiopia and Ghana*, Ethiopian Journal of Human Rights, Vol. 1, (2013), 1-40 at P.32

<sup>25</sup> Vienna Declaration and program of Action provides: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal

UN Committee on Economic Social and Cultural Rights (hereinafter CESCR) has strongly recommended that state shall provide ESC rights at least to the extent of minimum core.<sup>26</sup> Though not ratified by Ethiopia the UN as well has come up with optional protocol to ICESCR allowing individuals to complain and seek remedy for violations of ESC rights.<sup>27</sup> Regionally also the African Commission on Human and Peoples right (the African Commission) has unequivocally asserted that every rights in the African Charter on Human and Peoples Right (herein after ACHPR) can be made effective.<sup>28</sup> In addition to these, ESC rights are practically proved to be justiciable in some domestic legal systems like India where they are considered to be DPSP.<sup>29</sup> In Ethiopia also some ESC rights such as labour rights and right to property are no doubt justiciable in practice. For instance the right to form trade union<sup>30</sup> and the right to compensation<sup>31</sup> in case of expropriation of private property are being adjudicated by court of laws. Furthermore, adjudication of other ESC rights in general or those under NPPO provisions of the FDRE Constitution is not absent at all.

This thesis therefore, seeks to examine justiciability of ESC rights in Ethiopia in general. More specifically, the thesis analyses whether the provisions of chapter ten of the FDRE Constitution providing for NPPO are equivalents of DPSP Clauses which imply non-justiciability of these rights in the Country. The paper aims to show ESC rights provided under NPPO are justiciable

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manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. See paragraph 5 of Vienna Declaration and program of action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

<sup>26</sup> CESCR, *The Nature of State Parties Obligation*, General Comment No.3, adopted on 14/12/90, (5th Session, 1990), U.N. Doc. E/1991/23, Available at: [http://www.refworld.org/docid/4538838e\\_10.html](http://www.refworld.org/docid/4538838e_10.html).

<sup>27</sup> Relevant part of this Optional protocol reads: Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the Economic, Social and Cultural rights set forth in the Covenant by that State Party. See article 2 of Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution A/RES/63/117, adopted on 10 December 2008.

<sup>28</sup> See African Commission on Human and Peoples right, Communication 155/96, *The Social and Economic Rights action centre and the centre for Economic and Social rights v Nigeria*, 15th annual activity report, Para.68

<sup>29</sup> See for instance; Supreme Court of India, *People's Union for Civil Liberties V. Union of India and Others*, Writ Petition No. 196 (2003).

<sup>30</sup> See for Instance; *Workers union of National bank of Ethiopia V Ministry of labour and social affairs*, Federal Supreme Court Cassation Division, file No 55731, Vol. 11 (2004)

<sup>31</sup> See for instance; *Addis Ababa City Agriculture Bureau V Abebe Abay and others*, Federal Supreme Court Cassation Division, file No. 39539, Vol. 9. (2003), See also *Ethiopian Roads Authority V Kedir Halenjiso and Others*, File No. 52496, Vol. 11 (2004).

and that they can even aid justiciability of ESC rights under fundamental rights part of the Constitution in Chapter three.

### 1.3. Statement of the problem

Although, not comprehensive Ethiopia's formal legal frame provides for ESC rights. This starts with the country's Constitution which incorporates ESC rights both under its substantive part as rights and freedoms and also under its chapter ten as NPPO.<sup>32</sup> Besides, the country has also enacted several bylaws providing for ESC rights.<sup>33</sup> In addition to these the Country is member state to major international human rights instruments providing for ESC rights.<sup>34</sup> But unlike its formal frame which is relatively good implementation of ESC rights in practice is lagging far behind.<sup>35</sup> The prevalent argument against justiciability of ESC rights presenting them only as a policy objective is responsible for this lagging enforcement. This has resulted in underdeveloped judicial adjudication of ESC rights in the country.<sup>36</sup> The research therefore aims to scrutinize if this argument based on DPSP nature of ESC rights under chapter ten of the FDRE constitution is warranted to render ESC rights non-justiciable in Ethiopia.

In order to help answer this main question the researcher will address the following specific issues;

- What are the reasons to argue provisions of NPPO of the constitution renders ESC rights non-justiciable? And if these reasons can really render ESC rights non-justiciable in the country.

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<sup>32</sup>See for Instance FDRE Constitution (at note 10), article 41(4) and article 90(1) both provides for the right to health and education, article 42 provides for labour rights, article 44 and 92 provides for environmental rights, article 90(1) provides for the right to house, the right to food, the right to water and social security.

<sup>33</sup> Among domestic bylaws that provides protection for ESC rights in Ethiopia are; 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), Urban Lands Lease Holding Proclamation No. 721/2011, Condominium Proclamation 370/2003, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation 455/2005, Public Health Proclamation No. 200/2002, Public Servants' Pensions Proclamation No.714/2011 and its amendment proclamation, private organization employees pension proclamation No. 715/2011, Social Security Agency Re-establishment Proclamation No.495/2006 and subordinate regulations under these proclamation are some.

<sup>34</sup> Ethiopia is state party to the UDHR Since its inception in 1948, a member state to ICESCR since 1993 and to ACHPR since 1998 respectively. The country has also ratified other major human right treaties that provides for ESC rights such as; ACRWC, CEDAW, CRC, CERD.

<sup>35</sup>Esmael Ali, *Rethinking Justiciability And Enforcement of Socio-Economic Rights In Ethiopia: International Context And Comparative Perspective*, P. 48- 49, Available at: <https://chilot.me/llm-thesis-papers-ii>.

<sup>36</sup> Ibid.

- Is there international obligation on Ethiopia to provide justiciable ESC rights at home?
- Is there any local or international practice that insights justiciability of ESC rights in Ethiopia?
- Can nature of ESC rights render them non-justiciable?
- Are courts not able to adjudicate ESC rights?

#### **1.4. Scope of the study**

Although, reference can be made to justiciability of ESC rights internationally and in some other domestic legal systems to the extent helpful to my cause, this research paper mainly focuses on justiciability of ESC rights in Ethiopia. It specifically explores if provisions under chapter ten of the FDRE Constitution providing for NPPOs can render these rights non-justiciable, undermining the same rights as consecrated in the Constitutions Bill of Rights. As the FDRE Constitution clearly state international agreements ratified by the Country are an integral part of the law of the land according to which rights provided therein shall be interpreted,<sup>37</sup> Ethiopia's obligation under international and regional human rights instruments will also be considered to take these obligations home and help in understanding state duty under the Constitution regarding ESC rights.

To help understand the concept in a very detailed manner the paper will also consider some federal bylaws in Ethiopia which guarantees certain ESC rights to be justiciable before court of laws. This helps in furthering arguments for justiciability of ESC rights in the country.

The scope of this work is therefore mainly focused on provisions of the FDRE constitution providing for ESC rights, International instruments providing for the same rights to which Ethiopia is state party, international and domestic Court cases related to the subject and some allied domestic federal bylaws.

#### **1.5. Objective of the study**

In Ethiopia, in addition to the above mentioned arguments elsewhere against justiciability of ESC rights based on their nature, the fact that ESC rights are provided as NPPO under chapter ten of the FDRE Constitution makes them similar with DPSP and out of the reach of judiciary.<sup>38</sup> But

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<sup>37</sup> FDRE Constitution (at note 10), Article 9 (4) and Article 13 (2).

<sup>38</sup>Sisay Alemahu, (at note 4) P. 138

these arguments cannot hold water when seen in relation to the current understanding of justiciability of ESC rights internationally and even domestic practices in relation to some of these rights.

The aim of this paper is therefore, to show how provisions of NPPO of the Constitution cannot render ESC rights non-justiciable in Ethiopia and how arguments for non-justiciability of ESC rights under NPPO of the FDRE Constitution are not warranted. The thesis also aims considering judicial practices in the Country to see if Court cases are really absent in relation to ESC rights under the NPPO. Particularly, the paper has the following specific objectives;

- To evaluate implication for justiciability of provisions of NPPOs of the constitution on ESC rights consecrated in its bill of rights.
- Critically examine justiciability of ESC rights under international and regional human right systems to which Ethiopia is state party to see if Ethiopia has international duty to make ESC rights justiciable at home.
- Examine certain ESC rights in Ethiopia as they are justiciable in practice, to aid the argument for justiciability of other ESC rights in the country.
- To inspect each of the quartet duties of the states against justiciability of ESC rights in Ethiopia to curve the existing generalized approach in arguments for their non justiciability.
- The paper also aims to recommend all branches of government especially the judiciary and the right holder's measures they need to take in insuring justiciability of ESC rights in Ethiopia, so that their adjudication before the judiciary will improve.

### **1.6. Significance of the study**

Implementation of ESC rights is known to have been lagging behind their articulation or rhetoric as outlined above. Arguments against justiciability of these rights are immensely subduing their implementation. These arguments present ESC rights as DPSP where judicial remedy is not available for their violations. These objections had a consequence of downplaying the use of

litigation where ESC rights are violated, leaving promotion and protection of these rights almost exclusively to political, rather than judicial bodies.<sup>39</sup>

But today these objections are being eroded. Legal scholars and international human right bodies have come up with arguments that can defeat these existing prejudices against justiciability of ESC rights. Nevertheless, these later understanding is not well domesticated into Ethiopia's legal system where ESC rights are by and large remain to be considered as NPPO and out of court's jurisdiction. This indicates how judicial scrutiny of ESC rights violation is negatively affected in the country.

This research therefore contributes in enhancement of implementation of ESC rights in Ethiopia in two ways. First it will clarify justiciability of these rights in Ethiopia by showing how provisions of Chapter ten of the constitution cannot render them non-justiciable, so that every organ of the government carryout their constitutional obligation accordingly.<sup>40</sup> It will particularly help the judiciary in adjudicating ESC rights violations. Secondly, it will help the right holders and other national or international human rights NGOs to take violation of these rights to a court of law. On the other hand the work can also be used a resource for any upcoming research on the issue.

## **1.7 Research methodology**

To meet its objectives the work will examine existing literature related to justiciability or otherwise of ESC rights and the concept of DPSP to which the Ethiopia's NPPOs is associated. Books, journal articles, research studies related to the subject at hand will be inspected. The research is therefore doctrinal in nature.

International and regional human rights instruments and case laws, provisions of the FDRE constitution providing for ESC rights and other relevant domestic bylaws will be evaluated in detail. Pertinent General Comments of the UN treaty bodies to which Ethiopia is a state party will

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<sup>39</sup> Christian Curtis, *Courts And Legal Enforcement of Economic, Social And Cultural Rights, Comparative Experience of Justiciability*, International Commission of Jurists (2008) Geneva, page 2, Available at: [www.humanrights.ch/upload/pdf/080819\\_justiziabilit\\_esc.pdf](http://www.humanrights.ch/upload/pdf/080819_justiziabilit_esc.pdf), Accessed on June 10, 2016.

<sup>40</sup> Article 13(1) of the FDRE Constitution states: All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce provisions of chapter three which provides for human rights.

be considered to clarify the issue. To help draw good experience of other jurisdictions in relation to the subject at hand, legal jurisprudence of some selected countries will also be reviewed.

The researcher will also analyze domestic, foreign, regional and international cases related to ESC rights. Different internet sources will also be consulted. Hence, qualitative research methodology is used.

### **1.7. Limitation of the study**

The first and major limitation that I encountered in doing this research is the underdeveloped domestic jurisprudence and judicial practices in relation to ESC rights in our country Ethiopia. In remedying these problems, the researcher has explored legal jurisprudences of other countries and current international jurisprudences which are exemplary in this regard. Moreover, lack of adequate finance and access to the internet as well has posed their own shares of problems on the task. Generally, although all the above mentioned and other problems has encountered in doing this research, the researcher has tried to lessen their impact on the final outcome of the work.

### **1.8. Organization of the study**

Classified in to sections and sub sections this paper contains five chapters. Chapter one is about background of the study, summary of relevant literatures, research question, objectives of the study, research methodology and possible limitations encountered in doing this research.

The second chapter deals with controversies related to justiciability or otherwise of ESC rights in general. It traces historical background of controversies associated with ESC rights. Especial emphasis is placed upon the concept of DPSP to help clarify if they can justify non-justiciability ESC rights.

In the third chapter of the work the concept of justiciability and DPSP is examined. A closer look is made as to how states provide for ESC rights in their constitutions. Implication of quartet state duties and prohibition of retrogressive measures on justiciability of ESC rights is seen in relation to DPSP. The concept of indirect justiciability and minimum core obligation has also been dealt with to aid arguments for justiciability of ESC rights and hence DPSP.

In the fourth chapter of this work on the other hand provisions of NPPO of the FDRE Constitution are examined closely to see if they are similar with DPSP and to show how this provisions can in no way justify non-justiciability of ESC rights in the country. To help achieve

its purpose this chapter discuss Ethiopia's international obligation to provide for justiciable ESC rights. Some ESC rights that are being adjudicated before court of laws in the country, the concept of indirect justiciability and the issue of retrogressive measures will be discussed. Related domestic and foreign court cases will also be referred to elucidate the subject further.

The fifth and final chapter of this work finally concludes the findings and provides the researchers recommendation that will help in boosting justiciability of ESC rights in one way or another.

## CHAPTER TWO

### CONTROVERSIES RELATED TO JUSTICIABILITY OF ESCRIGHTS.

Debates related to justiciability of ESC rights can be traced back to the time before the adoption of Universal Declaration of Human Rights (hereinafter UDHR.)<sup>1</sup> However, this debate and controversy has got momentum during the making of the two binding human rights treaties, International Covenant on Civil and Political Rights (herein after ICCPR) and International Covenant on Economic Social and Cultural Rights (hereinafter ICESCR).<sup>2</sup> Though, the first comprehensive human right document, the UDHR contains and places equal emphasis to both civil and political rights and ESC rights,<sup>3</sup> its lack of binding nature has triggered the work for the adoption of binding human right document. But, the ideological divide that began to emerge during the drafting of UDHR have come to be wider and clear, capable to split the world in to east and west.<sup>4</sup> This divide has resulted in difficulty to have a comprehensive binding human rights treaty that contains both SEC rights and CP rights where, the UN Human Rights Commission is forced to adopt separate human rights treaties for each set of these human rights.<sup>5</sup> The resulting difference in the languages used in these two treaties and lack of enforcement body under the ICESCR has then massively contributed to the current marginalization of the rights and arguments against their justiciability.<sup>6</sup>

Both argument for and against justiciability of ESC rights have much evolved since then. Therefore, to help clarify the issue and approach it accordingly, this chapter will dwell upon

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<sup>1</sup>M. Glen Johnson and Janusz Symonides, *The Universal Declaration of Human Rights: A History of Its Creation and Implementation 1948 -1998*, UNESCO publishing (1998), P. 54-55, Available at: <http://unesdoc.unesco.org/images/0011/001144/114488E.pdf>.

<sup>2</sup> Sam McFarland, Human Rights; A Brief College Level Overview, Western Kentucky University, P. 6, Available at: [www.aaas.org/sites>files>content-files](http://www.aaas.org/sites>files>content-files).

<sup>3</sup> Malcolm Langford, *Closing The Gap, An Introduction to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights*, P. 2, Available at: <http://www.jus.uio.no/smr/forskning/njhr/utgaver/2009/1/langford.pdf>.

<sup>4</sup> Laurie-Ann S. Jackson, *A Critical Examination of the Relative Importance of Resource Constraints on Benchmarks And Benchmarking Processes in the African Context*, P.9, Available at: [http://www.publiclaw.uct.ac.za/usr/public\\_law/LLMPapers/jackson](http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/jackson).

<sup>5</sup>Sisay Bogale Kibret, *Competence and Legitimacy of Ethiopian Courts in the Adjudication of Socio-Economic Rights: an Appraisal of the Challenges and Prospects*, (2010), P. 13, Available at: <https://chilot.files.wordpress.com/2013/05/competence-and-legitimacy-of-ethiopian-courts-in-the-adjudication-of-socio-economic-rights>.

<sup>6</sup> J. Dennis & P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and health? The American journal of international Law*, Vol. 98, No. 3 (2004) Available at: <http://www.jstor.org/stable/3181641>.

controversies associated with justiciability of ESC rights. Followed by specific arguments against justiciability of ESC rights, historical account of the beginning of these controversies will make the first part.

## **2.1. Historical background of controversies associated with justiciability of ESC rights.**

Any discussion about rights cannot escape from the given time and the specific cultural and historical circumstances surrounding it.<sup>7</sup> Contents of human rights also shows these constantly evolving perceptions of what essential value society deems necessary to protect.<sup>8</sup> Different values came first at different time in history of human rights formation. Protecting individuals from mighty force of the state is among the very first value taken to be essential in the history of human rights making.<sup>9</sup> A set of special concern such as freedom from arbitrary arrest and from torture, arising from confrontation between monarch and their subjects become general philosophy about human dignity, equality and freedom in relation to authorities.<sup>10</sup> This in the opinion of the researcher resulted in more emphasis for civil and political factors that contributed to human rights creation and the resulting CP rights version of human rights. It also seems to have contributed to relegation of welfare and protective function of state as a factor for human rights creation.

But, the idea of protective function of state has also played its part in the making of present day human rights system. In the period between the two world wars, the perception of the organization and basic value of human society has changed, where Liberal states are transformed in to welfare state.<sup>11</sup> The concept of social right has also emerged during great depression that started in 1929 producing a radical change in perception of the relationship between the position of state and society.<sup>12</sup> This transformation into welfare state gave new meaning to liberal concept thus redefining them in social terms. The concept of equality now referred to that of

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<sup>7</sup> Makauwa Mutua, *The Ideology of human Rights*, Virginia Journal of International Law, No. 36 (1996), P. 653, Available at: [www.law.buffalo.edu/faculty/facultyDirectory/MutuaMakau.third.html](http://www.law.buffalo.edu/faculty/facultyDirectory/MutuaMakau.third.html).

<sup>8</sup> Sara Lyons, *The Universal Declaration of Human Rights and the American Convention on Human Rights; Comparing Origins, Manifestations and Aspirations*, University of Gothenburg School of Business, Economics and law, P. 4, Available at: [https://gupea.ub.gu.se/bitstream/2077/23321/1/gupea\\_2077\\_23321\\_1.pdf](https://gupea.ub.gu.se/bitstream/2077/23321/1/gupea_2077_23321_1.pdf).

<sup>9</sup> Ibid

<sup>10</sup> Asbjorn Eide, *Economic Social and Cultural Rights: A Text Book*, Second Revised Edn., Asbjorn Eide, Catarina Krause and Allan Rosas (eds), P. 12, Available at: [www.corteidh.or.cr/tablas/23652.pdf](http://www.corteidh.or.cr/tablas/23652.pdf).

<sup>11</sup> Sara Lyons (at note 8) P. 5

<sup>12</sup> Ibid

opportunities, the concept of liberty no longer entailed only non intervention on part of the state but also adoption of active policies for the true enjoyment of human rights.<sup>13</sup>

States then begun to come under obligation to make some positive moves in providing social justice to their subjects.<sup>14</sup>From the middle of 19<sup>th</sup> century onwards it was even believed that Civil and Political Rights without improvement in social and economic condition will only offer a little hope to ordinary people whose lives were being blunted by long working hours, low pay, slum housing and lack of access to education and health care where governments are expected to play role.<sup>15</sup>This role of the state in relation to social justice has been strongly favored in 1930's. Welfare function of the state then received support from both the united state of America and west European<sup>16</sup> states which later primarily contributed in inclusion of ESC rights into UDHR in 1948.

Hence, it can be said the idea of protective function of state and social welfare has played its own role in the making of the present day human rights standards. Historically therefore, it is impossible to claim factors that instigate creation of human rights are only related to civil and political liberty. Rather human rights are created also to rectify issues of social justice at the time.

Regarding state defiance to accept specific human rights duty towards the people, objection against ESC rights is not exceptional. During the drafting of UN charter for instance the super powers (United state of America, Soviet Union and Great Britain) were against precise legal obligations and international action on human rights altogether.<sup>17</sup> Latin American countries on the other hand wanted international bill of human rights to be discussed and some even wanted them to be included in the charter.<sup>18</sup>The Charter then contains only vague and general provisions for promotion and protection of human rights. Though, it mentions human rights in several places<sup>19</sup> the Charter defines them nowhere which implied the need for another document to elaborate human right provisions under the charter. But still the charter is approved containing

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<sup>13</sup> Ibid

<sup>14</sup> *Social and Economic Rights*, International Idea Institute For Democracy and Electoral Assistance (2014) P. 3, Available at: [http://www.constitutionnet.org/files/social\\_and\\_economic\\_rights\\_0.pdf](http://www.constitutionnet.org/files/social_and_economic_rights_0.pdf).

<sup>15</sup> Ibid

<sup>16</sup> Asbjorn Eide, (at note 10) P. 13

<sup>17</sup> M. Glen Johnson and Janusz Symonides, (at note1) P. 29

<sup>18</sup> For instance, Panama was in favor of including bill of human rights in to the UN Charter during the discussion at the San Francisco conference in 1945, see Eleanor Roosevelt and the Universal declaration of human rights P. 4, Available at: <https://fdrlibrary.org/.../c300e130-b6e6-45-8bf1-07b72195b370>.

<sup>19</sup> See Para. 1 and 3 of the preamble and article 13 of the UN charter.

provisions of human rights. Furthermore, the Charter also makes no distinction between human rights, which indicates unified approach is favored since then.

To come up with a more elaborated human rights document the UN Human Right Commission was made to start working on a single international human rights Covenant.<sup>20</sup> But debates between delegates of the Human Rights Commission have prevented a quick agreement on formal human rights.<sup>21</sup> Delegates debated over whether that instrument should be a mere statement of principles or a covenant complete with implementation mechanisms.<sup>22</sup> Ultimately the superpowers, USA and USSR won this argument, and the UDHR sets forth rights with no provisions for their protection.<sup>23</sup> The task on international bill of rights is then split into two. The Human Right Commission is made to produce a general manifesto and leave the question of enforcement to a detailed Covenant that will come later. This has eased the ideological divide and made adoption of UDHR sooner.<sup>24</sup> Irrespective of this emerging ideological difference of the time UDHR was adopted by the UN general assembly in December 1948, without any dissent.<sup>25</sup> Although, not in favor of consolidate binding Covenant, even the United States of America was in favor of the Declaration.<sup>26</sup> The Declaration contains in one consolidate text nearly the whole range of what today are considered as human rights. The intention to integrate different set of rights is evident as the preamble point out that the highest aspiration of common people is the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.<sup>27</sup>

After the adoption of UDHR in 1948 also, the ideological division between east and west has continued. The UN was unable to come up with a document to provide for unified binding human rights. Western states and United State of America continued to favor CP rights and oppose the

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<sup>20</sup> Malcolm Langford, (at note 3) P.2

<sup>21</sup> Ibid

<sup>22</sup> Elisabeth Reichert, *The Universal Declaration of Human Rights- Only A Foundation*, p. 10, Available at: [ehs.siu.edu >reichert-articles > article7](http://ehs.siu.edu/reichert-articles/article7).

<sup>23</sup> Amy Eckert, *Universality By Consensus: The Evolution of Universality In The Drafting of the UDHR*, (2000)P. 2, Available at: <http://www.du.edu/korbel/hrhw/volumes/2001/1-2/morsink-eckert.pdf>.

<sup>24</sup> James V. Spickard, *The Origins of the Universal Declaration of Human Right*, University of Read land (1999), P.14, Available at: [bulldog2.readlands.edu/fac/spickard/onlinepubs/origionUDHR.pdf](http://bulldog2.readlands.edu/fac/spickard/onlinepubs/origionUDHR.pdf).

<sup>25</sup> Mary Ann Glendon, *Knowing The Universal Declaration of Human Rights*, 73 Notre Dame L. Rev.1153 (1998), P. 12, Available at: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:12991698>

<sup>26</sup> Asbjorn Eide (at note 10), P. 8.

<sup>27</sup> See the preamble of UDHR.

idea of including justiciable ESC rights in a single document with the former.<sup>28</sup> The East on the other hand was in favor of unified binding human rights document.<sup>29</sup> This later split the Commission on the question of whether there should be one or two Covenants. The UN General Assembly was yet in favor of adopting single human rights document emphasizing the interdependence of all categories of human rights. This was clearly stated in the 1950 resolution where the General Assembly urged the Commission to adopt a single binding convention including both set of human rights.<sup>30</sup> Though, the debate involved at this time is far more political than legal, western states were finally successful in reversing the above General Assembly's resolution where the Commission is allowed to adopt two separate Covenants, one on CP rights and the other on SEC rights.<sup>31</sup> But, this separation resolution by itself emphasized unity between these two groups of human rights.<sup>32</sup>

The Commission then has prepared separate treaties, ICCPR and ICESCR both of which are adopted in 1966 and entered in to force ten years later.<sup>33</sup> The deference in languages used in these two treaties and lack of clear enforcement mechanism in the later treaty has contributed for arguments against justiciable ESC rights. Provisions of the ICCPR are crafted more clearly and from individual's rights perspective while provisions ICESCR are somehow vague and provide from states duty perspective. Though, states are required to develop possibility of judicial remedy as a mechanism to implement and enforce rights contained under ICCPR<sup>34</sup>, provision of equivalent clarity is lacking in case of ICESCR.

## **2.2. Vague and Imprecise normative content**

As I have discussed under 2.1 above growing sentiment against binding ESC rights has resulted in difficulty of adopting comprehensive human rights treaty, when UDHR is adopted. Even after UDHR similar problem has continued and finally resulted in the adoption of separate human

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<sup>28</sup> Solomon T. Eboobrah, *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>29</sup> Ibid.

<sup>30</sup> Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights, UN General Assembly Resolution 421(v) Adopted at Fifth Session of the General Assembly on Fourth December 1950, Available at: [www.un.org/documents/5/ares5.htm](http://www.un.org/documents/5/ares5.htm)

<sup>31</sup> Olivier De Schutter, *Economic, Social and Cultural Rights as Human Rights: An Introduction*, (2013), P. 4, Available at: <http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP2013-2-ODeSchutterESCRights.pdf>.

<sup>32</sup> See Section E of UNGA Resolution 421(v) of 4<sup>th</sup> Dec. 1950.

<sup>33</sup> See UNGA Resolution 2200A(XXI), of 16<sup>th</sup> Dec. 1966.

<sup>34</sup> See Article 2(3)(b) of the ICCPR.

rights treaties for ESC rights and CP rights respectively. These arguments against binding ESC rights were not only successful in separating these rights from CP rights but also it has resulted in vagueness and impreciseness of the former comparatively. This vagueness and impreciseness is manifested in the first comprehensive treaty providing for ESC rights, ICESCR.

The provision of ICESCR are said to be vague making it difficult for courts to determine their exact content and scope, whereas the provisions of ICCPR are presented to be precise where Courts can easily determine their content and scope.<sup>35</sup> It is claimed that ESC rights are by nature open ended and indeterminate, lacking conceptual clarity.<sup>36</sup> The problem with this lack of clarity and imprecision of ESC rights as provided under ICESCR is based on two major lines of argument. First, it is impossible to tell the obligation that these rights entail on part of the state. For instance it is difficult to accurately know what obligation is imposed on states by the right to health, food or adequate housing.<sup>37</sup> On the other hand although, obligation for progressive realization is set in place it is difficult to determine what is expected of states in a particular time.<sup>38</sup> These seem to have created lee ways for governments in violation of ESC rights to claim non-justiciability of the rights. Furthermore, the same critics have lead to a claim that ESC rights are only DPSP than binding human right standard<sup>39</sup> as I will discuss in chapter three.

However, these critics can be approached from two angles. First, there are ESC rights which are as clear as or even more understandable than CP rights content wise. The right to education, labour right and protection of family<sup>40</sup> as provided under ICESCR have relatively detailed elaboration of their constituent elements, well above some rights provided by the ICCPR, freedom of speech and protection of human dignity for instance. The fact that the degree of relativism that appears in ESC rights makes standardization of content impossible is also a

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<sup>35</sup> Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa A Choice Between Corrective and Distributive Justice*, Pretoria university Law Press (2009) P.34, Available at: [http://www.pulp.up.ac.za/pdf/2009\\_07/2009\\_07.pdf](http://www.pulp.up.ac.za/pdf/2009_07/2009_07.pdf).

<sup>36</sup> Mariette Brennan, *To Adjudicate and Enforce Socio-Economic Rights: South Arica Proves That Domestic Courts are a viable option*, P.6, Available at: <http://www.austlii.edu.au/au/journals/QUTLaw JJI/2009 /5.pdf>

<sup>37</sup> See article, 11 and 12 of ICESCR.

<sup>38</sup> Mariette Brennan, (at note 36) P. 7

<sup>39</sup> Jennifer Sellin, *Justiciability of The Right to Health- Access to Medicines, The South African and Indian Experience*, (2009)P. 7, Available at: [www.erasmuslawreview.nl/tijdschrift/ELR/2009](http://www.erasmuslawreview.nl/tijdschrift/ELR/2009).

<sup>40</sup> See article 8, 10 and 13 of ICESCR.

problem for CP rights. Hence, the bearing of detailed elaboration on justiciability of rights in the former category is incidental than determinative.<sup>41</sup>

On the other hand there are CP rights which are as vague as some ESC rights, but are being adjudicated before court of laws. Freedom of speech, protection of human dignity and protection from inhuman and degrading treatment are much vague than some ESC rights.<sup>42</sup> But this vagueness did not result in non-justiciability claim. This is not because the vagueness or impreciseness of these rights is of a lesser extent than that of ESC rights but only for CP rights are understood and clarified through long history of judicial adjudication which is lacking in the former.<sup>43</sup> It is noted that:

Our present understanding of civil and political rights as fairly precise rights is due to the fact that treaty bodies such as the European Court of Human Rights and the Human Rights Committee, via individual petition procedures, gradually have defined the legal content of the rights.<sup>44</sup>

It is therefore, a matter of time for ESC rights to be clear if we allow their judicial adjudication. Finally, courts are naturally endowed with a mandate to clarify vague provisions of the law while adjudicating cases. They do the same thing while adjudicating CP rights. Therefore, they follow the same path in adjudicating ESC rights litigations. Hence, it remains to be illogical to argue unclarity, impreciseness or vagueness of these rights will make them non-justiciable DPSP and oust courts from adjudicating there violations.

Therefore, Courts shall adjudicate ESC rights so that the rights will be gradually defined and their legal content established and known. In fact increase in significance of ESC rights in the past two decades was due less to the entrenchment of new rights than it was to the rediscovery and

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<sup>41</sup> Michael K Addo, *Justiciability Re-Examined, Economic, Social and Cultural Rights: Progress and Achievement: A Text book*, Beddard Ralph and Dilys M Hill (eds.), Macmillan, (1992) PP. 93-117, P.101.

<sup>42</sup> Amare Tesfaye, *Justiciability of Socio-Economic Rights In The Federal Democratic Republic of Ethiopia*, (2010) P.32, Available at: <https://chilot.me/llm-thesis-papers-ii/>.

<sup>43</sup> Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of justiciability*, International Commission of Jurist (2008) P. 16, Available at: [http://www.humanrights.ch/upload/pdf/080819\\_justiziabilitt\\_esc.pdf](http://www.humanrights.ch/upload/pdf/080819_justiziabilitt_esc.pdf).

<sup>44</sup> I E Koch, *The Justiciability of Indivisible Rights*, *Nordic Journal of International Law*, (2003) P.15, Available at: <https://books.google.com.et/books?isbn=1782547339>.

reinterpretation of already existing rights.<sup>45</sup> The CESCR rights is playing a major role in clarifying rights contained in the ICESCRs through its General Comments and even exploring the non explicit ones.<sup>46</sup> The Committee has tried to establish substantive contents of the right to education, the right to health, the right to housing and the right to water. Regionally also in Africa, though, we have little case laws to shed light on normative content of ESC rights of the ACHPR, indicative lists of intended meaning of these rights in the Charter is elaborated in Pretoria statement.<sup>47</sup> The African Commission is also playing its own role in clarifying normative contents of ESC rights as I will discuss in Chapter four. Therefore, one can at least refer to these clarifications of ESC rights normative content to lessen the claimed problem of vagueness or imprecision. Hence, it is not warranted to claim non-justiciability of ESC rights based on the assumption of their impreciseness and vagueness.

### **2.3. ESC rights as positive and resource demanding rights**

The other most commonly claimed distinction between ESC rights and CP rights is the distinction which presents the former as positive rights and the later as negative.<sup>48</sup> ESC rights are said to require states take specific positive action for their realization while CP rights impose only obligation not to interfere in their enjoyment. This is taken to be apparent difference in the state undertaking to underlie that CP rights involve immediate obligation whereas ESC rights requires policy action, have relativism and aspirationalism built into them.<sup>49</sup> This is mainly a generally sensed intuition taken to indicate existence of distinction between the two groups in enforcement. Obligations of CP rights are considered as justiciable obligation of restraint by the state, which

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<sup>45</sup>Michael Krennerich, *Economic, Social and Cultural Rights - From Hesitant Recognition to Extraterritorial Applicability*P.7, Available at: <http://menschenrechte.org/wp-content/uploads/2013/11/Article-by-Michael-Krennerich.pdf>.

<sup>46</sup> For instance, duties of the state under article 2, the right to health under article 12(1), the right to education under article 13 and 14, the right to housing under article 11(1) and the right to food under article 11 of the ICESCR are respectively clarified in General Comment Number 3, 14 and 11, 13, 4 and 12, of the CESCR. On the other hand the right to water is construed from article 11 of the ICESCR in General comment number 15 of the committee.

<sup>47</sup> Takele Soboka Bulto, *The Utility of Cross-Cutting Rights In Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights*, *University of Tasmania Law Review*, Vol. 29, No. 1, 2011,P. 147, Available at: [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1070002](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1070002).

<sup>48</sup> Philip Alston and Gerard Quinn, *The Nature And Scope of State Parties' obligation Under The International Covenant on Economic Social and Cultural Rights*, P. 4.

<sup>49</sup> Michael K Addo, (at note 41), P. 6.

Courts shall uphold, and obligations imposed by ESC rights are seen as mere aspiration, the realization of which is a matter of state policy but not the Court.<sup>50</sup>

The positive rights criticism tends to align with a conservative ideological view, suspicious of perceived steps towards increased state intervention that would interfere with the operation of free market by authorizing redistribution of wealth.<sup>51</sup> It emanates from the fear that ESC rights require for their realization or to remedy their violation, where states shall intervene in to the free market to redistribute resources mainly through Court decisions.<sup>52</sup> Considering negative rights alone as enforceable or justiciable rights on the other hand can be attached to the principle of natural law in particular the Kantian view of negative liberty based on autonomy.<sup>53</sup>

But, this classification of rights in to watertight compartment is both not feasible and helpful for their realization. The classification is not feasible for it is based on a misconception of the nature of both sets of rights. Practically all human rights need both negative and positive conduct from states and other stakeholders. For instance, individual right to fair trial cannot be realized if the state abstains from establishing the system and institutions like Courts and office of prosecution. The same is true in relation to individual political right to participate in political life of their states, by exercising the right to vote as it cannot be ensured without the state holding free, fair and periodic elections. Even other traditional CP rights like freedom of speech, freedom of religion, the right to life and security of person imposes positive obligation on states at least when it comes to duty to protect and promote. On the other hand some ESC rights needs no positive action from the state. The right not to be evicted from ones shelter is a typical example here. Abstinance of the state from unlawfully evicting individuals from their shelter will definitely do away with most violations of these rights.

Related with the above concept of positive-negative dichotomy is the issue of cost or resource. It is common to hear arguments claiming ESC rights realization is only dependant on availability of

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<sup>50</sup>*Economic and Social Rights in a Court Room, A Litigator's Guide to Using Equality and Non- Discrimination Strategies to Advance Economic and Social Rights*, Equal Right Trust (2014)P.20, Available at: [http://www.equalrightstrust.org/ertdocumentbank/ESR\\_Guide.pdf](http://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf)

<sup>51</sup> Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future For Socio-Economic Rights in National Law*, *American University International Law Review* (2006) P. 45, Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1112&context=auilr>.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

resources and against some cost on the government, while CP rights realization is not.<sup>54</sup> The heart of this assertion is that since CP rights are rights demanding abstention, they are said largely costless or resource independent and therefore, always realizable.<sup>55</sup>

In contrast to this are ESC rights which are said to be positive and their realization or enforcement depends on existence or otherwise of resources. It is claimed that any of these positive actions cannot be carried out without involvement of costs on the state and in a states where there is resource scarcity enforcement of these rights will be impossible. The same argument also leads to unwarranted conclusion that enforcement of these rights in different Countries is relative to the amount of resource that the countries have.

This argument claiming involvement of cost also ousts Courts from adjudicating ESC rights litigation for decisions will have economic implication affecting state budget, where Courts shall not involve.<sup>56</sup>

However, claiming one set of right is costless while others are not is not warranted as provision and maintenance of infrastructures essential to the realization of CP rights such as the right to fair trial and election rights certainly entails cost.<sup>57</sup> On the other hand some ESC rights like the right not to be expelled from ones house is defiantly cost free. Furthermore, fulfillment of ESC rights to the extent of minimum core is expected irrespective of resource constraint as I will discuss in Chapter three of this work.

Therefore, the distinction of rights as positive or negative and resource demanding or otherwise is not feasible and cannot warranty non-justiciable DPSP nature of ESC rights.

#### **2.4. ESC rights as progressive rights**

Though, the concept of progressive realization is central aspect of state obligation in connection with ESC rights under related regional and international human rights treaties, the concept is

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<sup>54</sup> Philip Alston and Gerard Quinn, (at note 48) P. 5

<sup>55</sup> Aoife Nolan, Bruce Porter and Malcolm Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal* (2007), P. 10, Available at: [http://socialrightscura.ca/documents/public\\_cations/BP-justiciability-belfast.pdf](http://socialrightscura.ca/documents/public_cations/BP-justiciability-belfast.pdf).

<sup>56</sup> Ilias Trispiotis, *Socio-Economic Rights: Legally Enforceable or Just Aspirational?* (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)

<sup>57</sup> Amare Tesfaye, (at note 42), P. 19

being misunderstood and its violation also being sidelined.<sup>58</sup> It is often assumed that the fact that ICESCR and other regional human rights treaties contain progressive realization component implies that ESC rights can only be realized when a country is economically developed or has reached a certain level of development.<sup>59</sup> The concept is sometimes misinterpreted as if states did not have to protect these rights until they have sufficient resources.<sup>60</sup> Hence, it is claimed that ESC rights are not justiciable, rather they are policy matter which shall be left for the other wings of government than court of laws.<sup>61</sup>

The same notion of progressive realization is also claimed by states.<sup>62</sup> It is presented as difficult to bring Court cases regarding progressive realization which are typically related to resource prioritization what is claimed to be prerogative of political branches than courts. At the same time these types of cases often needs relying on empirical data to prove causal link between inadequate progress on the enjoyment of specific right and state action or inaction which may not always be admissible in courts.<sup>63</sup> These has resulted in preference for immediate obligations, such as issues related to manifest discriminatory practices and direct interference by states with the enjoyment of ESC rights in their task.<sup>64</sup> However, this assumption which directly relates ESC rights with availability of resource is not warranted. Availability of resource alone is not a guarantee for realization of these rights, or had it been so we should have hear of their violation only in poor Countries. The same rights may also be well protected or realized in states where there are only limited resources. Even a growing budget may be poorly targeted or wastefully

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<sup>58</sup> Robert Larsson, *The Justiciability of Socio Economic Rights-Courts as Protectors of Economic and Social rights: The case of South Africa* (2009) P. 16, Available at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1559477&fileId=1564998>.

<sup>59</sup> Ibid

<sup>60</sup> *Frequently Asked Questions on Economic Social and Cultural Rights*, Fact sheet 33, Office of the United Nation High Commissioner for Human rights, P.14, Available at: <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

<sup>61</sup> E.G. 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- 103 at P. 103

<sup>62</sup> The government of South Africa for example claimed administration of Nevirapine nationwide requires extensive capacity building, infrastructure development, improved management and community mobilization effort which cannot be achieved at a time. See *Treatment of Action campaign V Minister of health*, Constitutional Court of South Africa, case CCT 8/02, Para. 15 and 16, 5 July, 2002, Available at: <http://www.saflii.org/za/cases/ZACC/2002/15.pdf>.

<sup>63</sup> Eitan Felner, *Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights*, *Oxford Journals, Journal of Human Rights Practice* (2009) P. 5, Available at: <http://jhrp.oxfordjournals.org/content/1/3/402.full>.

<sup>64</sup> Ibid.

spent while a shrinking one may be used more efficiently and actually contribute to realization of ESC rights.

In fact the ICESCR recognizes varying ability of states to fulfill the rights contained therein.<sup>65</sup> Impossibility of realization of ESC rights within a short period of time is known to be behind the concept of progressive realization. But, the concept shall not be misinterpreted depriving these rights of all meaningful content.<sup>66</sup> The notion is only meant to allow flexibility between states which are economically well-off and which are not.<sup>67</sup> In relation to this the Limburg principles provides;

The obligation to realize these rights progressively require state parties to move as expeditiously as possible toward the realization of the rights. Under no circumstance shall this be interpreted as implying for states the right to defer indefinitely in efforts to ensure full realization. On the contrary all state parties have the obligation to begin immediately to take steps to fulfill their obligations under the covenant.<sup>68</sup>

States therefore, have immediate obligation to take appropriate steps that will help realization of ESC rights. They shall not justify inaction or indefinite postponement of these rights using lack of resource as a pretext. States must make maximum effort towards improvement of these rights and shall also demonstrate the same.<sup>69</sup> Hence state compliance with their obligation under ICESCR or other related treaties shall be measured based on efforts they made with the available resource they have. The CESCR also states;

Even where the available resource is demonstrably inadequate, the obligation remains for state party to strive to ensure the widest possible enjoyment of the relevant rights under prevailing circumstances. Moreover, the obligation to monitor the extent of realization, or more specifically of the non realization of ESC rights and to devise strategies and programs for their promotion are not in any way eliminated as a result of resource constraint.<sup>70</sup>

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<sup>65</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 Available at: [http://www.refworld.org/docid/4538838e\\_10.html](http://www.refworld.org/docid/4538838e_10.html).

<sup>66</sup> Id., Para. 9.

<sup>67</sup> Id., Para. 11.

<sup>68</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN doc. e/cn.4/1987/17, principle 21, Available at: [http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UN\\_Limburg\\_Principles\\_1987\\_En.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UN_Limburg_Principles_1987_En.pdf).

<sup>69</sup> *Frequently Asked Questions on Economic Social and Cultural Rights*, (at note 60), P. 14.

<sup>70</sup> General Comment No. 3, (at note 65), Para., 11.

On the other hand also some rights in ICESCR are not linked to the concept of progressive realization. They are rather to be implemented immediately. Prohibition of non discrimination is among these rights.<sup>71</sup> Obligation of states to respect any of ESC rights is also immediate without any doubt.

Similarly the African Commission also unequivocally stated in *Purohit and Moore v The Gambia* that, although, it is cognizant of the fact that many African states are devoid of necessary amenities, infrastructure and resources that facilitate the full enjoyment of ESC rights, state parties shall take concrete and targeted step, while taking full advantage of its available resources, to ensure the rights are realized without discrimination of any kind.<sup>72</sup>

Hence the concept of progressive realization shall in no way serve as an escape hatch for states violating ESC rights. It is neither the intention of article 2 of ICESCR nor supported by General Comments of CESCR to postpone obligations of states in the covenant claiming the concept of progressive realization. Any argument undermining immediacy of ESC rights presenting them only as non-justiciable DPSP based on this concept is therefore, futile. Besides, as I will discuss in Chapter three States are prohibited from taking retrogressive measures on the existing enjoyment of ESC rights.

## 2.5. Conclusion

State defiance to accept human rights duty is not exceptional to ESC rights. During the adoption of the UN Charter for instance, the Super powers including; United State of America, Soviet Union and Britain were against precise legal obligation and international action on human rights. Debates from similar states has resulted in UN Human Rights ommissions failure to come up with binding consolidate document where UDHR is adopted providing for the rights but, without provision for their protection. Western states favored CP rights and opposed the idea of including justiciable ESC rights with the former. This has resulted in the adoption of two separate treaties the ICCPR and ICESCR. The difference in language used in these treaties and lack of enforcement mechanism in ICESCR has contributed to the current argument against justiciability of ESC rights.

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<sup>71</sup> Limburg Principle (at note 68), principle 22

<sup>72</sup> African Commission on Human and Peoples Right, Communication 241/2001, *Purohit and Moore v The Gambia*, 16<sup>th</sup> Annual Activity. Report (2002-2203) Para. 84

ESC rights are presented to be vague and imprecise which makes it impossible to establish their normative content. However, it has been discussed that, some ESC rights are clearer compared to some CP rights. On the other hand also there are CP rights which are even vaguer than some ESC rights but, are being adjudicated before courts. Clarity of ESC rights can be achieved through time if courts are allowed to adjudicate their violations. Furthermore, there are works of the CESCR and the African Commission which clarified normative contents of some ESC rights to be referred to.

ESC rights are also said to be positive and resource demanding. Their realization is claimed to depend on availability of resources unlike CP rights which are said to be resource free. But, ESC rights like the right not to be evicted from one house are resource free and need no positive action from the government side in most cases. Conversely, provision and maintenance of infrastructures essential to the realization of CP rights such as; fair trial and election rights are resource intensive and need positive actions. Therefore, these kinds of distinctions between rights are not warranted and unduly affect realization or justiciability of ESC rights. Finally, although ESC rights are claimed to be progressive, there are core minimum obligations to be met by states and prohibition of non discrimination in relation to ESC rights are not even related to the concept of progressive realization.

## CHAPTER THREE

### JUSTICIABILITY OF ESC RIGHTS Vs DPSP

Human rights, whether it is CP rights or ESC rights, will only be meaningful if their violations are remedied in some way.<sup>1</sup> The mere provision of substantive rights in international human right instruments or domestic laws of states is necessary but insufficient guarantee for the realization of these rights. However, not all human rights violations are being adjudicated before the judiciary. The claim considering ESC rights violation non remediable by the Court have resulted in categorization of human rights in to two groups.<sup>2</sup> CP rights are considered to be remediable by the Court while ESC rights are violations of which cannot be adjudicated by the judiciary.<sup>3</sup> The latter are taken to be non justiciable DPSP as I will discuss in this Chapter.

Arguments presenting ESC rights as vague and imprecise, resource demanding and progressive rights that I have discussed in Chapter two above, lie behind this assertion of non-justiciability. Those asserting their non-justiciability claim these rights to be DPSP where Courts and quasi-judicial organs have no power to adjudicate their violations.<sup>4</sup> But, this claim considering ESC rights only as DPSP than justiciable rights is becoming unacceptable.<sup>5</sup> In the next part of this paper the concept of justiciability and DPSP will be evaluated in relation to ESC rights. The quartet duties of states will be discussed to help us see if non fulfillment of some of these duties is amenable to judicial adjudication. The concept of indirect justiciability, retrogressive measure and minimum core obligation will also be dealt with to show ESC rights can be enforceable before Courts. Finally different ways of providing for ESC rights in domestic Constitution will be discussed.

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<sup>1</sup> Kent Roach, *The Challenges of Crafting Remedies for Violations of Socio-Economic Rights*, P. 1, Available at: <http://www.law.utoronto.ca/Roach>.

<sup>2</sup> Mirja A Trilsch, *The Justiciability of Economic Social and Cultural Rights in Domestic law*, P. 505, Available at: <http://www.mpil.de/files/pdf1/beitr234.pdf>.

<sup>3</sup> Ibid.

<sup>4</sup> Michael K Addo, *Justiciability Re-Examined, Economic, Social and Cultural Rights: Progress and Achievement: A Text Book*, Beddard Ralph and Dilys M Hill (eds.), Macmillan, (1992) p.p. 93 – 117, P. 93.

<sup>5</sup> Malcolm Langford, *Closing The Gap, An Introduction to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights*, P. 97, Available at: <http://www.jus.uio.no/smr/forsknings/njhr/utgaver/2009/1/langford.pdf>.

### 3.1. The concept of justiciability and ESC rights

Justiciability refers to, the quality or state of being appropriate or suitable for review by a Court.<sup>6</sup> It is a mechanism that guarantees recognized rights.<sup>7</sup> It is based on three normative pre-conditions including claim, setting and consequence of the claim.<sup>8</sup> Justiciable rights grant the right holders a legal course of action to enforce them, whenever the duty bearers do not comply with their duties.<sup>9</sup> Human rights are most securely protected where this mechanism of remedying their violation is made available. This right to remedy is always provided for CP.<sup>10</sup>

However, as I have discussed in chapter two of this work, ESC rights are considered to be non-justiciable. It is claimed that violations of these rights cannot be remedied by court of laws and other quasi judicial bodies and right holders should not be able to lodge a complaint based on them before Court of laws. However, I have also discussed under the same Chapter that any of the arguments based on vagueness, impreciseness, positive, resource demanding, progressive nature are not warranted to render ESC rights non-justiciable. But still a significant number of states from all over the world have declined to constitutionalise these rights as justiciable.<sup>11</sup>

In the last two decades on the other hand ESC rights appeared to have been partly rescued from controversies on justiciability and in many jurisdictions have been accorded a more prominent place in advocacy discourse and jurisprudence.<sup>12</sup>

The ACHPR is pioneering in treating ESC rights alike with CP rights.<sup>13</sup> The Limburg Principles later affirmed states parties shall provide for effective remedies including, where appropriate, judicial remedies.<sup>14</sup> CESCR also stated that some of the rights provided under the Covenant are capable of immediate application by judicial and other organs in many national legal systems.

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<sup>6</sup>Black's Law Dictionary (2000), P. 698.

<sup>7</sup>Christian Courtis, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, Comparative Experience of Justiciability*, International Commission of Jurists (2008) Geneva, P. 6, Available at: [www.humanrights.ch/upload/pdf/080819\\_justiziabilitt\\_esc.pdf](http://www.humanrights.ch/upload/pdf/080819_justiziabilitt_esc.pdf).

<sup>8</sup>Takele Soboka Bulto, *The Utility of Cross-Cutting Rights In Enhancing Justiciability of Socio-Economic Rights In The African Charter on Human and Peoples' Rights*, *University of Tasmania Law Review*, Vol. 29, No. 1, 2011, P. 147, Available at: [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1070002](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1070002).

<sup>9</sup>Ibid.

<sup>10</sup>See Art., 2(3) (a) (b) of ICCPR.

<sup>11</sup>Constitutions of both these Countries provide ESC rights to be non-Justiciable. See Article 37 of Indian Constitution and section 6(6)(c) of Nigerian Constitution.

<sup>12</sup>Malcolm Langford, (at note 4), P. 91

<sup>13</sup>Takele Soboka Bulto, *Exception As Norm: The Local Remedies Rule In The Context of Socio-Economic Rights in the African Human Rights System*, *The International Journal of Human Rights*, Vol. 16, No. 4, (2012), P. 555.

<sup>14</sup>Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN doc. e/cn.4/1987/17, principle 19, Available at: [http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UN\\_Limburg\\_Principles\\_1987\\_En.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UN_Limburg_Principles_1987_En.pdf).

Labour rights and the right to education are among rights said to be immediate nature.<sup>15</sup> Hence, anyone whose right to education or labour right is violated can take his/her case before court of laws and get the remedy thereof.

The Committee further required the legally binding international human rights standards operate directly and immediately within domestic legal system of state parties and enable those whose rights is violated to seek enforcement before national Courts and other tribunals.<sup>16</sup> It can be said that the discrepancy between CP rights and ESC rights based on resource implication of the later is arbitrary and incompatible with the principle that the two set of rights are indivisible and interdependent.

On the other hand also courts are already involved on matters involving ESC rights.<sup>17</sup> There is a moving trend that is making Court adjudication of these rights a normal business. Violations of these rights are being remedied by domestic and regional tribunals. Domestically Countries like; India and South Africa are known to have developed a relatively mature ESC rights jurisprudence. The South African constitution clearly provides ESC as justiciable fundamental rights.<sup>18</sup> The South African Constitutional Court has also so far rendered many inspiring decisions in relation to these rights. In the *Treatment Action Campaign case*<sup>19</sup> for instance the Court declared government program imposing restriction on availability of Nevirapine, a medicine used to reduce mother to child transmission of HIV, only to limited public hospitals against the right to health of positive mothers living out of the sites where the medicine is being provided.<sup>20</sup> Despite making declaratory order defining the violation and the need to use extra funds the court also made mandatory order instructing the government to remedy the violation.<sup>21</sup> The court has clearly enunciated that justiciability of ESC rights is not to be debated. The Court also had similar reasoning in relation to the right to housing in its previous judgment on Groothboom

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<sup>15</sup> CESCR, *The Nature of State Parties Obligation*, General Comment No.3, Para. 5, adopted on 14/12/90, (5<sup>th</sup> Session, 1990), U.N. Doc. E/1991/23, Available at: [http://www.refworld.org/docid/4538838e\\_10.html](http://www.refworld.org/docid/4538838e_10.html).

<sup>16</sup> CESCR, *The Domestic Application of the Covenant*, General Comment Number 9, Para. 4, Adopted on Nineteenth Session, 1998

<sup>17</sup> *Id.*, Para. 10

<sup>18</sup> See Section 23-31 of the South African Constitution.

<sup>19</sup> *Treatment of Action Campaign V Minister of health*, Constitutional Court of South Africa, Case CCT 8/02, Para. 15 and 16, 5 July, 2002, Available at: <http://www.saflii.org/za/cases/ZACC/2002/15.pdf>.

<sup>20</sup> *Id.*, Para. 135(2)

<sup>21</sup> *Id.*, Para. 135(3)

case.<sup>22</sup> Moreover, even in Countries where clear statement is set in the Constitution that these rights are not to be adjudicated by Court of laws like in Nigeria, and India<sup>23</sup> or where the constitution is silent about their non-justiciability like in Ghana<sup>24</sup> the experience shows violations of these rights being adjudicated before court of laws which indicates DPSP might be justiciable, as I will discuss in section 3.6 below.

Regionally, ACHPR has rendered ESC rights justiciable in the same way it does with CP rights.<sup>25</sup> The Charter emphasized inseparability of ESC rights and CP rights.<sup>26</sup> The African Commission on Human and People's Right is also adjudicating ESC rights violation. The findings in *SERAC V Nigeria* by the Commission shows how African states are expected to provide justiciable ESC rights. The Commission clearly stated that it will apply any of the diverse rights in the African Charter. It also made clear that there is no right in the Charter that cannot be made effective thereby sending message to other member state that any of their violation of ESC rights is enforceable before it.<sup>27</sup> The Commission made it clear that When States ratify or accede to international instruments like the African Charter, they do so voluntarily and very much aware to their responsibilities to implement the provisions of these instruments.<sup>28</sup> Hence, any member state to the ACHPR cannot provide these rights as non-justiciable without violating their regional obligation under the Charter. In fact it has been seen that the jurisprudence of the African Commission has its own positive impact on domestic legal systems of member states.<sup>29</sup>

This trend of adjudication of ESC rights is even uplifted to international arena when UNGA came up with optional protocol to ICESCR that allows compliant procedure under the covenant.<sup>30</sup> As

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<sup>22</sup> *Grootboom V. Government of South Africa*, Constitutional Court of South Africa, case CCT11/00, 4 October, 2000, Available at: <http://www.saflii.org/za/cases/ZACC/2000/19>.

<sup>23</sup> See section 6(6) (c) of Nigerian Constitution and Article 37 of Indian Constitution

<sup>24</sup> Both the Constitution of Ghana and Ethiopia are silent on the issue of justiciability or otherwise of ESC rights they provide. See FDRE Constitution and Ghanaian Constitution of 1992

<sup>25</sup> Takele, (at note 13), P. 556

<sup>26</sup> See Paragraph 8 of the Preamble of African Charter on Human and Peoples right (ACHPR)

<sup>27</sup> See African Commission on Human and Peoples Right, Communication 155/96, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, (SERAC)15th Annual Activity Report, Para.68

<sup>28</sup> African Commission on Human and Peoples Right, Communication 241/2001, *Purohit and Moore v The Gambia*, 16th Annual Activity Report (2002-2203) Para. 41

<sup>29</sup> See Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, *Journal of African law*, vol. 44, issue 1, (2000), Available at: <https://doi.org/10.1017/Soo2185530001280>

<sup>30</sup> See Optional Protocol to ICESCR, General Assembly Resolution A/RES/63/117, 10 December 2008, Available at: <http://www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117>.

this protocol provides for exhaustion of local remedies it will promote justiciability of ESC rights at domestic level also.

Hence, the assertion that claims ESC rights are non-justiciable unlike CP rights is not supported by practice as there is both national and international trend of adjudicating the same rights.

### 3.2. DPSP concept and background

DPSP are the ideals which states use as a base in the formulation of policies and making laws in order to secure social, economic and political justice.<sup>31</sup> They are principle which contains aims and objects of the state under the Constitution.<sup>32</sup> Being framed in terms of state duties instead of individual entitlements together with other principles and objectives that are not directly related to ESC rights, they require the state to carry out certain obligation in fulfillment of its mandate for the citizenry.<sup>33</sup> They are alleged only to guide the executive and legislative branch of the state to the exclusion of the judicial branch.<sup>34</sup> Hence, inclusion of the right under the DPSP is said to exclude the possibility of complaining about their violations in the regular Courts or quasi-judicial bodies.<sup>35</sup>

DPSPs therefore are taken to have two characteristic features: first they are fundamental to the governance of a Country and oblige the legislature to act in accordance with them. And secondly, they are said to be non-enforceable in Courts of law.<sup>36</sup>

The concept of DPSP traces its origin to the 1937 Constitution of Ireland. The non-justiciability of DPSP also seems to have been first stated in the same Constitution.<sup>37</sup> Article 45 of the 1937 Irish Constitution states that principles of social policy provided therein are intended for general guidance of the parliament in exclusion of the judiciary.<sup>38</sup> This is a clear statement to oust Courts from adjudicating ESC rights. This has highly influenced the Indian Constitution which has adopted similar model<sup>39</sup> and in turn influenced many Constitutions that came later all over the

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<sup>31</sup> SM Mehta, *A Commentary on Indian Constitutional law*, Deep and Deep publications, (1990), P. 215.

<sup>32</sup> Ibid.

<sup>33</sup> Abdi Jibril Ali and Kwadwo Appiagyei-Atua, *Justiciability of Directive Principles of State Policy in Africa: The Experiences of Ethiopia and Ghana*, Ethiopian Journal of Human Rights, Vol. 1, (2013), 1-40 at P.1.

<sup>34</sup> Takele (at note 13), P. 565.

<sup>35</sup> Ibid.

<sup>36</sup> Bertus De Villiers, *Directive Principles of State Policy and Fundamental Rights: The Indian Experience*, South African Journal on Human Rights, Vol. 8 (1992):29-49, P. 6.

<sup>37</sup> Abdi Jibril Ali and Kwadwo Appiagyei-Atua (at note 33) P. 5.

<sup>38</sup> Ibid.

<sup>39</sup> BK Sharma, *Introduction to the Constitution of India*, Prentice Hall India Pvt. Limited (2007), P. 125.

world. Nigerian Constitution also adopted similar model by expressly providing for non-justiciability of ESC rights.<sup>40</sup> However, in jurisdictions like Ethiopia and Ghana the judiciary is not clearly excluded from adjudicating ESC rights. I have pointed above that both the Constitution of Ethiopia and Ghana has no explicit statement to deny court adjudication of ESC rights. The Constitution of Ethiopia even incorporated both CP rights and ESC rights under its NPPO.

Although, DPSP usually include principles related to CP rights they are most of the time associated with ESC rights.<sup>41</sup> This association also seems to have resulted from the 1937 Constitution of Ireland and the Constitution of India that came later as their DPSP provisions provide only for ESC rights. This has inevitably aided those arguing against justiciability of ESC rights. But this is against contemporary understanding of human rights as universal, indivisible, interrelated and interdependent, where looking for a way out to make DPSPs justiciable is needed.

### **3.3. Constitutional guarantee of ESC rights as DPSP or justiciable rights**

ESC rights might be excluded from Constitution of a given Country. It may also be included as DPSP or explicitly incorporated in the substantive part of the Constitution as it is in South Africa.<sup>42</sup> On the other hand it is also possible for some ESC rights to be included as DPSP and some others as justiciable rights. In countries like; Lesotho, Namibia, Nigeria and Sierra Leone ESC rights are provided as non-justiciable DPSP.<sup>43</sup> In jurisdictions like; Ethiopia, Ghana, the Gambia and Uganda they form part of both fundamental rights and DPSP. But it is debated if provisions of NPPO of the FDRE Constitution are similar with DPSP. In some other legal systems like; Botswana, Tunisia, Zambia and Zimbabwe no legal guarantee is given to ESC rights at all.<sup>44</sup>

However, it would be incorrect to assume that the distinction between the fundamental rights and directive principles will result in justiciability of the former and non-justiciability of the later. The fundamental rights contain various rights that can be said to have a social, economic, cultural

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<sup>40</sup> Section 6(6) (C) of Nigerian Constitution states the Judicial power vested in accordance with the Constitution shall not, except as otherwise provided by the Constitution, extend to any issues or questions related to Fundamental Objectives and Directive Principles set out therein.

<sup>41</sup> Wiktor Osiatynski, *Human Rights and Their Limits*, Cambridge University Press (2009) P. 121.

<sup>42</sup> See Section 23-31 of the South African Constitution.

<sup>43</sup> Takele, (at note 13) P. 557.

<sup>44</sup> Ibid.

and educational nature.<sup>45</sup> They represent more than traditional conception of CP rights.<sup>46</sup> It is obvious therefore, that ESC rights can be provided either non-justiciable DPSP or/and as fundamental rights violation of which is to be adjudicated by the Court of law. Hence, the conception that all ESC rights only constitute non-justiciable DPSP, especially when it is not clearly claimed by the constitution is futile. At least State obligation to respect and protect the right to property, means of livelihood, and shelter for instance are as immediate and absolute as typical CP rights, the right to life. Hence, they shall better be taken as justiciable fundamental rights not DPSP. Therefore, ESC rights can make part of non-justiciable DPSP or justiciable fundamental rights, or some of them might be justiciable and some non-justiciable DPSP as Countries Constitution may provide.

On the other hand the 1937 Irish constitution, from which the concept of DPSP has said to have originated, clearly states that DPSP are not justiciable.<sup>47</sup> It puts DPSP beyond the reach of the Courts. It provides that the 'principles of social policy set forth in the article are intended for the general guidance of Irish national parliament, the Oireachtas.<sup>48</sup> The article further provides that the application of those principles in the making of laws shall be the care of the national parliament exclusively, and shall not be cognizable by any Court.<sup>49</sup> This is done to clearly tell the right holders that they cannot take to courts of law violations related DPSP. Similar clear statement is logically expected from Constitutions which came later for it will help in knowing certainly whether what is provided as DPSPs are meant for judicial adjudication or not. As human rights in general or ESC rights in particular are favored to be justiciable, than otherwise in cotemporary understanding, deviation from this at least demands clear statement providing the rights are not justiciable. But, still this statement by the Constitution shall not serve as an excuse for violation of these rights in a given state. This especially holds true when seen in relation state obligation to respect and protect.

Besides, in jurisdictions like Ethiopia and Ghana the judiciary is not clearly excluded from adjudicating ESC rights. I have pointed above that both the Constitution of Ethiopia and Ghana has no explicit statement to deny court adjudication of ESC rights. Absence of this kind of clear

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<sup>45</sup>Bertus De- villier, (at note 36), P. 31.

<sup>46</sup> Ibid.

<sup>47</sup> See The Constitution of Ireland, 1937, Article 45, Available at: [http://en.wikisource.org/wiki/constitution\\_of\\_Ireland\\_\(original\\_text\)](http://en.wikisource.org/wiki/constitution_of_Ireland_(original_text)).

<sup>48</sup> Ibid

<sup>49</sup> Abdi jibril Ali and Kwadwo Appiagyeyi-Atua, (at note 33), P. 5.

statement can therefore better taken to mean what is stated as DPSP is justiciable than otherwise. This especially holds true in Ethiopia where, the Constitutions provide ESC rights both as justiciable fundamental rights and DPSP without any ouster provision. Therefore, any argument that claims ESC rights provided under NPPO of the FDRE Constitution are non-justiciable DPSP is not warranted.

#### **3.4. Implication of quartet state duties in relation to ESC rights and DPSP**

As has been discussed before under 2.3, involvement of costs in realization of ESC rights is among arguments raised against justiciability of ESC rights. Both provision of remedies in case of violation and any positive activity meant for realization of these rights is said to involve cost, which is not always available and makes adjudicating failure in any of state duties impossible. However, this argument seems to emanate from failure to understand nature of states obligation in realization of human rights in general and ESC rights in particular. I have seen under similar section that not all obligations of states in realization of ESC rights demand resources. Duty to respect ESC rights is cost free as CP rights are claimed to be. Duty to protect and promote requires even much less resources than what is needed to realize CP rights. Therefore, the argument against justiciability of ESC rights based on involvement of resource seems to emanate from tendency that emphasis duty to fulfill aspect of state duties, a duty which is resource intensive in some way.

However, except for duty to fulfill which is somehow resource intensive, it is unreasonable to take other duties of the state in relation to ESC rights realization resource intensive and take them as a cause to render the rights non-justiciable DPSPs.

Duty to respect ESC rights implies that states must refrain from taking any action that is against individual's enjoyment of these rights. The African Commission for instance has clarified duty to respect. It has stated that obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of ESC rights.<sup>50</sup> This obligation primarily require states to refrain from interfering directly or indirectly with enjoyment of all human rights and freedom of the individuals to use material resources alone or in association with others to enjoy the right

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<sup>50</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011), Para. 5

in question.<sup>51</sup> Respecting ESC rights obliges states, inter alia, not to adopt laws and other measures, and to repeal laws and policies, administrative measures and programs that do not go along these rights.<sup>52</sup> It requires the states to cease any acts that directly or indirectly violate the right. This obligation of states therefore, needs no resources as claimed in case of CP rights. However, most violations of ESC rights are because of government's failure to respect. For instance the right not to be evicted from ones home involves zero cost from the government. Arbitrary denial of access to the existing institutions providing services related to ESC rights like schools, health care centers and others results in violation of these rights but is not related to lack of resources in any way. Also in rights to social security states are only expected to refrain from engaging in any practice or activities that denies or limits equal access to adequate social security and unreasonably or arbitrarily interfere with institutions or traditional arrangements meant to serve similar purposes.<sup>53</sup> However, state failure to respect a human right is often thought of only in the context of CP rights.<sup>54</sup>

From duty to respect perspective therefore, it is impossible to mark deference between ESC rights and CP rights and designate the former as non-justiciable DPSP. Therefore, as the escape hatch of resource demanding nature of ESC rights is closed in relation to this duty of the states, any violation of these rights that happens because of failure of the state to live up to this duty shall be adjudicated by Court of laws. It is reasonably impossible for states to put off their duty to respect these rights by providing them to be DPSP.

The rest of state duties in relation to ESC rights are also not equally resource intensive. Duty to protect demands states to intervene in order to control the conduct of individuals or non-state actors that has resulted or is about to result in violation of ESC rights. Where third party infringes these rights the public authorities should act to preclude further violations and to guarantee access to legal remedies for any victims of the infringement.<sup>55</sup> This can be achieved through the reaction

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<sup>51</sup>Sisay Bogale Kibret, *Competence and Legitimacy of Ethiopian Courts in the Adjudication of Socio-Economic Rights: An Appraisal of The Challenges and Prospects*, (2010), P. 22, Available at: <https://chilot.files.wordpress.com/2013/05/competence-and-legitimacy-of-ethiopian-courts-in-the-adjudication-of-Socio-Economic-rights.pdf>.

<sup>52</sup> Ibid.

<sup>53</sup> General Comment no 19, The Right to Social Security (Article 9), Committee on Economic Social and Cultural rights, thirty-ninth session, 2008.

<sup>54</sup> Mariette Brennan, *To Adjudicate and Enforce Socio-Economic Rights: South Africa proves That Domestic Courts Are A Viable Option*, P.66, Available at: <http://www.austlii.edu.au/au/journals/QUTLaw/JJI/>

<sup>55</sup> Hand Book for National Human Right Institutions, Economic Social and Cultural Rights (2005), P. 17, Available at: <http://www.ohchr.org/Documents/Publications/training12en.pdf>

of traditional government institutions like law makers, administrative bodies and police. This also demands same or lesser amount of resources than resources needed to protect CP rights. When individuals or non-governmental institutions act in violation of ESC rights of others, all these government machineries shall act to stop the same. Failure to do so cannot mainly or always be attributed to lack of resources. Claiming ESC rights to be non-justiciable DPSP because of cost involvement is therefore not sound. It is also possible for Courts of law to adjudicate states failure to satisfy their obligation in relation to ESC rights with the existing systems and institutions without demanding additional resources from the government. Or sometimes only minimal resources might have been required to protect these rights.

In *SERAC* case for example the government of Nigeria is alleged to have not required oil companies or its own agencies to produce basic health and environmental impact studies when allowing production of oil in Ogoni land, failing to satisfy its duty to protect.<sup>56</sup> The African Commission then found the government of Nigeria in violation of its duty to protect the Ogoni people's right to health and housing and order the government to ensure preparation of environmental and social impact assessment for any future oil developments in addition to specific remedy of compensation for those affected by the violation at hand.<sup>57</sup> It is therefore not reasonable to claim duty to protect ESC rights entails cost and this duty can be postponed to sometime in the future by providing the right as DPSP. Duty to protect ESC rights may not demand more resource than duty to protect CP rights. In most cases this duty can be achieved through the existing system and budget. Therefore, duty to protect has to be achieved immediately and states failure to do so shall be brought before the judiciary.

### **3.5. Prohibition of retrogressive measures and its connotation on justiciability of DPSPs.**

Retrogressive measures are measures that directly or indirectly result in backward step with respect to the enjoyment of rights recognized by ICESCR and other related regional covenants.<sup>58</sup> It is the result of limitation or cut in scope of substantive rights protection, increased requirements demanded to access established rights and negative change in public policy in

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<sup>56</sup> See *SERAC* (at note 27)

<sup>57</sup> *Id.*, Para.

<sup>58</sup> Natalia Torres Zuniga, *Justiciability of Regressive Measures of Social Rights. Some Reflections About Their Judicial Protection in Latin America*, P. 1, Available at: <http://www.jus.uio.no/wcccl/w4-zuniga>

relation to ESC rights.<sup>59</sup> Realization of ESC rights demands uninterrupted efforts from the states. There shall be no regression from what has already been achieved. Hence both the legislative and executive branches of the government shall be careful in doing their jobs related to ESC rights or any other activities that have indirect implication on the same right so that there will be no regression from what is already been achieved.

The CESCR has also sought to discourage retrogressive measures. The Committee provides duty to progressive realization impose an obligation to move as expeditiously and effectively as possible towards the full enjoyment of the rights.<sup>60</sup> This expeditious and effective move allows no deliberate and unjustified retrogressive measures. Any deliberate retrogressive move from what has been achieved requires careful consideration and would only be justified by reference to totality of the rights provided for in the covenant.<sup>61</sup> It shall also be seen in relation to the use of maximum available resources.<sup>62</sup> States are expected to act with care and deliberation in taking measures that might negatively affect enjoyment of ESC rights. The prohibition therefore, extends to measures taken negligently that reduce enjoyment of these rights.<sup>63</sup> The African Commission also provides any measures that reduce the enjoyment of ESC rights by individuals or peoples are *prima facie* in violation of the African Charter.<sup>64</sup>

Reduction or deviation of public resources meant for the satisfaction of ESC rights or deterioration of certain services related to these rights are retrogressive measures that shall be carefully evaluated. Withdrawal or reduction of budgets for realization of the rights shall also be carefully examined. States shall not take away what they had been providing for the satisfaction of these rights. Government budget for public health service and education sector must not be cut short arbitrarily. Any new legislation or policy related to ESC rights also has to be strictly considered so that they will not negate the existing level of enjoyment. It is impossible to withdraw established ESC rights through new legislations and to negatively affect rights being

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<sup>59</sup> Robert Larsson, *The Justiciability of Socio Economic Rights- Courts As Protectors of Economic and Social Rights: The Case of South Africa*, Lund University, (2009), P. 22, Available at: [lup.lub.lu.se/student-papers/record/1559477/file/1564998.pdf](http://lup.lub.lu.se/student-papers/record/1559477/file/1564998.pdf)

<sup>60</sup> General Comment No. 3 (at note 15), Para 9.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Hand book, (at note 54), P. 28.

<sup>64</sup> Guidelines (at note 50), Para. 20.

enjoyed through new policies. For instance states shall not leave some one or a given community homeless by evicting them from their home or even from state owned houses.

Any new legislation or policy or actions that results or is about to result in withdrawal or minimization of previous level of enjoyment of ESC rights shall be adjudicated by Court of laws. States shall not be allowed to defend violations resulting from these kinds of negative move from reaching the Court by claiming DPSP nature of the rights in the country's Constitution or other bylaws. Therefore, violations of ESC rights because of deliberate or negligent retrogressive measures shall be enforced by the judiciary. If the state provides these rights as DPSP despite being member state to international treaties like ICESCR and ACHPR, their duty not to take retrogressive measures shall be intact.

### **3.6. The minimum core obligation and DPSP**

Arguments favoring DPSP nature of ESC rights are also futile when seen in relation to the concept of minimum core obligation set by CDESCR. The Committee has stated that member states have a minimum core obligation under ICESCR to ensure that individuals enjoy basic level of enjoyment of each ESC rights.<sup>65</sup> This concept of minimum core seeks to establish a minimum legal content for notoriously indeterminate claims of economic and social rights.<sup>66</sup> The concept suggest that there are degrees of fulfillment of a right and that certain minimum level of fulfillment takes priority over a more extensive realization of the right.<sup>67</sup> It seeks to confer a minimum legal content<sup>68</sup> for ESC rights without which ICESCR will lose its raison d'être.<sup>69</sup> States therefore are expected to satisfy at least this minimum obligation and failure to do so shall be taken to the court of law. They can only be relieved of being liable for violation of these rights if only they can show failure to meet this minimum obligation has happened in spite of using every available resource including international assistances<sup>70</sup> to the realization of ESC rights as a matter of priority which is always difficult.

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<sup>65</sup> General comment No 3, (at note 15) Para, 10.

<sup>66</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept In Search of Content*, P. 1, Available at: <http://www.austlii.edu.au/au>.

<sup>67</sup> Joie Chowdhury, *Judicial Adherence To A minimum Core Approach to Socio-Economic Rights-A comparative*, P. 2, Available at: [http://scholarship.law.cornell.edu/lps\\_clacp/27](http://scholarship.law.cornell.edu/lps_clacp/27).

<sup>68</sup> Mesenbet Assefa, *Defining The Minimum Core Obligation-Conundrums In International Human Rights Law and Lessons From The Constitution of South Africa*, *Mekele University Law Journal*, Vol. 1. No.1 (2010),PP. 48-70 at: P. 54.

<sup>69</sup> General Comment No 3, (at note 15), Para, 10.

<sup>70</sup> Id., Para.13

Since General Comment 3 in 1990, the CESCR has used the minimum core obligation to give substance to the Covenants enumerated rights to food, education, health and the emerging right to water.<sup>71</sup> These works of minimum core concept is to assist in the adjudication of ESC rights in domestic court and supranational tribunals.<sup>72</sup> This work of the Committee is meant to ease the usual claim of indeterminacy. Once the Committee gives minimum core meaning to a given ESC right, the usual claim about their content will be absent where adjudication will be possible.

Minimum obligation of the states is intact even where there are resource constraints. States shall strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstance.<sup>73</sup> CESCR has further stated that resource constraints shall in no way eliminate monitoring of ESC rights realizations.<sup>74</sup> Hence courts shall be allowed to adjudicate non fulfillment of the minimum core obligation of ESC rights even when resource constraint is known to exist.

Some national Courts are using the concept of minimum core to give content to ESC rights. The Constitutional Court of Colombia for instance explicitly embraces the minimum core approach in socio-economic rights adjudication.<sup>75</sup> The court uses the minimum core set by the CESCR in adjudicating ESC rights violation.<sup>76</sup> Following similar approach as CESCR, the Court distinguished an essential minimum core of the right to health which was to be immediately enforceable and other elements that are subject to progressive realization.<sup>77</sup>

Though explicit mentioning of minimum core is absent the concept also appears in the Indian case laws.<sup>78</sup> Not only reading the right to health into the right to life, the supreme court of India also clearly states emergency medical treatment as a non-negotiable core minimum right.<sup>79</sup>

Regionally, the African Commission made statements suggesting that it has adopted the minimum core obligations concept developed by the CESCR in the SERAC case. It stated that

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<sup>71</sup> CESCR, General Comments, No. 12, 13, 14, 15.

<sup>72</sup> Katharine G. Young, (at note 66), P. 46

<sup>73</sup> General Comment No 3, (at note 15) Para, 11.

<sup>74</sup> Ibid

<sup>75</sup> Joie Chowdhury, (at note 67), P. 8.

<sup>76</sup> Ibid.

<sup>77</sup> See Alicia Ely Yamin and Oscar Parra Vera, *The Role of Courts in Defining Health Policy: The Case of The Colombian Constitutional Court*, Available at: <http://www.law.harvard.edu/programs/hrp/documents/>.

<sup>78</sup> Joie Chowdhury, (at note 67), P. 8.

<sup>79</sup> Ibid.

the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources.<sup>80</sup> It stated similarly that the minimum obligation embodied in the right to shelter obliged the Nigerian government not to destroy the houses of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes.<sup>81</sup> The Commission has also followed similar approach in the case *Purohit and others V Gambia* where it pronounced that article 16 of the Charter on the right to health, obliges the state of Gambia to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realized in all its aspects without discrimination.<sup>82</sup> It could therefore be argued that the minimum core obligations implicit in socio-economic rights under the African Charter are claimable immediately.<sup>83</sup>

At the UN level in addition to general comments of CESCR, the Limburg principle also states that state parties to ICESCR are under obligation to guarantee respect for minimum rights of survival for all and independent of available resources.<sup>84</sup>

Therefore, Courts in member states to the ICESCR and ACHPR shall also follow similar approach to adjudicate ESC rights violations. They shall determine minimum core content of these rights violations of which shall be adjudicated by court of laws. Violations of minimum core obligations are therefore, justiciable which means states cannot avail themselves non-justiciability providing these rights as DPSP.

### **3.7. Indirect justiciability of ESC rights and DPSP**

As it is clear from the discussion above justiciability of ESC rights has been debated for one or another reason. I have discussed dichotomy considering ESC rights as progressive and non-justiciable and CP rights as immediate and justiciable is prevalent in legal jurisprudence. Countries have provided ESC rights as non-justiciable DPSP in their Constitution to deny adjudication of their violation by Court of law, while providing for CP rights to be justiciable as has been discussed. But still indivisibility and interrelatedness of human rights has necessitated a way out so that Courts can also adjudicate violations of ESC rights. This leads to the concept of

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<sup>80</sup> SERAC, (at note 27), Para.65.

<sup>81</sup> Id., Para. 61.

<sup>82</sup> African Commission on Human and Peoples Right, *Purohit and others V Gambia* (2003), Para, 84.

<sup>83</sup> Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends In International and Comparative Law*, Cambridge University press, 2008, P. 326.

<sup>84</sup> Limburg Principles (at note 14), Principle 25.

direct justiciability of ESC rights for those rights enshrined as justiciable fundamental rights by the Constitution or other bylaws of a Country and indirect justiciability for those provided as non-justiciable DPSP.

Where the Country's Constitution provide that violations of ESC rights can be brought before Courts for adjudication it will be easy to invoke remedy under that specific provision, which is direct justiciability. This kind of justiciability is always applicable in a country that has explicitly incorporated SEC rights in the substantive part of its Constitution like that of the CP rights and has subjected these rights to judicial enforcement. As I have discussed in Chapter two 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.<sup>85</sup> In such cases, ESC rights are provided equal Constitutional protection with that of the CP rights. As a result, the SEC rights provisions of the Constitution are enforceable before Court of law and are capable of being used as a base for legal action.<sup>86</sup> But still vagueness of substantive content of ESC rights might create difficulty of establishing a right using provisions providing for them. Takele argued, for example, that the relatively obscure normative content of ESC rights under the African system of human rights has lead to more difficulty for activists and litigants in spotting the breaches with ease and specificity.<sup>87</sup> He further stated that this has been a push factor in using direct justiciability of the rights in question.<sup>88</sup>

On the other hand the chance of using direct justiciability approach is almost totally absent in case where ESC rights are provided as non-justiciable DPSP or note provided for at all. In such cases, it will be almost impossible for litigants to claim these rights before Court of laws as Courts are excluded from adjudicating related violations in the first case and substantive right to depend on by litigant is absent in the latter.

This problem necessitates a look for indirect justiciability which is applicable by interpreting other rights in the Constitutions that will give an impetus in according due protection to social

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<sup>85</sup>Fons Coomans, *Reviewing Implementation of Social and Economic Rights: An Assessment of The "Reasonableness" Test As Developed By The South African Constitutional Court* (2005), P. 4, Available at: [http://www.zaoerv.de/65\\_2005/65\\_2005\\_1\\_a\\_167\\_196.pdf](http://www.zaoerv.de/65_2005/65_2005_1_a_167_196.pdf).

<sup>86</sup>Amare Tesfaye, *Justiciability of Socio-Economic Rights In The Federal Democratic Republic of Ethiopia*, (2010) P. 83, Available at: <https://chilot.me/llm-thesis-papers-ii>.

<sup>87</sup>Takele, (at note 8), P. 145.

<sup>88</sup>Ibid.

and economic rights indirectly.<sup>89</sup> This approach is based on the use of expansive and progressive interpretation of the more flourished and expressly protected civil and political or cross-cutting rights like; the right to equality, the right to judicial protection and remedy and the right to due process.<sup>90</sup> The use of these rights to redress the violation of ESC rights is not questionable for violation of the latter will inevitably involve violation of the former.<sup>91</sup> Furthermore, the approach has been successfully put to good use for enhancing justiciability of ESC rights in Inter-American and European human right systems and even in national jurisdictions as a means to litigate and establish ESC rights.<sup>92</sup> The approach also is put into use in the African human rights system. The African Commission has established that the right to life shall be interpreted broadly to include the right to health and other ESC rights which are constitutive elements of dignified life.<sup>93</sup> Putting the same in to practice in *SERAC* case for instance, Although, there is no explicit mention of the right to food or housing under the ACHPR, the African Commission has established these rights from CP rights such as; the right to life and dignity.<sup>94</sup>

In the European human rights system also, the European Social Committee has successfully applied the non- discrimination guarantee under the revised European Social Charter to find France in violation of the right to education in the case *Autism Europe v France*.<sup>95</sup> In a similar vein, the Inter-American Court of Human Rights decided that the Paraguayan state had violated the right to life for failing to ensure access to food, water and health services to 19 members of an extremely poor indigenous community.<sup>96</sup> In the African human rights system also though, no explicit mention of the right to food and housing is made under the African Charter innovative approaches to the rights by the litigants and purposive interpretation of the Charter by the

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<sup>89</sup>Sandra Liebenberg, *The Protection of Economic, Social and Cultural Right In Domestic legal system*, In Economic Social and Cultural Rights: A Text book. Second Rev.edn, A. Eideetal (ed.s), Martinus Nijhoff Publishers, (2001), P.56-57.

<sup>90</sup>Amsalu Darge Mayessa, *The Integrated Approach: A Quest For Enhancing Justiciability of Socio-Economic Rights Under the Ethiopian Constitution*.(2010), P. 60, Available at: <https://chilot.me/llm-thesis-papers-ii>.

<sup>91</sup>Takele, (at note 8 ), P. 146.

<sup>92</sup>Id., P. 162.

<sup>93</sup>General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Para, 42 and 43, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples' Rights Held From 4 to 18 November 2015 in Banjul, The Gambia.

<sup>94</sup> See *SERAC* (at note 27).

<sup>95</sup> European Social Committee, *International Association Autism-Europe (IAAE)v France* (Complaint No. 13/2002)

<sup>96</sup>Inter American Court of Human Rights, *Sawboyamaya Indigenous Community V. Paraguay* (2006).

Commission has helped establish the same from more explicit rights such as the right to life and dignity.<sup>97</sup>

Similar approach is also being applied in some domestic jurisdictions including in those providing for ESC rights only as non-justiciable DPSP. India's jurisprudence for instance reveals one of the best examples in the world in terms of the justiciability of ESC rights, with the right to life interpreted expansively by the Supreme Court to embrace the right to food.<sup>98</sup> In *People's Union for Civil Liberties v. Union of India*, the Supreme Court has decided that state failure to implement food schemes and distribution in cases of starvation and risk of starvation, even when there were grain stocks available, amounted to a violation of the right to life.<sup>99</sup>

Therefore, although, direct justiciability of ESC rights is debatable and difficult especially in jurisdictions where they are provided as DPSP or not provided for at all, they can possibly be adjudicated via established CP rights. Hence, it is unsound to claim providing ESC rights as DPSP will render them non-justiciable at all.

### **3.8. Conclusion**

Justiciability refers to whether a given right has the quality or if it is appropriate for review by a Court. It grants the right holders a legal course of action to enforce their rights. ESC rights are claimed not to have this quality or appropriateness to be reviewed by a court and many states failed to constitutionalise these rights as justiciable. ESC rights are provided as DPSP in many jurisdictions like; India and Nigeria. They also form part of both DPSP and fundamental rights like in Ethiopia or might be absent from the constitution at all.

Although they include principles related to CP rights DPSP are most of the times associated with ESC rights. This can be traced to the Irish constitution of 1937 which provides only for ESC rights as DPSP. Not only providing these rights as DPSP the constitution clearly oust courts from enforcing related violations. However, this kind of ouster provision is lacking in some jurisdictions like Ethiopia and Ghana, which can aid arguments for justiciability of ESC rights in these countries.

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<sup>97</sup> Takele, (at note 8) P. 150.

<sup>98</sup> Henry J. Steiner et al, (eds), *International Human Rights In Context, Law, Politics, Morals* (3rd ed.), Oxford University press (2007), P. 322

<sup>99</sup> See Supreme Court of India, *People's Union for Civil Liberties V. Union of India and others*, writ petition No. 196 (2003).

Furthermore, it has been discussed that the need to provide for justiciable ESC rights has come to be pressing both at international, regional and domestic legal systems. The ACHPR is pioneering in placing ESC rights in an equal footing with the CP rights. The African Commission is also adjudicating violations of the same rights. At the UN level also the Limburg principles and Vienna declaration affirms justiciability of ESC rights. Furthermore, the CESCR has also stated that some of ESC rights and related government obligations are capable of immediate application. ESC rights violations are also being adjudicated in many domestic legal systems including where they are provided as DPSP like in India.

Some of state duties in relation to ESC right also imply justiciability of these rights. Duty to respect, protect and promote are less resource demanding compared to duty to fulfill. For instance, state duty to respect ESC rights demands no resource from government pocket. Duty to protect and promote can also be achieved using traditional government machineries. Even in case of duties that demand resources, CESCR clearly stated that, minimum core content of rights shall be identified and enforced by Courts. Similar approach is also followed by the African Commission. On the other hand deliberate and unjustified retrogressive measures that can take away the existing enjoyment of ESC rights shall be adjudicated by courts. The CESCR also prohibits similar moves.

Finally, it has been seen that, violations of ESC rights can be adjudicated via expansive and progressive interpretation of the expressly protected CP rights like, Non-discrimination, due process right and even the right to life and dignity. Hence, arguments presenting ESC rights only as non-justiciable DPSP is not warranted.

## CHAPTER FOUR

### DPSP AND JUSTICIABILITY OF ESCRIGHTS IN ETHIOPIA

Arguments against justiciability of ESC rights that I have discussed in Chapter two and three are also usual in Ethiopia. During the drafting of the FDRE Constitution whether ESC rights has to impose legal obligations on State and give legal entitlements to individuals or if they are only essential policy directives were debated, where they are finally decided to be both.<sup>1</sup> Nevertheless, there remains argument against justiciability of ESC rights in general and NPPO provisions of the Constitution in particular. Rakeb, considers these rights as mere aspirations meant to guide the government in the implementation of the Constitution and not to be adjudicated by court of laws.<sup>2</sup> Other scholars like Sisay, also claimed direct justiciability of ESC rights provided under NPPO provision is impossible.<sup>3</sup> They however, argue that these NPPO are only to be used as tool that guides the interpretation and construction of Fundamental Rights and Freedoms of the FDRE Constitution.<sup>4</sup>

These arguments against justiciability of ESC rights have also resulted in lesser adjudication of their violations by court of laws. Though, CP rights adjudication constitutes the daily task of the Ethiopian courts, ESC rights have got scant attention and are being marginalized.<sup>5</sup> Therefore, except for some rights, justiciability jurisprudence for ESC rights is underdeveloped in Ethiopia.<sup>6</sup> Though, there are direct or indirect adjudication of provisions of NPPO of the FDRE Constitution there are still claim of absence of related Court case. For instance, Abdi stated that no case concerning their justiciability is brought to Courts or quasi-judicial organs like the House of Federation.<sup>7</sup>

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<sup>1</sup> Danwood Mzikenge Chirwa and Lilian Chenwi (eds) *The Protection of Economic Social and Cultural Rights in Africa, International, Regional and National Perspective*, Cambridge University Press, 2016 P. 426.

<sup>2</sup> Rakeb Messele, *Enforcement of Human Rights In Ethiopia*, Research Sub-Contracted by Action Professionals' Association for the People (APAP) (2002), P. 29, available at: <http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf>.

<sup>3</sup> 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): 135-154, at 141-142, See also: Yitay BA, *The Critical Analysis of The Judicial Enforceability of Socio Economic Rights in Ethiopia*, University of Limpopo, 2011, P. 47.

<sup>4</sup> Ibid.

<sup>5</sup> Amare Tesfaye, *Justiciability of Socio-Economic Rights in the Federal Democratic Republic of Ethiopia*, (2010) P.111, Available at: <https://chilot.me/ilm-thesis-papers-ii/>, See also Danwood Mzikenge Chirwa and Lilian Chenwi (at note 1) P. 432.

<sup>6</sup> Ibid

<sup>7</sup> Abdi Jibril Ali and Kwadwo Appiagyei-Atua, *Justiciability of Directive Principles of State Policy In Africa: The Experiences of Ethiopia and Ghana*, *Ethiopian Journal of Human Rights*, Vol. 1, (2013), 1-40 at P.32.

In the opinion of the researcher this understanding of non justiciability of ESC rights under the Ethiopian Constitution has other sources in addition to the general objection against justiciability of these rights elsewhere, which I have discussed in chapter two. One is the confusion or doubt that is created because of inclusion of these rights under part of the Constitution that provides for the Countries NPPO and substantive part and unclarity of the Constitution about enforceability of these rights under the former part. The other reason emanate from not appreciating Ethiopia's international commitment to provide justiciable ESC rights and the actual practice on the ground. This Chapter therefore, is meant to evaluate impact of NPPO provisions of the FDRE Constitution on justiciability of ESC rights in Ethiopia, if they can render them non enforceable by Court of laws or not. Before getting in to its main subject the Chapter will briefly discuss the international aspect of arguments on justiciability of ESC rights in relation to Ethiopia.

#### **4.1. ESC rights under the FDRE Constitution and arguments against Justiciability of ESC rights in general.**

As has been discussed in chapter two arguments against justiciability of ESC rights have international dimension. Most of these arguments are based on alleged claim of vague, positive, resource demanding and progressive nature of the rights which we have seen are not self-sustaining. I have discussed that there are CP rights that are as resource demanding as some ESC rights or even more resource demanding sometimes, arguments based on resource demanding nature of these rights are baloney or they would have also render the former category of rights non-justiciable. The same is true in Ethiopia as the human rights provisions of the FDRE Constitution are verbatim copy of international human right treaties.<sup>8</sup> Not all ESC rights are resource demanding in Ethiopia and some are at least less resource demanding than their counter parts, CP rights. For instance, obligation of the state to respect the right to health, housing, education, food and social security as provided under Fundamental Bill of Rights part of the FDRE Constitution and or NPPO are achievable without resources. Hence, the State cannot present resource constraint as a pretext for violations in relation to this duty whether these rights are provided as NPPO or Fundamental Bill of Rights. The same is true with regard to State duty to protect these rights. Protecting violations of the right to health, housing, education and food for instance cannot demand more resources than what is needed for protection of the CP rights.

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<sup>8</sup> Human Rights provisions of the FDRE Constitution both in relation to ESC rights and CP rights are similar with what is provided under International bill of rights, UDHR, ICCPR and ICESCR. See The FDRE Constitution 1<sup>st</sup> year No. 1, 1995

Protection of these rights can be achieved using the traditional government institution including the executive, legislature and the judiciary as I have discussed under 3.4 above. Therefore, ESC rights under both part of the Constitution are justiciable alike in these regard and it is impossible to argue ESC rights under the NPPO provisions of the Constitution negatively impact justiciability of those rights provided under Fundamental Bill of Rights part of the Constitution. Furthermore, as I have discussed in chapter two, not all ESC rights are vague. For some ESC rights are even clearer than CP rights, claims generalizing all ESC rights as vague is not warranted. On the other hand the CESCR have also tried to reduce problem of vagueness of these rights and establish normative contents of specific ESC rights through its General Comments. It has been discussed that the Committee have tried to establish substantive contents of the right to health, the right to housing, the right to education, and the right to food through its General Comments.<sup>9</sup> I have also discussed that the Committee have construed the right to water from the explicitly provided right to food. Similarly the African Commission is also doing an esteemed job in elaborating state duties in relation to ESC rights and establishing constitutive elements of ESC rights provided in the ACHPR. The right to health, the right to education, the right to housing, the right to food and other ESC rights provided by the ACHPR is elaborated by the Commission.<sup>10</sup> Being a state party to the ICESCR and the ACHPR Courts in Ethiopia can alleviate problems of vagueness of these rights by utilizing the General Comments and guiding principle. It has also been discussed in Chapter two that claims about positive and progressive nature of ESC rights cannot sustain the argument that these rights non-justiciable. Some rights like the right not to be evicted from one's shelter most of the time needs abstinence from the side of the state. Duty of the states in relation to providing progressive ESC rights is also established to be concrete and enforceable by General Comment of the CESCR. Besides, the FDRE Constitution did not grant under its NPPO provisions for ESC rights that are positive and progressive in nature than what it provides for under its Fundamental Bill of Rights. Hence, it is not possible to logically argue these relatively clearer rights under NPPO will negatively impact justiciability of ESC rights under Fundamental Rights part of the Constitution.

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<sup>9</sup> See the discussion in chapter two.

<sup>10</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011)

## 4.2. How the FDRE Constitution guarantee ESC rights and its implication on justiciability

The FDRE Constitution has provided for ESC rights both under substantive part which is considered to be justiciable and under its NPPO which is said to be equivalent with non-justiciable DPSP by scholars like Rakeb and Sisay.<sup>11</sup> As the Constitution clearly obliges the three tiers of the government to respect and enforce rights provided under its Fundamental Bill of Rights in Chapter three,<sup>12</sup> arguments against justicibility of ESC rights in this part of the Constitution is not supported by claim of absence of enforcement provision. It is rather supported by arguments based on vagueness, progressiveness and resource demanding nature of these rights.<sup>13</sup> However, absence of similar provision under NPPO the Constitution can be claimed to be a cause for non-justiciability of ESC rights provided therein in addition to those general objections. Arguments against justiciability of ESC rights in the FDRE Constitution as a whole, also seems to have benefited from this.

Although it is more logical to argue ESC rights are justiciable as the Constitution did not oust Courts from adjudicating related violations, associating NPPO provisions of the Constitution with DPSP seems to have created a problem on enforceability of ESC rights including those provided as Fundamental Rights under Chapter three.<sup>14</sup> However, this does not mean that ESC rights are not considered legal rights and enforced before Courts of law.<sup>15</sup> Critical examination of the way ESC rights are incorporated under the FDRE constitution will help come up with contrary understanding.

Providing ESC rights both under its Fundament Bill of Rights and NPPO, the FDRE Constitution sets a unique example.<sup>16</sup> This can be taken as a need to emphasize these rights and setting them to be a priority in government's national policy. Moreover, ESC rights under NPPO provisions of the Constitution is clearer than those under Fundamental Bill of Rights and can be used in interpreting ESC rights guaranteed under the later part. The right to health, education, housing, food, social security and even the right to clean water are provided clearly under NPPO than

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<sup>11</sup>See Rakeb Messele (at note 2), P. 21 and Sisay Alemahu (at note 3), P. 141

<sup>12</sup> Article 13(1) of the FDRE Constitution reads: All federal and state legislative, executive and judicial organs at all level shall have the responsibility and duty to respect and enforce the provision of this Chapter.

<sup>13</sup>See Rakeb Messele (at note 2) and Sisay Alemahu (at note 3).

<sup>14</sup> Ibid.

<sup>15</sup>Esmael Ali *Rethinking Justiciability and Enforcement of Socio-Economic Rights in Ethiopia: International Context and Comparative Perspective*, P. 6. Available at: <https://chilot.me/llm-thesis-papers-ii>.

<sup>16</sup>Sisay Alemahu (at note 3) P. 38.

under Fundamental Rights part as I will discuss in a while. As Courts can utilize these comparatively clear provisions under the NPPO provisions to elucidate ESC rights under Fundamental Rights part, it can even be claimed that provisions of ESC rights under NPPO sets favorable ground for justiciability of those under Fundamental Bill of Rights part than otherwise. As the Constitution gave everyone the right to bring justifiable matter to a court of law and obtain judgment<sup>17</sup> and for the Constitution is a justiciable document as a whole<sup>18</sup> violations of ESC rights both under Fundamental Bill of Rights and NPPO shall be adjudicated before Courts. Furthermore, it has been discussed in Chapter three that, as enforcement of human rights in general is favored than otherwise, claiming ESC rights non-justiciable shall at least require clear provision in the Constitution that oust Courts from entertaining their violation. The 1937 Constitution of Ireland which is said to be source of the concept of DPSP is clear in this regard as it oust Courts from adjudicating violations related to its DPSP provisions. The Constitution unequivocally states;

The principles of social policy set forth in this article are intended for the general guidance of the Oireachta. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognizable by any Court under any of the provisions of this Constitution.<sup>19</sup>

Similar ouster provision is included in other constitutions that came later. Indian and Nigeria's constitutions are seen as best examples.<sup>20</sup> But, experience in these Countries is otherwise. The Indian we have seen that Supreme Court has crafted a way in to adjudicate violations of ESC rights which are provided to be DPSP and non justiciable by the Constitution.<sup>21</sup> In Nigeria also the Supreme Court has held that though, DPSP are not justiciable by themselves they can have legal effect if enacted into law in furtherance of fundamental values and objectives they represent.<sup>22</sup> This shows how ESC rights are being adjudicated by court of laws even in jurisdiction

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<sup>17</sup> FDRE Constitution (at note 8), Art, 37

<sup>18</sup> Abdi Jibril Ali and Kwadwo Appiagyeyi-Atua, ( at note 7) P.111.

<sup>19</sup> See article 45 of the 1937 National Constitution of Ireland, Available at: [https://en.wikisource.org/wiki/constitution\\_of\\_Ireland\(original\\_text\)#top](https://en.wikisource.org/wiki/constitution_of_Ireland(original_text)#top)

<sup>20</sup> See Article 37 of Indian Constitution and section 6(6)(c) of Nigerian Constitution

<sup>21</sup> See Supreme Court of India, *People's Union for Civil Liberties V. Union of India and others* , (2003)

<sup>22</sup> Atudiwe P. Atupare, *Reconciling Socio Economic Rights and Directive Principles With a Fundamental Law of Reason in Ghana and Nigeria* , P. 91, Available at: [http://harvardhrj.com/wp-content/uploads/2014/07/V27\\_Atupare.pdf](http://harvardhrj.com/wp-content/uploads/2014/07/V27_Atupare.pdf).

where they are provided to be non-justiciable DPSP let alone where a Constitution is silent about their non-justiciability.

On the other hand in Ghana where Courts are not clearly ousted from adjudicating violations related to provisions of DPSP in the Constitution, Justice Adade has claimed in *New patriotic Party v Attorney general*(31<sup>st</sup> December case) that the absence of ouster provision shall mean courts are allowed to adjudicate related violations.<sup>23</sup> He further stated that;

The evidence to establish non-justiciability must be internal to the Constitution, not otherwise, for the simple reason that if the proffered proof is external to the Constitution it must of necessity conflict with it, and be void and inadmissible; we cannot add words to the Constitution in order to change its meaning.<sup>24</sup>

The above position is reiterated in the subsequent case of *Ghana Lotto Operators Association & Others v National Lottery Authority* where Justice Date-Bah stated that there is no language in the Constitution which provide DPSP provisions are not of and by themselves legally enforceable by any Court.<sup>25</sup>The Court has held that, rights provided as DPSP in the Constitution are becoming, by international practice and the domestic practice in many jurisdictions, just as fundamental as other rights and therefore, enforceability of these rights is a legitimate purpose for the Court to seek to achieve through appropriate purposive interpretation.<sup>26</sup>

Thus, considering the experience of justiciability of ESC rights even in jurisdictions where they are provided as non-justiciable DPSP like in India and the experience of Ghana where silence about justiciability is interpreted positively to render the rights justiciable, ESC rights under NPPO of the FDRE Constitution shall be enforceable by themselves than rendering ESC rights under Fundamental Bill of Rights of the Constitution non-justiciable.

Moreover, unclarity of the FDRE Constitution about enforcement of ESC rights under NPPO can in no way be taken to hinder enforcement of these rights. Reading unclarity of the Constitution as prohibition of enforcement will lead to absurd conclusion that all laws that do not make reference to their enforcement by Court would be non-justiciable.<sup>27</sup> This will also render the traditionally enforceable CP rights under NPPO non-justiciable as the later contains both ESC rights and CP

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<sup>23</sup> See Supreme Court of Ghana, *New patriotic Party v Attorney general*(31<sup>st</sup> December case) (1994).

<sup>24</sup>Kofi Quashigah, The 1992 Constitution of Ghana, P. 15, Available at:[http://www.icla.up.ac.za/images/country\\_reports/ghana\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/ghana_country_report.pdf).

<sup>25</sup> Ibid., See also Supreme Court of Ghana, *Ghana Lotto Operators Association & Others v National Lottery Authority* (2007-2008).

<sup>26</sup>Abdi Jibril Ali and Kwadwo Appiagyeyi-Atua (at note 7), P. 37.

<sup>27</sup>Id., P. 32

rights. If ESC rights under NPPO provisions of the Constitution is said to be non-justiciable for the mere absence of enforceability provision, it logically follows that Principles of National defense<sup>28</sup> and Political Objectives<sup>29</sup> are also non-justiciable. However, one cannot legally argue that Ministry of Defense will not be held accountable before Court of law if the Armed Force acted in partisanship while carrying out its function.<sup>30</sup>

Practically also cases concerning justiciability of ESC rights are not totally absent in Ethiopia. Though, very much meager there are even practical adjudication of ESC rights under NPPO. In the case between *Abadit Lemlem v Municipal city of Zalanbasa and others* for instance the Ethiopian Supreme Court Cassation Division courageously claimed its judicial power and decided on the right to housing.<sup>31</sup> In the case at hand the claimant pleaded violation of her right to housing as she is expelled from the house she constructed using government compensation, because she is alleged to be non citizen. The Supreme Court has reversed the decision of Tigray Supreme Court which had dismissed the case as non-justiciable.<sup>32</sup> Being hesitant to assert the right to housing under NPPO,<sup>33</sup> the Cassation Division did not mention the Right to housing in deciding the case. But, reading the decision one can see that, what was actually declared by this it is justiciability of the right to housing provided under NPPO. The Court clearly enunciated that it is impossible to argue violation of this right is to be seen administratively than by Court of laws.<sup>34</sup> For decisions by this Court have a binding effect on subordinate Courts both at federal and regional levels, the latter have duty to adjudicate similar violations.<sup>35</sup> Furthermore, as the right to housing is not explicitly provided for under Fundamental Rights part of the Constitution the case makes a good example which shows justiciability of ESC rights under NPPO.<sup>36</sup> The rights to property and labour rights are also being enforced before Courts.<sup>37</sup> Surprisingly, absence

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<sup>28</sup> FDRE Constitution (at note 8) Art, 87.

<sup>29</sup> Id., Art. 88.

<sup>30</sup> Art. 87(5) of the FDRE Constitution Prohibits partisanship of the Armed Force

<sup>31</sup> Amsalu Darge Mayessa, *The Integrated Approach: A Quest For Enhancing Justiciability of Socio-Economic Rights Under the Ethiopian Constitution*, (2010), P. 116 Available at: <https://chilot.me/llm-thesis-papers-ii> .

<sup>32</sup> W/o Ababadit Lemelem Vs Zalambassa City Administration Office and Ato Brihan Zerfe, Federal Supreme Court Cassation, file No-48217, Vo.11 (2004 E.C).

<sup>33</sup> FDRE Constitution (at note 8), Art, 90.

<sup>34</sup> Abadit Lemlem V Zalambesa City (at note 32) Para., 6

<sup>35</sup> Federal Courts Proclamation Re-amendment Proclamation No 454/2005, Art., 2(1).

<sup>36</sup> The Right to Housing is not mentioned under Article 41 of the FDRE Constitution. But one can drive this right in to this article by broadly interpreting sub-Article 4 of the provision.

<sup>37</sup> See for instance; *Addis Abba City Agriculture Bureau V Abebe Abay and others*, Federal Supreme Court Cassation Division, file No. 39539, Vol. 9. (2003) See also *Ethiopian Roads Authority V Kedir Halenjiso and Others*, file No. 52496, Vol. 11 (2004).

of judicial enforcement of ESC rights is contested even by scholars who had been considering NPPO provision of the Constitution to be similar with DPSP and is devoid of direct enforcement by Courts. For instance, arguing against absence of judicial enforcement of ESC rights in Ethiopia, Sisay himself has observed that Courts in the Country are already engaged in adjudication of these rights, including those under NPPO.<sup>38</sup>

Besides, bulks of Constitutional provisions also find their application through other specific legislations.<sup>39</sup> Even if, Courts and litigants alike have been criticized for not applying direct provision of the Constitution in Ethiopia<sup>40</sup>, Courts are adjudicating ESC rights in their everyday application of private laws as adjudication of private laws related to; property, contract or tort involves some vision of ESC rights.<sup>41</sup>

What's more, except the Right to Property<sup>42</sup> and Labour rights<sup>43</sup> which are being adjudicated before Court of laws as I will discuss in the following sections of this Chapter, provisions of ESC rights under Fundamental Bill of Rights of the FDRE Constitution are equally vague as those under NPPO or sometimes even more unclear than the later. For instance, the body of article 41 which is the main provision in relation to ESC rights in the country does not depict its title. Its contents are so crude that it is difficult to identify the rights guaranteed and extent of their protection.<sup>44</sup> The right to health and education are provided as an indicative list from state duty perspective under this article.<sup>45</sup> A closer look at article 35 and 36 of the FDRE constitution also reveals that these provisions do not guarantee general right to health and education even to the class they target.<sup>46</sup> There are also no bylaws to elucidate these rights. Hence ESC rights are vaguely provided under Fundamental Rights provisions of the Constitution.

On the other hand though, from government duty perspective, NPPO provisions of the Constitution clearly states for the right to health, education, housing, food, social security and

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<sup>38</sup> Danwood Mzikenge Chirwa and Lilian Chenwi (at note 1) P. 435

<sup>39</sup>Takele Soboka Bulto, *Judicial Referral of Constitutional Dispute In Ethiopia: From Practice To Theory*, *African Journal of International and Comparative Law*, Vol. 19, No. 1, 2011, P. 107 Available at: [https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id).

<sup>40</sup> Ibid

<sup>41</sup> Katharine Young, *A Typology of Economic and Social Rights Adjudication: Exploring The Catalytic Function of Judicial Review*, P. 386, Available at: <https://academic.oup.com/icon/article/8/3/385/623501/A-typology-of-economic-and-social-rights>.

<sup>42</sup> FDRE Constitution,(at note 8), Art, 40.

<sup>43</sup> Id., Art. 42.

<sup>44</sup> Sisay Alemahu, (at note 3).

<sup>45</sup> FDRE Constitution,(at note 8), Art, 42.

<sup>46</sup> Id., Art. 35(9) and 36(5).

even the right to clean water.<sup>47</sup> It also somehow tried to elucidate normative content of the right to education.<sup>48</sup> It can therefore, be said provisions under Fundamental Bill of Rights of the Constitution are vaguer compared to those under NPPO provisions. Plausibly, non-justiciability should not be the rational for crafting them vaguely in the Bill of rights part than under NPPO.<sup>49</sup> They can rather serve interpretative purpose. Furthermore rights which are provided under NPPO are also provided under Fundamental Rights part of the Constitution. In this regard also Sisay argued, that NPPO provisions provide additional avenue for implementation and enforcement of ESC rights than restricting them.<sup>50</sup> ESC rights under NPPO shall be harmonized with those under Fundamental Bill of Rights as complementary to each other so that it will be possible to enforce ESC rights to the fullest extent. The vague ESC rights under Fundamental Bill of Rights of the Constitution can be clarified when read into similar rights under NPPO. Courts can do this as the Constitution imposes a judicial duty upon them to be guided by the NPPO in carrying out their duty<sup>51</sup> and doing so would not amount to intrusion into works of other organs of the government.<sup>52</sup>

#### **4.3. Non-justiciability claims on NPPO and Ethiopia's international obligation**

All international agreements ratified by Ethiopia are made an integral part of the law of the land.<sup>53</sup> All these international agreements ratified by Ethiopia therefore, guarantee human right in the same way as domestic laws and are all binding in the operation of the three branch of the government. Furthermore, the FDRE Constitution clearly stated that fundamental rights and freedoms in its bill of rights shall be interpreted in a manner conforming to UDHR and International Covenants adopted by the country.<sup>54</sup> Ethiopia is a member state to almost all international and regional human right treaties. UDHR, ICESCR, ICCPR, CERD, CEDAW, CRC, ACHPR, ACRWC are among others.<sup>55</sup> Rights guaranteed by these international treaties are considered to be justiciable these days. The jurisprudence of African Commission that has been

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<sup>47</sup> Id., Art. 90

<sup>48</sup> Id., Art. 90 (2)

<sup>49</sup> Esmael Ali, (at note 15) P. 33

<sup>50</sup> Danwood Mzikenge Chirwa and Lilian Chenwi (at note 1) P. 432.

<sup>51</sup> FDRE Constitution, (at note 8), Art, 85 (1).

<sup>52</sup> Berihun Adugna Gebeye, *The Potential of Directive Principles of State Policy For Judicial Enforcement of Socio-Economic Rights: A Comparative Study of Ethiopia and India*, P. 92, Available at: [file:///C:/Users/USER/Downloads/gebeye\\_berihun.pdf](file:///C:/Users/USER/Downloads/gebeye_berihun.pdf).

<sup>53</sup> FDRE Constitution, (at note 8), Art, 9(4).

<sup>54</sup> Id., Art. 13(2).

<sup>55</sup> See: <http://library.umn.edu/research/ratification>.

discussed in Chapter three shows justiciability of ESC rights provided by the ACHPR. Furthermore, the Commission clearly stated that ESC rights are justiciable and enforceable rights and that state parties to the African Charter have obligations to ensure individuals and people have access to enforceable administrative and/or judicial remedies for any violation of these rights.<sup>56</sup> At the UN level also I have discussed the jurisprudence of CESCR proves justiciability of ESC rights provided by ICESCR. Though, Ethiopia is not a state party, the UN have even came up with Optional Protocol to the ICESCR which allows the Committee to consider communications related to violations of ESC rights.<sup>57</sup>

Therefore, in addition to being binding by themselves, ESC rights provided by these treaties also plays a role in giving meaning to unclear ESC rights in domestic laws. Besides, for international law shall complement, supplement and overrides contrary domestic law in matters involving the protection of human and peoples' rights,<sup>58</sup> even when domestic laws of the Country, arguably including the Constitution is against ESC rights as provided under the above mentioned human right instruments the later shall prevail. The Vienna Convention on The Laws of Treaties also prohibits States to invoke their domestic laws as a justification for their failure to perform a treaty.<sup>59</sup> Consequently, Ethiopia's obligation under international treaties and jurisprudence thereof obliges justiciability or of ESC rights in general or those provided under NPPO provisions of the FDRE constitution.

The CESCR is doing estimable job in clarifying state obligations under the Covenant. In addition to establishing normative contents of specific ESC rights as has been discussed, the Committee also tried to establish State parties' obligation in relation to ESC rights under ICESCR. Although, the Committee recognizes full realization of ESC rights under the Covenant may be progressive it has affirmed that steps toward satisfaction of these right must be taken within reasonable shortest time.<sup>60</sup> States shall make deliberate, concrete and targeted steps towards their satisfaction.<sup>61</sup> From this it can be derived that whether a State is making this kind of positive step or not can be

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<sup>56</sup> Guidelines, (at note 10), Preamble.

<sup>57</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution A/RES/63/117, adopted on 10 December 2008.

<sup>58</sup> Takele Soboka Bulto, *The Monist-Dualist Divide and The Supremacy Clause: Revisiting The Status of Human Rights Treaties In Ethiopia*, *Journal of Ethiopian Law*, Vol. 23, No. 1, 2009 P. 5.

<sup>59</sup> Vienna Declaration and Program of Action, Adopted By the World Conference On Human Rights in Vienna on 25 June 1993, Art., 27.

<sup>60</sup> CESCR, General Comment No.3, Para. 2, adopted on 14/12/90, (5<sup>th</sup> Session, 1990), U.N. Doc. E/1991/23, Available at: [http://www.refworld.org/docid/4538838e\\_10.html](http://www.refworld.org/docid/4538838e_10.html).

<sup>61</sup> Ibid.

adjudicated by Court of laws. In relation to this Young, has stated that; facing the complexity of the myriad institutions that impact on the material terms of social life, Courts must discharge their role in enforcing the positive arrangements that determine who does what in order to secure economic and social rights.<sup>62</sup>

Therefore, Courts in Ethiopia shall also play similar role. The government cannot legally claim non- justiciability of NPPO provisions of the Constitution, failing to make positive arrangements for realization of ESC rights or making less positive arrangement than it can. This kind of claim by the government will be against international obligation of the Country.

The CESCR further stated that the term progressive realization in the Covenant shall be read in the way to establish clear obligation of State parties.<sup>63</sup> It has established obligation to ensure satisfaction of minimum essential level of ESC rights mandatory on all member States and consider States failing to do so are prima facie in violation of the Covenant.<sup>64</sup> This minimum core obligation is intact for all State parties including Ethiopia. Thus, ESC rights in Ethiopia are enforceable before Court of laws at least to the extent of minimum core whether they are provided under fundamental bill of rights or NPPO.

Regionally also Ethiopia is under obligation to provide for justiciable ESC rights. The Country is a state party to the ACHPR, a continental treaty which explicitly recognized interrelatedness, interdependence and indivisibility of ESC rights and CP rights.<sup>65</sup> The Charter clearly stated in its preamble that CP rights cannot be disassociated from ESC rights. It further states satisfaction of ESC rights is a guarantee for enjoyment of CP rights.<sup>66</sup> The Charter is distinct in incorporating these two classes of rights in equal footing.<sup>67</sup> Thus, being a member state to the charter Ethiopia is again under obligation to guarantee enforceable ESC rights.

The African Commission on Human and People's Right established with protective and promotional functions<sup>68</sup> is also playing a role in establishing positive jurisprudence concerning

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<sup>62</sup>Young, *The Minimum Core of Economic and Social Rights: A Concept In Search of Content*, P. 386, Available at: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1920&context>.

<sup>63</sup> General comment 3, (at note 60), Para., 9

<sup>64</sup> Id., Para.10

<sup>65</sup> African Charter on Human and Peoples Right (ACHPR), Adopted in Nairobi, 1981, Entered In to Force on October 1986, Para.8 of the Preamble.

<sup>66</sup> Ibid.

<sup>67</sup>Takele Soboka Bulto. *The Utility of Cross-Cutting Rights In Enhancing Justiciability of Socio-Economic Rights In The African Charter on Human and Peoples' Rights*, *University of Tasmania Law Review*, Vol. 29, No. 1, 2011, P.158, Available at:[https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=1070002](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1070002).

<sup>68</sup> ACHPR, (at note 65) Art. 30.

enforcement of ESC rights. As I have discussed under 3.6 above, in its endeavor to put in practice the notion of interdependence and indivisibility the Commission has adjudicated ESC rights provided under the African Charter associating them with traditionally justiciable CP rights. As has been discussed Chapter three also the interpretations applied by the Commission in *SERAC* case reveals that the indivisibility and interrelatedness of human rights applies across all generations of human rights. The Commission has also elaborated the right to life as provided in the Charter in the case *Purohit and others V Gambia*, where it states the right to include the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.<sup>69</sup>As a state party, Courts in Ethiopia shall also interpret ESC rights under the Constitution the way the Commission did.

Generally, in view of the fact that ESC rights as provided under international treaties are justiciable as I have discussed above, considering ESC rights provided by the FDRE Constitution as non-justiciable DPSP will result in violation of international obligation of the Country. Therefore ESC rights under the FDRE constitution are all justiciable from this perspective and it cannot be warranted to argue ESC rights under NPPO of the Constitution implies non justiciability of these rights in the Country

#### **4.4. Some ESC rights as indicators of justiciability in Ethiopia**

In relation to ESC in Ethiopia, article 41 of the FDRE Constitution is eye catching. Anyone who wants to consider justiciability or otherwise of these rights in Ethiopia may certainly begin with this article. But, it has been seen that the body of this provision doesn't depict its title.<sup>70</sup> Let alone encompassing all ESC rights, fundamental ESC rights like; the right to housing, food and clean water are only implicit under this article.<sup>71</sup> Rights of labour<sup>72</sup> and the right to property<sup>73</sup> which are typically ESC rights in nature are provided in separate provisions of the constitution and are being enforced before Court of laws.

For instance, the right to association including the right to form trade unions for collective bargaining purposes, the right to strike, equal pay for equal work, paid leaves, reasonable limits

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<sup>69</sup>African Commission on Human and Peoples Right, *Purohit and Others V Gambia* (2003), Para, 80.

<sup>70</sup> See the discussion under 4.2

<sup>71</sup> The Right to Housing, Food and Clean Water are not mentioned under Art, 41 of the FDRE Constitution. These rights can only be derived in to this provision by way of interpretation, considering the phrase other social services under sub Art, (4) to include them.

<sup>72</sup> FDRE Constitution (at note 8). Art. 42.

<sup>73</sup> Id., Art. 40.

to working hours and a healthy and safe work environment are all granted from workers right perspective in the Constitution.<sup>74</sup> In addition to these the Country's Parliament has enacted bylaws to make these rights applicable on the ground. Proclamation number 377/2003<sup>75</sup> and 262/2002<sup>76</sup> are in part enacted to provide for rights of private and public sector workers respectively. Similarly related right to health and welfare is also granted under NPPO provisions of the Constitution from government's duty perspective for the same class.<sup>77</sup> The later also provides for equality of men and women in social and economic endeavors.<sup>78</sup> Justiciability of these rights is also out of question as it is part of normal business of courts in Ethiopia to adjudicate labour cases as it stands. The Courts in the country, both at the federal and state level even allocate separate division for labour cases.<sup>79</sup> Therefore, providing for similar ESC rights under the Fundamental Bill of Rights part of the Constitution NPPO provisions of the FDRE Constitution are equally being enforced before Courts as the former.

Furthermore, although the right to clean and healthy environment is clearly stated both under Fundamental Bill of Rights and NPPO provisions of the Constitution,<sup>80</sup> the right is more elucidated under the later part. The NPPO elucidate the right stating design and implementation of programs and projects shall not damage or destroy the environment.<sup>81</sup> It also provides for duty of the state and citizens to protect the environment.<sup>82</sup> This right is enacted into bylaws more like it is elucidated under the NPPO than as it is under Fundamental Bill of Rights. The Environmental Pollution Control Proclamation<sup>83</sup> for instance is enacted solely to eliminate or mitigate pollution and undesirable consequences of social and economic development activities.<sup>84</sup> It also guarantees everyone the right to institute Court cases against any person allegedly causing actual or potential damage to the environment.<sup>85</sup> In one notorious case, *Action Professionals' Association for the People (APAP) V. Environmental Protection Authority*, the defendant

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<sup>74</sup>Id., Art, 42

<sup>75</sup>Labour proclamation No 377/2003, Federal Negarit Gazeta, 10<sup>th</sup> year, No. 12, (2004).

<sup>76</sup> Federal Civil Servant Proclamation No. 262/2002, Federal Negarit Gazeta, 8<sup>th</sup> year, No. 8, (2002).

<sup>77</sup> FDRE Constitution, (at note 8). Art. 89 (8).

<sup>78</sup> Id., 89(7)

<sup>79</sup> See For Example Art. 20 and 23 of Federal Courts proclamation No 25/1996, Federal Negarit Gazeta, 2<sup>nd</sup> year No. 13 (1996).

<sup>80</sup> FDRE Constitution, (at note 8), Art., 44(1) and 92(1).

<sup>81</sup> Id., Art. 92(2)

<sup>82</sup> Id., Art. 92(4)

<sup>83</sup> Environmental Pollution Control Proclamation No 300/2002, Federal Negarit Gazeta, 12<sup>th</sup> year No 12, (2002)

<sup>84</sup> See Para. 3 of The Preamble of Environmental Pollution Control Proclamation No 300/2002, Federal Negarit Gazeta, 12<sup>th</sup> year No 12, (2002).

<sup>85</sup> Id., Art. 11(2).

Environmental Protection Authority is sued for not doing enough to protect Akaki and Mojo rivers from pollution. In the case at hand, non-justiciability of the right to clean and healthy environment were neither availed by the defendant nor declared by the Court. Although, the Court dropped the case by ruling the Plaintiff has no standing<sup>86</sup> the fact that the Court did not reject the case on the ground of non-justiciability and that the defendant did not avail the same indicates rights under NPPO provision of the FDRE Constitution are enforceable before the judiciary. Therefore, Provisions of NPPO in general or ESC rights in that part do not appear to have negative implication on justiciability of similar rights under the other part of the Constitution.

#### **4.5. Indirect justiciability of ESC rights in Ethiopia**

As pointed out in Chapter two, it will be easy to invoke a remedy under specific provision if the Country's Constitution provides that violations of ESC rights can be brought before Courts. We have seen the South African Constitution provides a clear example of the direct protection of ESC rights.<sup>87</sup> This is possible when ESC rights are guaranteed capacity of being used as a base for legal action.<sup>88</sup> Indirect justiciability, which uses the traditionally justiciable CP rights to enforce ESC rights, is useful when the latter are not given justiciable status by Country's Constitution.

In addition to claiming justiciability of ESC rights directly in Ethiopia resort can also be made to indirect mechanism to get them adjudicated by court of laws. It is possible to claim ESC rights both under Fundamental Bill of Rights and NPPO part of the FDRE Constitution through expansive and progressive interpretation of the traditionally justiciable CP rights. This innovative approach of indirect justiciability has been successfully utilized African, Inter-American and European Human Rights systems and even in some national jurisdictions as a means to litigate and reveal the violations of ESC rights as has been discussed in chapter three of this work. Moreover, this aspect of justiciability has proven to be instrumental in rendering an impetus for the enhanced justiciability as well as giving an outlet to the gradual development of a jurisprudence for the complaints to depend on to establish specific SEC violations.<sup>89</sup>

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<sup>86</sup> *Action Professionals Association for the People (APAP) V. Environmental Protection Authority (EPA)*, Federal First Instance Court, Arada bench, File No 64902(1999 E.C). The decision was upheld by Federal high Court and Supreme Court.

<sup>87</sup> See the discussion under 3.6.

<sup>88</sup> Amare Tesfaye, (at note 5), P. 83.

<sup>89</sup> Amsalu Darge, (at note 31), P. 60.

The FDRE Constitution for instance provides for the right to equality of all person without discrimination based on race, nation, nationality, or other social origin, color, sex, language, religion, political opinion and other grounds.<sup>90</sup> The Constitution also provides that Fundamental Rights and Freedoms which include both ESC rights and CP rights have to be respected on the basis of equality and non discrimination on any of the above mentioned grounds.<sup>91</sup> This right is a cross-cutting right between all other rights. It is a right behind every other right. Hence one can use this right to claim the right to health, food or shelter whenever there is discrimination based on the above grounds. The right to due process of law which is a defense against arbitrary action of government organs can also serve in protecting ESC rights like the right to property or shelter for instance.

On the other hand also the right to life which is provided under substantive part of the FDRE Constitution<sup>92</sup> can serve as a leeway to claim for other rights without which the right to life is meaningless. It is practically impossible to think about the right to life without satisfaction of other rights like the right to food, health and shelter. Therefore, it is possible to indirectly claim for ESC rights both under NPPO and Fundamental Bill of Rights part of the FDRE Constitution through the instrumentality of CP rights which are traditionally being adjudicated by court of laws.

#### **4.6. Conclusion**

In Ethiopia there are arguments against justiciability of ESC rights. Claims related to nature of ESC rights that we have discussed in chapter two of this research and unclarity about enforcement of provisions of Chapter ten of the FDRE Constitution providing for NPPO are claimed to entail non-justiciability of these rights in the Country. It has been discussed these arguments against justiciability of ESC rights have also resulted in lesser adjudication of similar rights before Courts. However, I have discussed that any of those arguments based on nature of ESC rights are not warranted to claim these rights are not justiciable in Ethiopia. In addition to this, I have also seen that, ESC rights provisions of the FDRE Constitution under NPPO are somehow more elucidated than similar provisions under substantive part. Hence, it is not defensible to argue ESC rights under the former part have implication of non-justiciability on similar rights provided under the later part. It can rather be claimed ESC rights provision can aid

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<sup>90</sup> FDRE Constitution, (at note 8) Art., 25.

<sup>91</sup> Id., Preamble, Para. 2.

<sup>92</sup> Id., Art., 15.

adjudication of similar rights under substantive part of the Constitution. Furthermore, practical adjudication of ESC rights under NPPO provision of the FDRE Constitution is also not absent. Courts in Ethiopia are involved in adjudication of ESC rights both under Fundamental Rights part and NPPO either directly or indirectly while adjudicating CP rights.

The FDRE Constitution provides for ESC rights both under its substantive part in Chapter three and under NPPO in Chapter ten, without ousting Courts from adjudicating ESC rights provided under the later part. The rights under substantive part of the Constitution are justiciable by virtue of article thirteen. It is also wiser to argue ESC rights under NPPO part of the Constitution are justiciable. The experience of Ghana where absence of ouster provision is interpreted positively not to render the rights non-enforceable by Court also proves the same. Besides even in jurisdictions where they are provided to be non-justiciable we have seen them being adjudicated in practice. Furthermore, the FDRE Constitution gave everyone the right to bring justiciable matters before Courts and obtain decision thereby which makes it is not reasonable to claim ESC rights violation is otherwise.

Moreover, taking in to account international treaties to which Ethiopia is a state party and the practice thereof it has been seen that ESC rights in Ethiopia shall be enforceable before the judiciary.

Finally, ESC rights provided under NPPO part of the Constitution are being adjudicated before Courts in Ethiopia. The right to House which is only explicitly provided under NPPO of the FDRE Constitution for instance is directly claimed and decided on by the Federal Supreme Court. On the other hand adjudication of labour and property right is usual in the Country. It is also possible for Ethiopia Courts to adjudicate ESC rights violations through expansive and purposive interpretation of the traditionally justiciable CP rights. Furthermore, international commitment of the Country also entails the Country shall provide enforceable ESC rights. Therefore, ESC rights under NPPO part of the FDRE Constitution are justiciable by themselves either directly or indirectly and have no negative implication on justiciability of similar rights under its substantive part.

## **CAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1. Conclusion**

Arguments against justiciability of ESC rights are common. Arguments against judicial enforcement of these rights are there since the inception of UDHR. These arguments have later developed to a level of denying Court adjudication of these rights. ESC rights are said to be vague, imprecise, resource demanding, positive and progressive in nature which is claimed to make their enforcement impossible. As a result they are provided to be non justiciable DPSPs in many jurisdictions.

In Ethiopia also similar general arguments against justiciability of ESC rights are coupled with confusion created because of inclusion of these rights under NPPO provisions of the FDRE Constitution to result in claims against their justiciability and lesser adjudication of their violations. ESC rights under NPPO provisions of the Constitution are taken to have rendered similar rights under Fundamental Bill of Rights part of the Constitution non justiciable.

However, this work demonstrates that arguments based on the alleged nature of ESC rights are not convincing to render them non justiciable. For instance, some ESC rights such as the right to education, labour rights and protection of family provided for under ICESCR have relatively detailed elaboration of their constituent elements. Similarly, ESC rights like the right not to be evicted from ones shelter needs no positive action and are resource free while CP rights like the right to fair trial are positive and resource intensive. In the same way any claim against justiciability of ESC rights in Ethiopia based on similar allegation is not self sustaining. These alleged nature of ESC rights cannot also be logically claimed to cause similar rights under NPPO provision of the Constitution non justiciable. This holds true especially in the absence of constitutional provision that provides ESC rights under NPPO non justiciable. Therefore, it is also not logically supported to state ESC rights under this part of the Constitution implies non justiciability of similar rights under Fundamental Bill of rights part of the Constitution.

Besides, looking at the international jurisprudence there is a moving trend towards establishing justiciability of ESC rights. The Vienna Declaration and Program of Action provides for universality, interdependence and interrelatedness of human rights, where it is not justified to classify CP rights as justiciable and ESC rights non-justiciable. The CESCR is also doing an

immense job in clarifying substantive contents of specific ESC rights and duties of the State in relation to these rights through its General Comments. For instance, the right to housing, health and food is elaborated by the Committee. Justiciability of non fulfillment of core minimum obligations with regard to ESC rights is also affirmed by the Committee. Furthermore, the Committee indicated that making a steady move by states than they can and retrogressive measures that snatch pre-existing enjoyment of ESC rights can be taken to a court of laws. Regionally also, providing CP rights cannot be dissociated from ESC rights, the ACHPR also affirmed universality of human rights. Moreover, the jurisprudence of the African Commission also proved universality and interdependence of human rights. The Commission has attested that violations of ESC rights are enforceable before courts like CP rights. Similar trend is also being followed in some domestic jurisdictions like South Africa.

Being a state party to the ICESCR and the ACHPR, Ethiopia as well is under obligation to follow similar path. The Country cannot provide for non justiciable ESC rights without violating these international obligations. Embracing these international obligations it is not defensible to argue NPPO provisions of the FDRE constitution leave ESC rights in the constitution non justiciable.

Furthermore, considering the way ESC rights are provided under the FDRE Constitution it is more logical to claim that these rights are meant to be justiciable than otherwise. The Constitution provides both for ESC rights and CP rights under its justiciable bill of rights part which can be taken as a holistic approach. It again provides for both sets of rights under its NPPO provisions without rendering them non-justiciable. What's more, ESC rights under the NPPO provisions part of the Constitution are more elucidated than those under its Fundamental Bill of Rights part. Therefore, it is not warranted to claim the Constitution aimed non-justiciability of ESC rights in providing them in some detail than it did under its Fundamental Bill of Rights part. This can rather be taken as a need to emphasize these rights and setting them to be a priority in government's national policy. They are meant to elucidate the relatively vague provisions of ESC rights under the Fundamental Rights part of the Constitution. This clarity of ESC rights provisions under NPPO can positively help in adjudicating violation of similar rights under Fundamental Bill of Rights part.

Hence, ESC rights under NPPO provisions of the Constitution cannot negatively impact justiciability of similar rights under other parts of the Constitution. Absence of similar non-

justiciability argument in relation to CP rights under NPPO provisions of the Constitution also capitalizes this assertion.

Additionally, unlike some jurisdictions like; Nigeria and India which oust Courts from adjudicating ESC rights violations, the FDRE Constitution did not have similar provision. Nonetheless, for enforcement of human rights must be favored than otherwise, at least this kind of ouster provision is needed to claim non-justiciability of ESC rights under NPPO provisions of the Constitution. However, even in jurisdictions where Courts are clearly ousted from adjudicating ESC rights violations like India it has been seen that courts have crafted a mechanism to enforce them. Likewise, absence of similar ouster provision is interpreted positively not to render ESC rights non-justiciable in Ghana. Therefore, absence of a provision that ousts Courts from adjudicating ESC rights in the NPPO provision of the FDRE Constitution shall be taken to mean Courts are allowed to enforce violations of these rights and that they don't imply non-justiciability. Absence of this ouster provision rather makes Courts in Ethiopia face only little restraint to establish justiciability of ESC rights.

On the other hand I have seen that some of ESC rights both under Fundamental Bill of Rights and NPPO provisions of the FDRE Constitution are practically being adjudicated by court of laws either directly or via adjudication of CP rights. It has also been discussed that ESC right which are not clearly provided for under Fundamental Bill of Rights part of the Constitution but, under the NPPO provisions is affirmed to be justiciable by decision of the Supreme Court. Hence, it is not warranted by practice to claim ESC rights under NPPO provision of the FDRE Constitution implies non-justiciability of similar rights under Fundamental Bill of Rights part of the Constitution. It cannot also be said practical cases concerning justiciability of ESC rights under NPPO provision are absent.

Therefore, ESC rights under NPPO part of the FDRE Constitution is Justiciable by themselves, rather than implying non-justiciability of ESC rights under Fundamental Rights part of the Constitution. These provisions can also be utilized to elucidate ESC rights provided under Fundamental Rights part of the Constitution. There are also practical cases indicating justiciability of ESC rights under both part of the Constitution.

## 5.2. Recommendations

Based on the findings of this research the following recommendations are forwarded;

- Right holders shall know that ESC rights provisions of the FDRE Constitution despite their presence are justiciable and claim their enforcement before Courts when these rights are violated. They shall litigate violations of these rights using provisions of ICESCR and General Comments of CESCR, ACHPR, case laws of the African Commission and cross cutting rights like the right to equality, due process, dignity and life.
- Courts in Ethiopia shall adjudicate violations of ESC rights provided under NPPO provisions of the FDRE constitution whenever these are claimed before them. They shall also use these provisions to clarify normative contents of ESC rights under Fundamental Right part of the Constitution in chapter three whenever the later are claimed by right holders.
- Courts shall use provisions of ICESCR and General Comments of CESCR, ACHPR and case laws of the African Commission, to which Ethiopia is a state party to adjudicate violations of ESC rights provided under NPPO provisions of the FDRE Constitution. They can also use cross cutting rights such as; non-discrimination and due process rights to indirectly adjudicate violations of ESC rights. The right to life and dignity can also be used to achieve similar purpose.
- Non-governmental and other organizations working in the area of human right protection shall work towards creating awareness among the right holders that, ESC rights under NPPO provisions of the FDRE Constitution are justiciable by themselves and cannot imply non-justiciability of ESC rights under fundamental rights part of the constitution. They shall also help the right holders in bringing cases of violations before Courts.
- The House of Peoples' Representative shall also enact bylaws that, elucidates the vague human right provisions both under the Fundamental Rights part of the Constitution and NPPO provisions of the Constitution in line with international commitment of the Country.

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